

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of )  
)  
Rules and Regulations Implementing the )  
Telephone Consumer Protection Act of 1991 )  
)  
To The Commission )  
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)

CG Docket No 02-278

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AUG 15 2003

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

PETITION FOR EMERGENCY STAY

The National Automobile Dealers Association (“NADA”) and its members hereby request an emergency stay of at least six months of the effective date of the implementation of the rules adopted by the Federal Communications Commission (“FCC” or “Commission”) in the Commission’s June 26, 2003 Report and Order (“Order”) in the above-captioned proceeding regarding unsolicited facsimile advertisements (“fax rules”)<sup>1</sup> and the Company-Specific Do-Not-Call rules (“do-not-call rules”).<sup>2</sup> The stay sought by NADA will serve the public interest because it will provide affected entities the necessary time to review and understand the new rules and implement the necessary compliance procedures.

Under the Order, affected entities have only thirty days<sup>3</sup> from the *Federal Register’s* publication of the Order (July 25, 2003) to obtain written permission in order to continue sending facsimile materials that contain “commercial” information. In addition, NADA’s members will only have thirty days<sup>4</sup> to comply with the Commission’s requirement that all entities have a written Company-Specific Do-Not-Call policy in place before they initiate telemarketing calls to any residential telephone subscriber

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<sup>1</sup> 47 C.F.R. § 64.1200(a)(3)

<sup>2</sup> 47 C.F.R. § 64.1200(d)

<sup>3</sup> The Commission’s *Federal Register* notice dated July 25, 2003, 68 Fed. Reg. 44,144 – 44,179, states that OMB must first approve these new information collection requirements before they take effect

A NADA and its Members

NADA submits this request on its own behalf, as a nonprofit organization, and on behalf of its nearly 20,000 members, franchised new car and truck dealers. NADA's members represent the vast majority of franchised new car and truck dealers, employ over 1,100,000 individuals (with a payroll of almost \$49 billion) and account for yearly sales in excess of \$718 billion.

B NADA and its Members' Interests

NADA and its members on more than a daily basis utilize facsimile transmissions to communicate commercial information. In addition, NADA members routinely place telemarketing calls to residential telephone subscribers. Regarding the fax rules, the FCC's requirement that NADA obtain written approval from its nearly 20,000 members located in all 50 states and the District of Columbia prior to the imminent effective date is simply unworkable. In addition, NADA members cannot obtain written consent from the multitude of businesses with whom they conduct fax transactions on a daily basis in the time allotted. Regarding the do-not-call rules, it is completely unreasonable to expect nearly 20,000 businesses whose telemarketing calls are largely covered by the prior established business relationship ("EBR") exemption to become cognizant of the do-not-call requirements, let alone develop a written policy by the effective date. Failing to stay the removal of this long-standing exemption will significantly disrupt these types of commercial activities.

C. Basis for Relief

In deciding whether to grant a stay of its rules, the Commission has said it will "consider requests for interim or injunctive relief on a case-by-case basis," and has "expressly declined to delineate procedural requirements or a single evidentiary standard applicable to all requests." *In re AT&T Corp.*, 13 FCC Red 14,508 (1998) (internal quotations omitted). As a general matter, however, the Commission will follow the standard of injunctive relief used in federal court, which sets forth four relevant factors: "(1) likelihood of success on the merits; (2) the threat of

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<sup>4</sup> *Id.*

irreparable harm absent the grant of preliminary relief, (3) the degree of injury to other parties if relief is not granted; and (4) that the issuance of the order will further the public interest.” *Id.* (citing *Virginia Petroleum Jobbers Ass’n v Fed Power Comm’n*, 259 F.2d 921 (D.C. Cir. 1958)) Not all factors need be established, and “no single factor is necessarily dispositive.” *Id.*

1) Likelihood of Success on the Merits. Given the substantial changes wrought by the Commission’s new fax and do-not-call rules, it is arbitrary and capricious for the Commission to not allow more time for companies to come into compliance (this particularly applies since the Commission failed to propose these specific changes and allow the business community an opportunity to comment before adopting them) We expect the Commission to grant the petition for reconsideration because the rules adopted by the Commission are simply unworkable in their current form, and the stay that this Petition seeks is consistent with the reasonable consumer protection and privacy goals set forth in the Order and the Telephone Consumer Protection Act

2) Threat of Irreparable Harm. Fax advertising is routinely relied upon by businesses throughout the country The imminent deadline the Commission has set will create a period in which trade associations will be unable to communicate vital product and service information to its members This will temporarily deprive members of one of the primary benefits to voluntarily joining a trade association. It also will disrupt the ability of NADA members to continue their commercial fax activity. In addition, it will temporarily eliminate their ability to communicate product information to their consumers over the telephone For example, an automobile dealer would be unable to contact customers whose lease terms are about to expire to inform them of lease-end options due to the absence of a written do-not-call policy Such a result would have a profoundly negative impact on the automotive industry.

3) Degree of injury to other parties There will be no discernable injury to other parties if the Commission grants this stay request Any injury suffered would be minimal and far outweighed by the public interest benefits described herein

4) Public interest showing. Granting a temporary stay in order to permit small businesses and their associations time to comply with the new rules is in the public

interest NADA represents a significant number of small businesses, and small businesses depend disproportionately on the use of facsimile machines and telephones to communicate product information to customers as these are often the most efficient means of communication. The nature of today's economy makes life difficult for large and small businesses alike, and a temporary stay of a Commission rule that could interfere with the critical flow of information certainly advances the public interest.

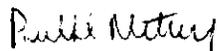
### **Conclusion**

For the reasons set forth above, the Commission should grant, at minimum, a six month stay of the effective date of the rules adopted in the Order as they pertain to unsolicited facsimile advertisements and the Company-Specific Do-Not-Call rules

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