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
	)	
Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338

NOTICE OF PROPOSED RULEMAKING AND ORDER

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Comment Date: 30 days after publication in the Federal Register
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By the Commission:

I. INTRODUCTION

1. The Junk Fax Prevention Act of 2005 (the Junk Fax Prevention Act)[1] amends section 227 of the Communications Act of 1934 (the Act) relating to unsolicited facsimile advertisements.[2] Section 2(h) of the Junk Fax Prevention Act provides that "not later than 270 days after the date of enactment of this Act, the Federal Communications Commission shall issue regulations to implement the amendments made by this section."[3] We therefore propose modifications to the Commission's rules on unsolicited facsimile advertisements and seek comment on related aspects of those rules.

II. BACKGROUND

A. Telephone Consumer Protection Act of 1991

2. On December 20, 1991, Congress enacted the Telephone Consumer Protection Act (TCPA) to address a growing number of telephone marketing calls and certain telemarketing practices

[1] *See* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005) (Junk Fax Prevention Act). The Junk Fax Prevention Act was signed into law on July 9, 2005.

[2] 47 U.S.C. § 227.

[3] *See* Junk Fax Prevention Act, Sec. 2(h). The Commission must issue regulations to implement these amendments no later than April 5, 2006. In the accompanying Order, we further delay the effective date of the written permission requirement currently scheduled to go into effect January 9, 2006, to avoid any confusion that might arise should the Commission not conclude its rulemaking by that date.

thought to be an invasion of consumer privacy.[4] In relevant part, the TCPA prohibits the use of any telephone facsimile machine, computer, or other device to send an "unsolicited advertisement" to a telephone facsimile machine.[5] An unsolicited advertisement is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."[6] The TCPA also requires those sending any messages via telephone facsimile machines to identify themselves to message recipients.[7] The TCPA did not expressly exempt persons with whom the sender has an established business relationship (EBR) or tax exempt nonprofit organizations from the prohibition on sending unsolicited facsimile advertisements, although it did create such exemptions from the definition of "telephone solicitation."[8]

B. TCPA Orders

3. In 1992, the Commission adopted rules implementing the TCPA, including restrictions on the transmission of unsolicited facsimile advertisements by facsimile machines.[9] The Commission's rules on unsolicited facsimile advertisements incorporated the language of the statute virtually verbatim.[10] The Commission stated that "the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition" on unsolicited facsimile advertisements.[11] The Commission concluded, however, that facsimile transmissions from persons or entities that have an EBR with the recipient can evidence the necessary invitation or permission of the recipient to receive the facsimile advertisement.[12] The Commission defined the term "established business relationship" to mean:

> a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the

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[4] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227.

[5] 47 U.S.C. § 227(b)(1)(C).

[6] 47 U.S.C. § 227(a)(4).

[7] Specifically, the TCPA provides that the facsimile include "in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual." 47 U.S.C. § 227(d)(1)(B).

[8] *See* 47 U.S.C. § 227(a)(3).

[9] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 (1992) (*1992 TCPA Order*); *see also* 47 C.F.R. § 64.1200.

[10] *See, e.g.*, 47 C.F.R. § 64.1200(a)(3) (no person or entity may "[u]se a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine"); 47 C.F.R. § 64.1200(f)(10) (the term "unsolicited advertisement means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission").

[11] *1992 TCPA Order*, 7 FCC Rcd at 8779, para. 54, n.87.

[12] *Id.*

residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.[13]

4. On July 3, 2003, the Commission revised many of its telemarketing and facsimile advertising rules under the TCPA.[14] The Commission reversed its prior conclusion that an EBR provides companies with the necessary express permission to send facsimile advertisements to their customers.[15] Instead, the Commission concluded that the recipient's express permission must be in writing and include the recipient's signature.[16] The Commission also revised the definition of an EBR, in the context of telephone solicitations, to limit the duration of that exception to 18 months after the recipient's last purchase or transaction, or three months after the recipient's last application or inquiry.[17]

5. On August 18, 2003, the Commission issued an *Order on Reconsideration* that delayed, until January 1, 2005, the effective date of the requirement that the sender of a facsimile advertisement first obtain the recipient's prior express permission in writing.[18] Comments filed after the release of the *2003 TCPA Order* indicated that many organizations needed additional time to secure this prior written permission.[19] On October 3, 2003, the Commission released an order staying the 18-month and three-month time limitations imposed on the duration of the EBR as applied to the sending of unsolicited facsimile advertisements pending either a decision on this issue on reconsideration or January 1, 2005.[20] On October 1, 2004, the Commission further delayed these requirements through June 30, 2005.[21]

6. On June 27, 2005, the Commission further delayed until January 9, 2006, the effective date of: (1) section 64.1200(a)(3)(i) of the Commission's rules, which requires a person or entity sending a facsimile advertisement to obtain a prior signed, written statement as evidence of a facsimile recipient's permission to receive the advertisement; and (2) the rule establishing the duration of an EBR as applied to the sending of unsolicited facsimile advertisements.[22]

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[13] *1992 TCPA Order*, 7 FCC Rcd at 8771, para. 35.

[14] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003) (*2003 TCPA Order*).

[15] *2003 TCPA Order*, 18 FCC Rcd at 14127-28, para. 189.

