

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

In the Matter of)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278
)	
To: The Commission)	
)	

**NATIONAL ASSOCIATION OF REALTORS®
PETITION FOR EXTENSION OF STAY
OF FACSIMILE ADVERTISEMENT RULES**

The NATIONAL ASSOCIATION OF REALTORS® (“NAR”), together with the support of all fifty state associations of REALTORS®, and the REALTOR® associations for the District of Columbia, Puerto Rico, and the Virgin Islands,¹ hereby petitions the Commission for a six-month extension of the stay of the unsolicited facsimile advertisement rules adopted by Report and Order, June 26, 2003 (“June 26 Order”), and stayed pursuant to an Order on Reconsideration, August 18, 2003 (“Stay Order”), in the above-captioned proceeding.² The revised unsolicited fax rules, which eliminate the established business relationship (“EBR”) exception to the general prohibition on sending unsolicited fax advertisements, were initially set to take effect August 25, 2003. Prior to the effective date, however, the Commission issued a Stay Order in which it recognized the magnitude of the administrative burden the revised rules

¹ See Appendix A for a list of the supporting state associations of REALTORS®.

² NAR is also participating with the Fax Ban Coalition, which filed a similar petition on August 10, 2004. NAR fully supports the Fax Ban Coalition’s request for an extension of stay.

would place on businesses—large and small alike—that have relied on the EBR to conduct business and communicate with customers.

The stay of the revised fax rules is set to expire December 31, 2004, and an extension is warranted and in the public interest to give Congress time to complete consideration of legislation that would reinstate the current effective rules and to give the Commission time to complete its reconsideration process. NAR, its state and local associations and its REALTOR[®] members will have to begin to implement procedures designed to comply with the revised rules approximately six months prior to the rules' effective date. This costly process may ultimately be unnecessary, as Congress is swiftly considering legislation and the Commission has yet to act on petitions for reconsideration.³

BACKGROUND

NAR represents over 1 million real estate practitioners. The world's largest professional trade association, NAR is composed of real estate professionals who are involved at the local level in residential and commercial real estate nationwide as brokers, salespeople, property managers, appraisers, counselors, investors, developers and others engaged in all aspects of the real estate industry. Members belong to one of more than 1,600 local associations and 54 state and territory associations of REALTORS[®]. NAR is the owner of the collective membership marks REALTOR[®] and REALTORS[®], which serve to identify real estate professionals who are members of NAR. More broadly, the real estate industry employs over

³ NAR also raised a number of critical requests for clarification and reconsideration of the June 26 Report and Order on the do-not-call side of the proceeding. It is imperative that the Commission clarify its telemarketing rules to permit real estate professionals to call those individuals who have entered the market to conduct a real estate transaction—either by offering their property “for sale by owner” (“FSBO”) or listing their property with another agent but for various reasons, the house may not sell and the listing contract expires (“lapsed listing”)—regardless of whether that individual's telephone number is on the Do-Not-Call registry.

three and a half million people and represents a vital sector of our economy that drives numerous other industries, including financial, construction, furniture, appliance, and numerous others.

The real estate industry—including home buyers, sellers, and real estate professionals—relies on sending commercial faxes. As anyone who has bought or sold a house knows, the fax machine is an invaluable tool of the real estate trade. Real estate brokers and agents regularly use faxes to communicate with other real estate professionals, related entities and individuals. Agents use faxes to share new property listings with other real estate professionals who may have clients interested in purchasing the property. Real estate brokers and agents also routinely send house listing information directly to customers and clients who may request it by telephone, but have not yet entered into a formal agreement for representation. The information that is sent by fax is important and time-sensitive.

