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September 14, 2005

Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: In the Matter of Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991 -
CG Docket No. 02-278
Notice of *Ex Parte* Submission

Dear Ms. Dortch:

This filing is being submitted on behalf of the National Association of Realtors to explain various models on how the real estate industry is organized, which the Commission should take into account as it considers its rules under the Telephone Consumer Protection Act and the Junk Fax Prevention Act of 2005.

Sections 2(c) and 2(d) of the Junk Fax Prevention Act require the FCC to implement a new "opt-out" opportunity for recipients of commercial faxes. Specifically, pursuant to Section 2(c) the FCC must implement rules requiring a sender to include an opt-out notification on any unsolicited facsimile advertisement sent pursuant to the established business relationship exception. Pursuant to Section 2(d), the FCC is directed to implement rules regarding the procedure for a recipient to opt-out of receiving faxes from a sender.

Both of these provisions beg the question of how to define the fax sender for purposes of this opt-out provision. That is, when a recipient validly opts-out of receiving future faxes, to whom is it applicable? We propose that, consistent with the telemarketing rules adopted by the Commission and by the Federal Trade Commission, the Commission consider the issue within the framework of the reasonable expectation of recipients.

This issue becomes important when placed in the context of how many industries, including the real estate industry, actually operate on a daily basis. While it is difficult to characterize the typical real estate firm, they generally fall under one of the following business models: 1) independent office; 2) franchisee; or 3) national or regional corporation. Within each

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model, however, the overwhelming majority of real estate sales agents operate as independent contractors (i.e., self-employed).

Consider the question of sender as it applies to a real estate franchise. Company A is a real estate franchisee that is organized and incorporated separately from a national real estate corporation (franchisor). And while Company A uses the national corporation's branding, the franchisee operates and advertises itself as a distinguishable entity. As this franchisee and all other franchisees of the national real estate corporation are legally separate and distinguishable entities, logically each is therefore a separate fax sender. A valid opt-out made to Company A should only be binding for facsimiles sent from that franchisee, but not from other separately incorporated franchisees.

Also, consider the question of sender as it applies to a national real estate company where each office is owned by the corporation, but is functionally distinct. For instance, Company B is organized and incorporated on a national basis. Company B has offices all over the country that distinguish and identify themselves by location, for example, Company B of Northern Virginia. As a practical matter, although these offices are incorporated as part of Company B, each office is functionally distinct and often has different broker-managers. In this situation, to the extent faxes sent from Company B of Northern Virginia, state in the opt-out notice which distinguishable real estate office sent the fax, a reasonable recipient would assume it applies to that particular office, not the entire national Company B.

The Commission should be mindful of how at least the real estate industry is organized as it crafts its rules and policies under the TCPA and the Junk Fax Prevention Act. Specifically, we urge the Commission to adopt a rule that a validly perfected opt-out request is binding upon any facsimile machine or sender of faxes associated with or employed by (1) a separately incorporated or otherwise legally organized entity; or (2) branches or offices of the same legal entity that plainly distinguish and identify themselves separately in the opt-out notice. These conclusions are consistent with both the reasonable expectations of recipients and the realities of the business world.

We hope this information is useful and please let us know if you have any questions or would like to discuss.

Sincerely,



Gerard J. Waldron
Counsel to National Association of Realtors