[16] *2003 TCPA Order*, 18 FCC Rcd at 14128-29, para. 191. *See also* 47 C.F.R. § 64.1200(a)(3)(i).

[17] *2003 TCPA Order*, 18 FCC Rcd at 14079, para. 113. *See also* 47 C.F.R. § 64.1200(f)(3). Prior to the *2003 TCPA Order*, the EBR definition applied to both telephone solicitations and unsolicited facsimile advertisement transmissions and contained no expiration date.

[18] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order on Reconsideration, 18 FCC Rcd 16972, 16974-75, paras. 5-6 (2003) (*Order on Reconsideration*).

[19] *Order on Reconsideration*, 18 FCC Rcd at 16974, para. 5.

[20] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, 18 FCC Rcd 19890 (2003) (*EBR Duration Order*).

[21] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, 19 FCC Rcd 20125 (2004).

[22] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, FCC 05-132 (rel. June 27, 2005) (*Stay Order*); *see also infra*, para. 32.

C. Junk Fax Prevention Act of 2005

7. In general, the Junk Fax Prevention Act: (1) codifies an EBR exemption to the prohibition on sending unsolicited facsimile advertisements;[23] (2) provides a definition of an EBR to be used in the context of unsolicited facsimile advertisements;[24] (3) requires the sender of a facsimile advertisement to provide specified notice and contact information on the facsimile that allows recipients to "opt-out" of any future facsimile transmissions from the sender;[25] and (4) specifies the circumstances under which a request to "opt-out" complies with the Act.[26] In addition, the Junk Fax Prevention Act authorizes the Commission to: (1) determine the "shortest reasonable time" within which a sender must comply with a request not to receive future facsimile advertisements;[27] (2) consider exempting certain classes of small business senders from the requirement to provide a "cost-free" mechanism for a recipient to transmit an opt-out request;[28] and (3) consider whether to allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the "opt-out" notice otherwise required by the Junk Fax Prevention Act.[29]

III. NOTICE OF PROPOSED RULEMAKING

A. Recognition of an Established Business Relationship Exemption

1. Background

8. Section 2(a) of the Junk Fax Prevention Act amends section 227(b)(1)(C) of the Act by adding an EBR exemption to the prohibition on sending unsolicited facsimile advertisements. Specifically, section 2(a) provides that it shall be unlawful for any person within the United States or any person outside the United States if the recipient is within the United States:

> (C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless –
>
> (i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

[23] Junk Fax Prevention Act, Sec. 2(a).

[24] Junk Fax Prevention Act, Sec. 2(b).

[25] Junk Fax Prevention Act, Sec. 2(c).

[26] Junk Fax Prevention Act, Sec. 2(d). In addition, the Junk Fax Prevention Act requires the Commission to submit an annual report to Congress regarding enforcement of the rules relating to the sending of unsolicited facsimile advertisements. Junk Fax Prevention Act, Sec. 3. The Junk Fax Prevention Act also requires the Comptroller General of the United States to conduct a study regarding complaints received by the Commission concerning unsolicited facsimile advertisements. *See* Junk Fax Prevention Act, Sec. 4

[27] Junk Fax Prevention Act, Sec. 2(c).

[28] *Id.*

[29] Junk Fax Prevention Act, Sec. 2(e).

(ii) the sender obtained the number of the telephone facsimile machine through –

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution, except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before the date of enactment of the Junk Fax Prevention Act of 2005 if the sender possessed the facsimile machine number of the recipient before such date of enactment; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D), except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E).[30]

2. Discussion

9. We propose amending section 64.1200(a)(3) of the Commission's rules in accordance with the specific requirements in section 2(a) of the Junk Fax Prevention Act regarding the express recognition of an EBR exemption.[31] Specifically, we propose removing section 64.1200(a)(3)(i) of the Commission's rules which provides that a facsimile advertisement is unsolicited unless "the recipient has granted the sender prior express invitation or permission to deliver the advertisement, as evidenced by a signed, written statement that . . . clearly indicates the recipient's consent to receive such facsimile advertisements from the sender."[32] Congress has concluded that an unsolicited advertisement from a sender with an EBR to the recipient will not be governed by the general prohibition found in section 227(b)(1)(C).[33] As discussed further below, in the context of an EBR, such prior express permission may be formed by means other than a signed, written statement that indicates the recipient's consent to receive facsimile advertisements.[34] We seek comment on these and any other issues that commenters

[30] Junk Fax Prevention Act, Sec. 2(a).

[31] *See* 47 C.F.R. § 64.1200(a)(3).

[32] 47 C.F.R. § 64.1200(a)(3)(i). *See also infra,* proposal in para. 29.

[33] However, we further note that, under the statute, "the [established business relationship] exception . . . shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E) [of the Act]." Junk Fax Prevention Act, Sec. 2(a). *See also infra* para. 25.

[34] *See infra,* Sec. III.B.

may consider pertinent to this topic.

10. In addition, we seek specific comment on whether we should establish parameters defining what it means for a person to provide a facsimile number "within the context of [an] established business relationship."[35] Under what circumstances should we recognize that a person has voluntarily agreed to make a facsimile number available for public distribution? Should the burden rest with the sender to establish that the recipient has agreed to make the number publicly available? When the sender obtains the facsimile number from a directory, advertisement, or site on the Internet, should the sender be required to make reasonable efforts to confirm with the entity that compiled the numbers that the recipients have "voluntarily" agreed to allow them to be made publicly available?