Similarly, NAR and its state and local associations routinely use faxes to communicate effectively with their members. These faxes inform members about upcoming continuing education classes, meetings, seminars, products, services, and membership renewal. This is information that members not only expect, but for which they have paid NAR, state and local associations dues in order to receive. Many of these faxes will meet the definition of unsolicited fax advertisements and, absent advance written consent, could not be sent under the revised fax rules. As described below, the revised rules would impede fax communication from real estate professionals to consumers, from one real estate professional to another, and from REALTOR® associations to their REALTOR® members.

For more than a decade, the real estate industry has relied on the EBR to send these commercial faxes. When the June 26, 2003 Order was released, the industry (and many others) was shocked to learn that the Commission had decided to eliminate the EBR for faxes as

part of its revised rules. Under the revised rules, to send a commercial fax the sender must first obtain the recipient's signed, written consent along with the recipient's fax number. Even if a potential home buyer calls a real estate professional and specifically requests information on new listings to be faxed to him or her, the real estate professional cannot comply because this may still be deemed "unsolicited" under the revised fax rules.

There seems to be a perception that obtaining written, signed consent with the recipient's fax number would not be overly burdensome or disruptive to the real estate industry because such consent could easily be obtained at the outset of the business relationship. This misconstrues the manner in which real estate professionals do business. Real estate agents frequently have a long-term informal relationship with a customer seeking to purchase a home. It is not uncommon for an agent to cultivate and maintain an informal relationship with a casually interested customer for many months before any agreement is signed between the two—if an agreement is reduced to writing at all. Consequently, a potential home buyer or seller may request listing information from a real estate professional by fax before it would be practical for the agent to request and the consumer to give the signed, written permission contemplated by the revised rules.

DISCUSSION

An extension of the stay of the revised rules is warranted and in the public interest because compliance, which would require REALTOR® associations and real estate professionals to compile consent forms, would be costly and the daunting task of obtaining them would have to begin almost immediately in anticipation of the revised rules currently set to take effect January 1, 2005. At this time, though, legislation that would reinstate the EBR is moving quickly through Congress. If enacted, this legislation would obviate the need for costly

compliance procedures. Further, an array of issues have been presented to the Commission for reconsideration and clarification of its revised rules. The form the final, effective rules ultimately take will dictate the compliance system that NAR's 1 million members, and its state and local associations, may be forced to implement. It makes little sense (and indeed would be at odds with Congress's intent) to disrupt businesses now and require them to develop compliance procedures for a rule that ultimately may never take effect, when a further stay could issue with no corresponding harm to others.

The Commission generally uses the same factors courts use in ruling on preliminary injunction motions. *In re AT&T Corp.*, 13 FCC Rcd 14,508 (1998). The factors are (1) the likelihood of success on the merits; (2) the threat of 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 issue of the order will further the public interest. *See Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1958). The Commission evaluates each request on a case-by-case basis. *See In re AT&T Corp.*, 13 FCC Rcd 14,508. A stay is clearly warranted in this instance.

1. Likelihood of success on the merits.

Success in Congress. NAR, together with a large group of concerned associations and businesses, has raised with Congress the problems that would be caused by eliminating the EBR. Congress has responded with legislation to reinstate the EBR for faxes. That legislation would permit real estate professionals, their customers, and other businesses to operate as they have done for the past decade. In the House of Representative, legislation reinstating the EBR was introduced with tremendous bipartisan support on June 16, 2004, and passed the House

unanimously on July 20, 2004. This was a clear sign that Members of Congress on both sides of the aisle recognize the harm the revised rules would have on businesses and their customers.

Key bipartisan members of the Senate Commerce Committee introduced companion legislation, S. 2603, which was reported by the Committee on July 22, 2004. The Senate, however, is now out of session so further action cannot be taken until mid-September, when Congress returns. Given the legislation's bipartisan support, it is likely that there will be a legislative solution reinstating the EBR, but that result cannot be guaranteed. Without assurance that Congress will act before year's end to reinstate the EBR, NAR's 1 million members, its 54 state and territory associations and its 1600 local associations cannot risk delay and have to begin to undertake the costly compliance measures described herein, unless the Commission acts.

