



National **Retail** Federation

*The Voice of Retail Worldwide*

**The below Petition for Stay and Reconsideration was filed on August 4, 2003, under Docket Number 92-90 by mistake. This is a refiling under Docket 02-278 at the request of the FCC.**

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

**Petition for Stay and Reconsideration  
by the National Retail Federation**

**In the Matter of**

**Rules and Regulations Implementing the  
Telephone Consumer Protection Act of 1991**

**CG Docket No. 02-278  
CC Docket No. 92-90**

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August 4, 2003

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**Telephone Consumer Protection Act**  
**Post Rule Comments of the National Retail Federation**

On behalf of the National Retail Federation (“NRF”), our members, and the many state and national associations we represent, we respectfully request that the Federal Communications Commission (“Commission”) schedule for immediate reconsideration the portions of the final rule concerning fax solicitations sent by trade associations to their members. Implementations of these provisions as planned, on August 25, 2003, will cause enormous harm to many trade associations, including those we represent, and their members, without providing a significant corresponding benefit to the public.

By way of background, the National Retail Federation is the world's largest retail trade association with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet and independent stores. NRF members represent an industry that encompasses more than 1.4 million U.S. retail establishments, employs more than 20 million people -- about 1 in 5 American workers -- and registered 2001 sales of \$3.5 trillion. In its role as the retail industry's umbrella group, NRF also represents 32 national and 50 state associations in the U.S. The Commission’s proposal that all of these entities engage in a crash project to obtain tens of thousands of signed, written consents from companies and individuals who have already paid to hear from them is inconsistent with the purposes behind the law and needlessly overturns established understandings.

At the outset, we want to say that the NRF supports the efforts of the Commission and the Federal Trade Commission (“FTC”) to harmonize their telemarketing rules, and those of the states, to create a uniform national standard for telemarketing calls to the

general public. NRF was extensively involved in the proceedings before the FTC concerning the telemarketing sales rule. Our members broadly supported most of the provisions in the final rule. NRF filed comments in this proceeding, reiterating that support and urging the Commission to weigh carefully the costs and benefits of particular characteristics of any expansion of the Telephone Consumer Protection Act (“TCPA”) rules. In addressing telemarketing, NRF devoted particular attention to the role played by an Establish Business Relationship provision. NRF (and its predecessor organization, the National Retail Merchant’s Association) was heavily involved in the Commission’s original rulemaking under the TCPA, as well as the process that lead to the legislation’s adoption. At that time, NRF also focused on the comparable role of Prior Express Consent.

Given the overwhelming focus of the current rulemaking on the coordination of the TCPA telemarketing rules with those of the FTC and the fact that the 1992 facsimile rules have appear to have worked well, it was surprising that the Commission chose to change the facsimile rules so dramatically. It was particularly surprising that the changes were further extended to trade associations on so thin a basis, given the Commission’s historical understanding of the relatively unique manner in which most associations operate. While the Commission inquired as to whether membership in a trade association and publication of one’s fax number in a directory created an expectation that those numbers would be used for facsimile advertising by outside telemarketers, that is not the crucial question here. The important issue is whether the members of the association had such an expectation as to communications *from the organization that they chose to join*.

NRF exists to serve the educational, associational and public policy needs of its members. A single NRF member might have thousands of employees in its headquarters operations, many hundreds of who might choose to take advantage of NRF services within a given year. In NRF's case, many may attend meetings or conventions on loss prevention, customer relationship management or information technology. Dozens may choose to attend our Annual Convention. All do so at favorable rates as a consequence of their corporation's singular membership.

The scores of fax numbers with whom we communicate in that one company do not originate from a single source. Some may be the fax numbers of executives within divisions of the organization who annually attend NRF activities, and for whom their division fax may be the most reliable means of communication between them and the association. They rely on us to inform them. The Commission's new rule would ask that we cease communication until we can find another means of engaging the individual and ask that he or she sign a document signifying intent to continue to engage in the very purpose for which their corporation joined the association. Multiply this request by thousands of members, just for NRF, plus members of the state and national retail associations we represent, and the consequences quickly escalate from a burden to an absurdity. Every other association with a comparably large membership base will face similarly insurmountable obstacles.

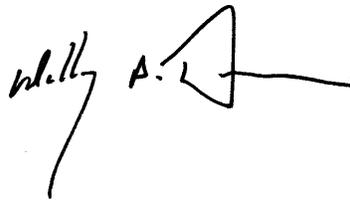
In 1992, the Commission properly recognized that in the absence of a general do-not-call regime for facsimile advertisements, a prohibition on unsolicited faxes from unknown individuals was in order. An exception was created for known entities. Known individuals, especially those with whom one has a business relationship, are less likely to

abuse that trust, especially in view of their knowledge of the recipient's ability to unilaterally terminate the exception. In its 1995 Reconsideration, the Commission essentially recognized that publication of a fax number, depending on how broad was the group to whom it was published, required a more individualized analysis as to whether the incentives underlying that trust existed between possibly unknown members of the group as a whole: thus the case-by-case examination. However, none of those considerations upends the nature of the direct relationship between the association and the members who have joined it, on an ongoing basis, precisely so that they might be served. The record does not support reversal of the existing rules or obligations.

For the reasons set forth above, it is a practical impossibility for associations, such as NRF, to obtain the necessary consents in the very few August days before the new rule takes effect. In any event, the change in the rule, as to trade associations and their members, is unwarranted.

Accordingly, NRF respectfully requests that the Commission immediately reconsider and revise this portion of its Rule, either on its own motion, or by staying applicability of these provisions pending an expedited publication and reconsideration via public comment.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mallory B. Duncan". The signature is stylized and includes a large, sweeping flourish that extends downwards and to the left.

Mallory B. Duncan  
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National Retail Federation

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