11. Finally, the Junk Fax Prevention Act provides an exception from the requirement that any sender transmitting a facsimile advertisement on the basis of an EBR must have obtained the facsimile number through the "voluntary communication of such number, within the context of such established business relationship" or through "a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution."[36] Under the statute, if the EBR was in existence prior to the date of enactment of the statute and the sender also possessed the facsimile number before the date of enactment of the statute, the sender is not required to demonstrate how it obtained the facsimile number.[37] We propose amending the Commission's rules consistent with this exception, which would permit senders to send facsimile advertisements to persons with whom an EBR was formed prior to July 9, 2005, provided the facsimile number was in the sender's possession before July 9, 2005, as well. If we adopt this proposal, how should the Commission verify that a sender had an EBR and recipient's facsimile number prior to July 9, 2005? We seek comment on this proposal and any other issues that relate to the sender's ability to send facsimile advertisements to persons with whom an EBR was formed prior to enactment of the Junk Fax Prevention Act.

B. Definition of Established Business Relationship

1. Background

12. Section 2(b) of the Junk Fax Prevention Act – Definition of Established Business Relationship – amends section 227(a) of the Act by providing a definition of an EBR to be used in the context of unsolicited facsimile advertisements. Specifically, section 2(b) adds the following language:

> (2) The term 'established business relationship', for purposes only of subsection (b)(1)(C)(i) [creating an EBR exemption for unsolicited facsimile advertisements] shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that –
>
> > (A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

[35] *See* Junk Fax Prevention Act, Sec. 2(a).

[36] *Id.*

[37] *Id.*

> (B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G).[38]

13. "Paragraph 2(G)" refers to Section 2(f) of the Junk Fax Prevention Act. That provision authorizes the Commission to limit the duration of the EBR in the context of unsolicited facsimile advertisements. Specifically, Section 2(f) provides that the Commission:

> (G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall—
>
> > (I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;
> >
> > (II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;
> >
> > (III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and
> >
> > (IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and
>
> (ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on the date of the enactment of the Junk Fax Prevention Act of 2005.[39]

2. Discussion

14. As contemplated by section 2(b) of the statute, we seek comment on whether to incorporate into the Commission's facsimile advertising rules the following definition of an EBR:

> For purposes of paragraph (a)(3) of this section, the term established business relationship means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential

[38] Junk Fax Prevention Act, Sec. 2(b).

[39] Junk Fax Prevention Act, Sec. 2(f).

subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.[40]

15. We note that this proposed EBR definition differs from the definition of an EBR in the Commission's rules for telephone solicitations[41] in that it expressly extends the exemption to faxes sent to *both* business and residential subscribers, rather than just residential subscribers.[42] This is consistent with the fact that the prohibition on sending unsolicited facsimile advertisements, unlike telephone solicitations, applies to both businesses and residential subscribers.

16. The Junk Fax Prevention Act authorizes the Commission, after a period of three months from the date of enactment of the Act, to consider limits on the duration of an EBR.[43] Therefore, we take this opportunity to seek comment on whether to limit the EBR as applied to unsolicited facsimile advertisements. As part of our review, and as required by the statute, we will evaluate the Commission's complaint data to determine whether the EBR exception has resulted in a significant number of complaints regarding facsimile advertisements, and whether such complaints involve facsimile advertisements sent based on an EBR of a duration that is inconsistent with the reasonable expectations of consumers.[44]

17. In the context of telephone solicitations, Congress has concluded that the right to call consumers becomes more tenuous over time.[45] Consistent with the conclusion of the Federal Trade Commission, this Commission has limited the duration of the EBR for telephone solicitations to 18 months following a purchase or transaction and three months after an application or inquiry.[46] The Commission concluded that this 18/3-month limitation on the duration of an EBR strikes an appropriate balance between industry practices and consumers' privacy interests.[47] Accordingly, we seek comment on whether it is appropriate to limit the EBR duration for unsolicited facsimile advertisements in the same manner as telephone solicitations. To the extent that commenters suggest EBR durations for facsimile advertisements that may vary from those imposed on telephone solicitations, including not adopting any limitation on the duration of the facsimile EBR, we seek empirical evidence to distinguish the Commission's findings relating to the EBR duration for telephone solicitations.

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[40] *See* 47 C.F.R. § 64.1200(f)(4) (as in effect on January 1, 2003).

[41] *See* 47 C.F.R. § 64.1200(f)(3).

[42] *Id.*

[43] Junk Fax Prevention Act, Sec. 2(f).

[44] *See* Junk Fax Prevention Act, Sec. 2(f).

[45] *See* H.R. REP. No. 102-317 at 14 (1991) ("In the Committee's view, an 'established business relationship' also could be based upon any prior transaction, negotiation, or inquiry between the called party and the business entity that has occurred during a reasonable period of time. . ."). The House Report also states that, ". . . the Committee believes the test to be applied must be grounded in the consumer's expectation of receiving the call. Consequently, the test shall consist of a determination of whether the new solicitation occurs within a reasonable period of time and the new product or service being promoted is related substantially to the prior relationship." *Id.* at 15.