Success at the Commission. NAR timely filed a petition for reconsideration of the Commission's rules on August 25, 2003. NAR, along with multiple other petitioners, created a substantial record for the need to reinstate the EBR, and the legal and policy basis for the Commission to do so. NAR has demonstrated the substantial burden the revised rules would have on small businesses in general, and real estate professionals in particular.

While NAR has consistently advocated for the reinstatement of the EBR, it has also requested that the Commission clarify its rules in several crucial respects. For instance, NAR requested reconsideration or clarification that faxes may be sent in response to a customer's inquiry. At a minimum, NAR has argued, consent other than by a signed writing should be permitted. Specifically, NAR requested that the Commission permit consent that is: (1) written but unsigned, (2) provided electronically (whether by a web-based "click-through" or in an e-mail), (3) orally (in person, by telephone, or in a telephone message), (4) by automated

means (in response to an automated fax-on-demand phone system by which the caller can request faxed information), or (5) made through a third party.

Given the substantial nature of the virtually unopposed record on these issues, it is likely that the Commission will revise and clarify its rules.

2. Irreparable harm.

NAR, along with the other petitioners in this proceeding, has overwhelmingly demonstrated the harm that would be caused by the Commission's revised rules. Real estate professionals send and receive important commercial faxes in at least three different contexts:

(a) Broker/agent to client or customer; (b) Broker/agent to other brokers/agents; and (c)

REALTOR® Associations to their REALTOR® members.

(a) *REALTOR® to customer.* Approximately six million homes changed hands last year. Even under the very conservative estimate that each prospective buyer received two faxes from two agents during their home search, approximately 24 million faxes would have been sent. To send those faxes, an equal number of signed permission forms would now be required to be sent, received, and, perhaps most costly, stored and inventoried by real estate professionals.

(b) *Among Brokers and Agents.* Despite the prevalence of email communication today, brokers and agents typically use faxes to inform each other of open houses and to announce new property listings and changes in asking prices for listed homes. Conservatively, each broker or agent will send such faxes to at least ten other real estate professionals or firms. This conservative estimate means that 10 million faxes would be sent each year for these purposes.

(c) REALTOR® Association to its REALTOR® members. For NAR and its state and local associations to continue to keep their memberships informed about association programs, products and services through faxes, an additional 3 million signatures would have to be obtained.

Based on these very conservative estimates, therefore, real estate professionals and REALTOR® associations send close to 37 million faxes in the course of a year, each of which would required a written, signed permission form with the recipient's telephone number. Of course, in the real estate community the population changes significantly from year to year as new agents enter the industry, others leave, and fax numbers change. Thus, each real estate firm and his or her association must put in place a compliance system—in case the revised rules as currently written take effect January 1, 2005—that can track from whom, and from which facsimile number, the firm or association has received permission to send faxes.

NAR estimates it would take real estate professionals and their associations nearly six months to prepare themselves for compliance with the revised rules. This would be a costly undertaking that, without an extension of the stay, would have to begin almost immediately for them to be prepared for the January 1, 2005 effective date, despite the apparently likely prospect that legislation may be enacted by Congress or a final decision issued by the Commission.

3. Injury to other parties.

Importantly, there would be no corresponding harm to other parties should the Commission issue an extension of the stay. To NAR's knowledge, there have been no complaints at the FCC since the current stay went into effect regarding unwanted faxes sent notwithstanding the existence of an established business relationship. And there is no basis in the record to predict that during a six-month extension of the stay such complaints would arise.

To the contrary, home buyers, especially in tight housing markets, would be injured if they could not receive house listing information they specifically request from real estate professionals without first submitting written and signed permission.