[46] 47 C.F.R. § 64.1200(f)(3).

[47] *See 2003 TCPA Order*, 18 FCC Rcd at 14079, para. 113.

18. In addition, as set forth in the Junk Fax Prevention Act, we seek comment on the benefits to facsimile recipients of limits on the EBR.[48] Are there direct costs to consumers associated with receiving facsimile advertisements, such as costs for paper, toner, and time spent collecting and sorting faxes that weighs in favor of limiting the facsimile EBR? Are there direct benefits to consumers of having an EBR that is not limited in duration? If the Commission adopts any such limits on the EBR, we also ask commenters to describe the costs to senders of demonstrating the existence of an EBR that is limited in duration.[49] Would these costs be overly burdensome, particularly for small businesses?

C. Notice of Opt-Out Opportunity

1. Background

19. Section 2(c) of the Junk Fax Prevention Act – Required Notice of Opt-Out Opportunity – amends section 227(b)(2) of the Act by adding language that requires senders of unsolicited facsimile advertisements to include a notice on the first page of the facsimile that informs the recipient of the ability and means to request that they not receive future unsolicited facsimile advertisements from the sender. Specifically, section 2(c) requires that the Commission:

> (D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if –
>
> (i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;
>
> (ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) [setting forth the circumstances under which a request to opt-out complies with the Act] is unlawful;
>
> (iii) the notice sets forth the requirements for a request under subparagraph (E);
>
> (iv) the notice includes –
>
> (I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and
>
> (II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders,

[48] *See* Junk Fax Prevention Act, Sec. 2(f).

[49] *See* Junk Fax Prevention Act, Sec. 2(f).

but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d).[50]

2. Discussion

20. We propose amending the Commission's rules to comply with the specific notice requirements on unsolicited facsimile advertisements as set forth by Congress in section 2 of the Junk Fax Prevention Act. In addition, we seek comment on whether it is necessary to set forth in our rules under what circumstances a notice will be considered "clear and conspicuous."[51] If so, we ask commenters to describe those circumstances under which a notice should be considered "clear and conspicuous." As directed by Congress, we also seek comment on the "shortest reasonable time" within which a sender of unsolicited facsimile advertisements must comply with a request not to receive future facsimile advertisements from the sender. We note that the Commission's rules require that persons or entities making calls for telemarketing purposes must honor a do-not-call request within a reasonable time.[52] The Commission's rules provide that this reasonable period "may not exceed thirty days from the date of such request."[53] We seek comment on whether this 30-day limitation is the shortest reasonable period in which to expect senders of unsolicited facsimile advertisements to honor a do-not-fax request. If not, we seek empirical evidence from commenters to support proposals for longer or shorter periods.

21. We note that the Commission's rules currently require senders of facsimile messages to identify themselves on the message, along with the telephone number of the sending machine or the business, other entity, or individual sending the message.[54] We therefore seek comment on the interplay between this identification requirement and the notice requirement described above for senders of unsolicited facsimile advertisements.[55] We seek comment on ways to minimize the burdens associated

[50] Junk Fax Prevention Act, Sec. 2(c).

[51] *See, e.g.,* the definition of "clear and conspicuous" for purposes of the Commission's truth-in-billing requirements at 47 C.F.R. § 64.2401(e): "clear and conspicuous means notice that would be apparent to the reasonable consumer."

[52] 47 C.F.R. § 64.1200(d)(3).

[53] *Id.*

[54] 47 C.F.R. § 68.318(d). *See also* 47 U.S.C. § 227(d)(1)(B) (making it unlawful for any person within the United States "to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual").

[55] *See also supra,* para. 20 (proposing to codify the specific notice requirements for unsolicited advertisements as set forth in section 2 of the Junk Fax Prevention Act).

with complying with these separate requirements that are consistent with the goals of the TCPA and its recent amendments.

22. As provided by the Junk Fax Prevention Act, we also seek comment on whether to exempt certain classes of small business senders from the requirement to provide a cost-free mechanism for a recipient to transmit a request not to receive future facsimile advertisements. In particular, we seek empirical information as to whether the costs to such small businesses are unduly burdensome given the revenues generated by such small businesses. Should the Commission decide to exempt certain classes of small businesses from the requirement, we seek specific information on how such "classes" of small businesses may be defined. Do the Small Business Administration's Standard Industrial Classification regulations provide any useful guidance?[56] Are there any legal impediments to adopting a definition of small business or class of small businesses for use in this context that may deviate from the SBA's standard definition?[57] Does the Junk Fax Prevention Act provide sufficient authority to allow the Commission to adopt a small business classification that varies from the SBA? Would such an exemption for small business senders have any adverse impact on consumers and businesses who receive facsimile advertisements from small businesses? Are there alternative mechanisms available so that recipients are able to request of any small business that it not send future unsolicited advertisements?

23. In addition, we seek comment on whether we need to enumerate specific "cost-free" mechanisms for a recipient to transmit a do-not-fax request, and, if so, we seek comment on what those specific mechanisms should be. For instance, should the provision of a toll-free telephone number, website, or email address for receiving do-not-fax requests, comply with this requirement? Should a local telephone number be considered a "cost-free" mechanism if the unsolicited facsimile advertisements are sent only to local consumers? We seek comment on these issues and any other issues commenters may consider pertinent to this topic.

D. Request to Opt-Out of Future Unsolicited Advertisements

1. Background

24. Section 2(d) of the Junk Prevention Act – Request to Opt-Out of Future Unsolicited Advertisements – amends section 227(b)(2) of the Act by adding language that sets forth when a request not to send future unsolicited facsimile advertisements complies with the Act. Specifically, section 2(d) states that the Commission:

> (E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if –
>
> (i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

[56] *See* 13 C.F.R. § 121.201.

[57] For example, section 632(a)(2)(C) of the Small Business Act requires that, unless specifically authorized by statute, a federal agency may not prescribe a size standard for purposes of rulemaking that deviates from the standard definition set forth by the SBA, unless the alternative size standard is subject to public notice and comment, and approved by the Administrator of the U.S. Small Business Administration. 15 U.S.C. § 632(a)(2)(C).

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine.[58]

2. Discussion

25. We propose adopting the requirements provided in the Junk Fax Prevention Act regarding the making of a request not to receive future unsolicited facsimile advertisements. Section 2(a) of the Junk Fax Prevention Act provides that "the exception under clauses (i) and (ii) [creating the EBR exemption] shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine. . . ."[59] We seek comment on whether the Commission's rules should reflect that a do-not-fax request terminates the EBR exemption with the sender of the facsimile even if the recipient continues to do business with the sender.[60] We seek comment on whether to specify that if the sender of the facsimile advertisement is a third party agent or fax broadcaster that any do-not-fax request sent to that sender will extend to the underlying business on whose behalf the fax is transmitted. We also seek comment on whether there are any other methods of communication that we should prescribe for making a do-not-fax request other than those required in the notice section discussed above (*i.e.* a domestic contact telephone and facsimile number and a cost-free mechanism).[61] Should, for instance, a sender be required to honor a request made by mail or e-mail even if such addresses are not necessarily provided by the sender in the facsimile communication's "opt-out" notice? Finally, we seek comment on situations in which a consumer that has made a do-not-fax request of a sender subsequently provides express invitation or permission to receive facsimile advertisements from that entity. Should the facsimile sender bear the burden of proof to demonstrate that it had the consumer's express invitation or permission to send the facsimile advertisement?

E. Authority to Establish Nonprofit Exception

1. Background

26. Section 2(e) of the Junk Fax Prevention Act - Authority to Establish Nonprofit Exemption - amends section 227(b)(2) of the Act by adding language that authorizes the Commission to consider exempting nonprofit organizations from the notice requirements discussed above.[62] Specifically, section 2(e) provides that the Commission:

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[58] Junk Fax Prevention Act, Sec. 2(d).

[59] Junk Fax Prevention Act, Sec. 2(a)(C)(iii).

[60] We note that, in the context of telephone solicitations, the Commission's rules provide that a telephone subscriber's seller-specific do-not-call request terminates any EBR exemption with that company even if the subscriber continues to do business with the seller. *See* 47 C.F.R. § 64.1200(f)(3)(i).

[61] *See supra*, Sec. III.C.

[62] *See supra*, Sec. III.C. *See also* Junk Fax Prevention Act of 2005, Sec. 2(e).

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only—

(i) by regulation issued after public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements[.][63]

2. Discussion

27. We seek comment on whether the Commission should allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the associations' tax-exempt purpose that do not contain the "opt-out" notice required by the Junk Fax Prevention Act. In particular, we seek comment on whether such notice is necessary to protect the ability of members of such associations to stop the sending of any future unsolicited advertisements. For example, how will members of such associations obtain the necessary information to opt-out if associations are not required to provide such information? What benefits, if any, are there to nonprofit organizations if the Commission exempts them from this requirement? How should we determine whether an unsolicited advertisement is sent "in furtherance of the association's tax-exempt purpose?"[64] We seek comment on these issues and any other issues commenters may consider pertinent to this topic.

F. Unsolicited Advertisement

1. Background

28. Section 2(g) of the Junk Fax Prevention Act – Unsolicited Advertisement – amends section 227(a)(5) of the Act[65] which defines the term "unsolicited advertisement" by adding "in writing or otherwise" before the period at the end of that section.

2. Discussion

29. We propose amending the definition of unsolicited advertisement in section 64.1200(f)(10) of the Commission's rules to read as follows:

The term unsolicited advertisement means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any

[63] Junk Fax Prevention Act, Sec. 2(e).

[64] *See id.*

[65] Section 227(a)(4) of the Act prior to the enactment of the Junk Fax Prevention Act.

person without that person's prior express invitation or permission, in writing or otherwise.

30. In addition, we seek comment on the phrase "prior express invitation or permission" in the definition. In addition to written permission, what other forms of permission should be allowed by our rules? If permission is given orally, for instance, should the facsimile sender bear the burden of proof to demonstrate that it had the consumer's prior express invitation or permission?