4. Public interest.

As discussed above, Congress is working rapidly toward a solution that would alleviate the administrative and costly burden of the revised fax rules. By passing corrective legislation unanimously in just over a month, the House of Representatives' intent is clear—businesses and their customers who have an established business relationship should continue to be permitted to communicate with each other by fax without more regulatory obstacles. The Senate has been moving equally quickly in a bipartisan manner, but is now out of session until mid-September. Congress's intent to relieve small businesses of this regulatory burden would be defeated if businesses were required to expend the time and money to comply in anticipation of the revised rules taking effect simply because Congress did not have the time to act prior to mid-September and the Commission did not extend the stay.

The public interest is served by giving the Congress the time it needs to complete the process. The Commission should be working with Congress to give effect to Congress's intent, not thwarting it.

CONCLUSION

For the reasons discussed above, and in the request for an extension of stay filed by the Fax Ban Coalition, NAR hereby requests a six-month extension of the stay of the revised fax rules, which would expire June 30, 2005.

Respectfully submitted,

NATIONAL ASSOCIATION OF REALTORS®



Walter T. McDonald, CRS, GRI
President
NATIONAL ASSOCIATION OF REALTORS®
700 11TH Street, N.W.
Washington, D.C. 20001
Telephone: (202) 383-1000



Gerard J. Waldron
Aaron Cooper
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-6000
Fax: (202) 662-6291

Its Counsel

August 10, 2004

Appendix A

Alabama Association of REALTORS®
Alaska Association of REALTORS®
Arizona Association of REALTORS®
Arkansas REALTORS® Association
California Association of REALTORS®
Colorado Association of REALTORS®
Connecticut Association of REALTORS®
Delaware Association of REALTORS®
Florida Association of REALTORS®
Georgia Association of REALTORS®
Hawaii Association of REALTORS®
Idaho Association of REALTORS®
Illinois Association of REALTORS®
Indiana Association of REALTORS®
Iowa Association of REALTORS®
Kansas Association of REALTORS®
Kentucky Association of REALTORS®
Louisiana REALTORS® Association
Maine Association of REALTORS®
Maryland Association of REALTORS®
Massachusetts Association of REALTORS®
Michigan Association of REALTORS®
Minnesota Association of REALTORS®
Mississippi Association of REALTORS®
Missouri Association of REALTORS®
Montana Association of REALTORS®
Nebraska REALTORS® Association
Nevada Association of REALTORS®
New Hampshire Association of REALTORS®
New Jersey Association of REALTORS®
New York State Association of REALTORS®
North Carolina Association of REALTORS®
North Dakota Association of REALTORS®
Ohio Association of REALTORS®
Oklahoma Association of REALTORS®
Oregon Association of REALTORS®
Pennsylvania Association of REALTORS®
Puerto Rico Association of REALTORS®
REALTORS® Association of New Mexico
Rhode Island Association of REALTORS®
South Carolina Association of REALTORS®
South Dakota Association of REALTORS®
Tennessee Association of REALTORS®

Texas Association of REALTORS®
Utah Association of REALTORS®
Vermont Association of REALTORS®
Virgin Islands Territorial Association of REALTORS®
Virginia Association of REALTORS®
Washington Association of REALTORS®
Washington D.C. Association of REALTORS®
West Virginia Association of REALTORS®
Wisconsin REALTORS® Association
Wyoming Association of REALTORS®

SERVICE

Courtesy copies of the foregoing Petition for Extension of Stay were delivered
this 10th day of August, 2004, as follows:

By email:

K. Dane Snowden
Chief
Consumer and Governmental
Affairs Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jay Keithley
Deputy Bureau Chief
Consumer and Governmental
Affairs Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Bryan Tramont
Office of Chairman Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mathew Brill
Office of Commissioner Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Daniel Gonzalez
Office of Commissioner Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

June Taylor
Chief of Staff
Consumer and Governmental
Affairs Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Gene Fullano
Consumer and Governmental
Affairs Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Sheryl Wilkerson
Office of Chairman Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Scott Bergmann
Office of Commissioner Adelstein
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Martha Johnston
Director
Office of Legislative Affairs
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554