G. Other Issues: Creation of CG Docket No. 05-338

31. In this NPRM, we open a new docket—CG Docket No. 05-338. All filings in response to this NPRM and those addressing the Commission's facsimile advertising rules generally, should be filed in CG Docket No. 05-338. Although we urge parties that previously filed in CG Docket No. 02-278 on the facsimile advertising rules to re-file in new CG Docket No. 05-338, such filings nevertheless will be considered in this proceeding. Therefore, we incorporate by reference comments filed in CG Docket No. 02-278 that are responsive to the issues raised in this proceeding. The existing TCPA docket, CG Docket 02-278, will remain open for other TCPA-related filings.

IV. ORDER

32. On June 27, 2005, the Commission released an Order delaying until January 9, 2006, the effective date of the Commission's determination that an EBR will no longer be sufficient to show that an individual or business has given its permission to receive unsolicited facsimile advertisements.[66] Consistent with the Junk Fax Prevention Act, we extend the stay of the Commission's existing facsimile advertising rules until the conclusion of this rulemaking.[67] Specifically, we delay, until the conclusion of this rulemaking, the effective date of: (1) the Commission's prior determination that an EBR will no longer be sufficient to show that an individual or business has given prior express permission to receive an unsolicited facsimile advertisement; (2) section 64.1200(a)(3)(i) of the Commission's rules, which requires a person or entity sending a facsimile advertisement to obtain a prior signed, written statement as evidence of a facsimile recipient's permission to receive the advertisement; and (3) the rule establishing the duration of an EBR as applied to the sending of unsolicited facsimile advertisements.[68]

V. PROCEDURAL MATTERS

A. Ex Parte Presentations for Notice of Proposed Rulemaking

33. This proceeding shall be treated as a "permit but disclose" proceeding in accordance with the Commission's *ex parte* rules, 47 C.F.R. § 1.1200. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substances of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. *See* 47 C.F.R. § 1.1206(b).

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[66] *See supra*, para. 6; *see also Stay Order supra,* n.22.

[67] As noted above, we must issue regulations to implement the Act's amendments by April 5, 2006. *See supra,* n.3.

[68] *See EBR Duration Order*, 18 FCC Rcd 19890 (2003) (staying the limitations imposed in section 64.1200(f)(3) on the duration of an established business relationship as applied to the sending of unsolicited facsimile advertisements).

Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b).

B. Paperwork Reduction Act

34. The Notice of Proposed Rulemaking contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and OMB to comment on the information collection requirements contained in this NPRM, as required by the PRA. Public and agency comments are due 60 days after the date of publication of this NPRM in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

C. Congressional Review Act

35. The Commission will not send a copy of the Order pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A), because the adopted rules are rules of particularly applicability.

D. Filing of Comments and Reply Comments

36. Pursuant to sections 1.415 and 1.419 or the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before the dates indicated on the first page of this document. When filing comments, please reference CG Docket No. 05-338. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS); (2) the Federal Government's eRulemaking Portal; or (3) by filing paper copies.[69]

37. Electronic Filers: Comments may be filed electronically using the Internet by accessing http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments.

- For ECFS Filers: filers should transmit one electronic copy of the comments for CG Docket No. 05-338. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail message to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

38. Paper Filers: Parties who choose to file by paper must file an original and four copies of

[69] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

each filing in CG Docket No. 05-338. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

39. The Commission's contractor will receive hand-delivered or messenger-delivered paper filings or electronic media for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, S.W., Washington, D.C. 20554.

40. Comments and reply comments must include a short and concise summary of the substantive discussion and questions raised in the NPRM. We further direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. We strongly encourage that parties track the organization set forth in this NPRM in order to facilitate our internal review process. Comments and reply comments must otherwise comply with section 1.48 and all other applicable sections of the Commission's rules.[70]

E. Materials in Accessible Formats

41. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice) or (202) 418-0432 (TTY). This Notice of Proposed Rulemaking and Order can also be downloaded in Word and Portable Document Format (PDF) at http://www.fcc.gov/cgb/policy.

F. Initial Regulatory Flexibility Analysis

42. Pursuant to the Regulatory Flexibility Act of 1980, as amended,[71] the Commission's Initial Regulatory Flexibility Analysis regarding this Notice of Proposed Rulemaking is attached as an Appendix.

VI. ORDERING CLAUSES

43. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1-4, 227, and 303(r), of the Communications Act of 1934, as amended; 47 U.S.C. §§ 151-154, 227, and 303(r); the Junk Fax Prevention Act of 2005, and section 64.1200 of the Commission's Rules, 47 C.F.R. § 64.1200, this Notice of Proposed Rulemaking and Order in CG Docket Nos. 02-278 and 05-338 IS ADOPTED.

[70] *See* 47 C.F.R. § 1.48.

[71] 5 U.S.C. §§ 601 *et seq.*

44. IT IS FURTHER ORDERED that CG Docket No. 05-338 SHALL BE created for this proceeding and for other issues related to the Commission's facsimile advertising rules.

45. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of the Notice of Proposed Rulemaking and Order, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary

Appendix

Initial Regulatory Flexibility Analysis

46. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[72] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Notice of Proposed Rulemaking (NPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the first page of this NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[73] In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.[74]

A. Need for, and Objectives of, the Proposed Rules

47. On July 9, 2005, the Junk Fax Prevention Act[75] was signed into law amending the provisions of section 227 of the Communications Act.[76] Most importantly, the Junk Fax Prevention Act codifies an established business relationship exemption to the provision which prohibits the sending of unsolicited facsimile advertisements. It also requires the sender of a facsimile advertisement to provide specified notice and contact information on the facsimile that allows recipients to "opt-out" of any future facsimile transmissions from the sender.[77] It also requires the Commission to issue regulations to implement the amendments within 270 days of the date of enactment of the statute.[78] Therefore, the proposed rules are necessary to comply with this congressional mandate and to provide additional guidance to regulated entities that must comply with the federal statute. The proposed modifications to the Commission's existing rules are necessary if they are to be consistent with the amendments made by the Junk Fax Prevention Act.

48. In this NPRM, we propose a number of modifications to the Commission's rules on unsolicited facsimile advertisements. We propose amending Section 64.1200(a)(3) of the Commission's rules to expressly recognize an established business relationship (EBR) exemption. We also propose removing Section 64.1200(a)(3)(i) of the Commission's rules which provides that a facsimile advertisement is unsolicited unless the recipient has granted the sender prior express invitation or permission to deliver the advertisement, as evidenced by a signed, written statement that clearly indicates the recipient's consent to receive such facsimile advertisements from the sender. We also propose amending the Commission's rules to permit senders to send facsimile advertisements to persons with

[72] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[73] *See* 5 U.S.C. § 603(a).

[74] *See Id.*

[75] *See* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005) (Junk Fax Prevention Act).

[76] *See generally* Junk Fax Prevention Act.

[77] Junk Fax Prevention Act, Sections 2(a) and (c).

[78] Junk Fax Prevention Act, Sec. 2(h).

whom an established business relationship was formed prior to July 9, 2005, provided the facsimile number was in the sender's possession before July 9, 2005. In addition, we seek comment on incorporating into our rules the definition of "established business relationship" that applied to telephone solicitations and was in effect on January 1, 2003.[79] We also seek comment on whether to limit the duration of the EBR as applied to facsimile advertising.[80]

49. The Junk Fax Prevention Act requires senders of unsolicited facsimile advertisements to include a notice on the first page of the facsimile that informs the recipient of the ability and means to request that they not receive future unsolicited facsimile advertisements from the sender. Therefore, we propose amending the Commission's rules consistent with these specific notice requirements and clarifying under what circumstances a notice will be considered "clear and conspicuous." Additionally, we propose defining the "shortest reasonable time" within which a sender of unsolicited facsimile advertisements must comply with a request not to receive future facsimile advertisements from the sender. We also propose adopting the requirements provided in the Junk Fax Prevention Act regarding the making of a request not to receive future unsolicited facsimile advertisements. The request would need to identify the numbers of the telephone facsimile machine or machines and be made to the sender of the advertisement.

50. As contemplated by the Junk Fax Prevention Act, the proposed rules also address the ability of professional or trade associations that are tax-exempt nonprofit organizations to send to their members unsolicited advertisements in furtherance of the association's tax-exempt purpose that do not contain the "opt-out" notice required by the statute. In addition, the proposed rules address the ability of small business senders to provide "cost-free" mechanisms for recipients to transmit opt-out requests. Finally, we propose amending the definition of "unsolicited advertisement" so that it is consistent with the definition in the Junk Fax Prevention Act.

B. Legal Basis

51. The proposed action is authorized under Sections 1-4, 227 and 303(r) of the Communications Act of 1934, as amended; 47 U.S.C. §§ 151-154 and 227, and the Junk Fax Prevention Act of 2005, Public Law Number 109-21, 119 Statute 359.

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

52. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[81] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[82] In addition, the term "small business" has the

[79] *See* 47 C.F.R. § 64.1200(f)(3) (as in effect on January 1, 2003).

[80] *See* Junk Fax Prevention Act, Sec. 2(f).

[81] 5 U.S.C. § 603(b)(3).

[82] 5 U.S.C. § 601(6).

same meaning as the term "small business concern" under the Small Business Act.[83] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[84]

53. The Commission's rules on the sending of unsolicited facsimile advertisements would apply to any entity, including any telecommunications carrier, that uses the telephone facsimile machine to advertise.[85] Thus, we expect that the proposals in this NPRM could have a significant economic impact on a substantial number of small entities, including the following:

54. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a specific size standard for small entities specifically applicable to providers of interexchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees.[86] According to the FCC's *Telephone Trends Report* data, 281 carriers reported that their primary telecommunications service activity was the provision of interexchange services.[87] Of these 281 carriers, an estimated 254 have 1,500 or fewer employees, and 27 have more than 1,500 employees.[88] Consequently, we estimate that a majority of interexchange carriers may be affected by the rules.

55. *Incumbent Local Exchange Carriers.* Neither the Commission nor the SBA has developed a small business size standard for providers of incumbent local exchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees.[89] According to the FCC's *Telephone Trends Report* data, 1,310 incumbent local exchange carriers reported that they were engaged

[83] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[84] Small Business Act, 15 U.S.C. § 632 (1996).

[85] 47 C.F.R. § 64.1200; 47 U.S.C. § 227. The Office of Advocacy, U.S. Small Business Administration reported that participants of a roundtable on the economic impacts of the facsimile advertising provisions stated that the TCPA's broad definition of "unsolicited advertisement" captures almost every small business in the country, and many industry representatives argued that their entire industry segment was covered by the rule. In addition, the U.S. Chamber of Commerce reportedly stated that these rules would affect every small business in the country, particularly home-based businesses. *See* Letter to Marlene H. Dortch from Thomas M. Sullivan, Chief Counsel for the Office of Advocacy, U.S. Small Business Administration, November 21, 2003; *see also* Letter to Michael K. Powell, former Chairman of the FCC, from R. Bruce Josten of the U.S. Chamber of Commerce, April 23, 2004.

[86] 13 C.F.R. § 121.201, NAICS code 517110.

[87] *Telephone Trends Report*, Table 5.3.

[88] *Id.*

[89] 13 C.F.R. § 121.201, NAICS code 517110.

in the provision of local exchange services.[90] Of these 1,310 carriers, an estimated 1,025 have 1,500 or fewer employees and 285 have more than 1,500 employees.[91] Consequently, the Commission estimates that the majority of providers of local exchange service are small entities that may be affected by the rules and policies adopted herein.

56. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of "Paging"[92] and "Cellular and Other Wireless Telecommunications."[93] Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.[94] Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.[95] Thus, under this category and associated small business size standard, the great majority of firms can be considered small. For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.[96] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[97] Thus, under this second category and size standard, the great majority of firms can, again, be considered small.

57. Ordinarily, we do not seek comment on the entities that must comply with proposed rules. However, the proposed rules in this document potentially could apply to any entity, including any telecommunications carrier, that sends an unsolicited advertisement to a telephone facsimile machine. Thus, under these unusual circumstances, we seek comment on whether the approximately 4.44 million small business firms in the United States, as identified in SBA data, will need to comply with these rules, or whether it is reasonable to assume that only a subset of them will be subject to these rules given that

[90] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, at Table 5.3, p. 5 - 5 (May 2004) (*Telephone Trends Report*). This source uses data that are current as of October 22, 2003.

[91] *Id.*

[92] 13 C.F.R. § 121.201, NAICS code 517211.

[93] 13 C.F.R. § 121.201, NAICS code 517212.

[94] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

[95] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000). The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

[96] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000).

[97] U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000). The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

not all small businesses use the facsimile machine for advertising purposes.[98] After evaluating the comments, the Commission will examine further the effect any rule changes might have on small entities not named herein, and will set forth our findings in the final Regulatory Flexibility Analysis.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

58. The NPRM seeks comment on a number of rule changes that will affect reporting, recordkeeping and other compliance requirements for entities sending unsolicited facsimile advertisements. The proposed rules will apply to all entities using telephone facsimile machines to send unsolicited advertisements. If we are to adopt an EBR exemption to the prohibition on sending unsolicited facsimile advertisements, many entities that send such messages only to their EBR customers will not be required to obtain separate permission from recipients, thereby potentially minimizing some of the compliance requirements. However, in the event a question arises about the existence of an EBR or the duration of the EBR, the sender might need to maintain records evidencing the EBR and when the EBR was formed. Such records might also need to demonstrate whether or not the facsimile number was in the sender's possession before date of enactment of the Junk Fax Prevention Act. Because the Commission determined in 1992 that an EBR could evidence permission to send a facsimile advertisement, we believe most senders of facsimile advertisements currently maintain these records and will not be required to take any new action to comply with the proposed rules.[99]

59. In addition, the NPRM proposes adopting the specific notice requirements on unsolicited facsimile advertisements as set forth in section 2 of the Junk Fax Prevention Act. As mandated by the Junk Fax Prevention Act, senders of unsolicited advertisements must include a notice on the first page of the facsimile that informs the recipient of the ability and means to request that they not receive future unsolicited advertisements from the sender.[100] Under the Junk Fax Prevention Act, the notice must be on the first page of the advertisement; be clear and conspicuous; include a domestic contact telephone and facsimile machine number for the recipient to transmit an opt-out request to the sender; and provide a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. Finally, the telephone and facsimile machine numbers and cost-free mechanism must permit an individual or business to make such a request at any time on any day of the week.[101] Should we adopt the notice requirements in the Junk Fax Prevention Act, senders would need to take steps to ensure that their facsimile advertisements contained the notice and that such notice meets any specific criteria as outlined above. In addition, senders of facsimile advertisements must implement a cost-free mechanism, if they do not already have one in place, to allow recipients of such messages to request not to receive future advertisements.

60. The NPRM also seeks comment on the "shortest reasonable time" within which a sender of facsimile advertisements must comply with a request not to receive future facsimile advertisements

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[98] U.S. Department of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities, UC 92-S-1, Subject Series, Establishment and Firm Size, Table 2D, Employment Size of Firms.

[99] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8779 at para. 54, n.87.

[100] *See* Junk Fax Prevention Act, Sec. 2(c); *see also supra*, para. 19.

[101] *See* Junk Fax Prevention Act, Sec. 2(c).

from the sender.[102] If we adopt a 30-day limitation, or an alternative time period, within which senders of unsolicited facsimile advertisements must honor a do-not-fax request, entities subject to the rules would need to make sure to utilize some recordkeeping system to ensure that such requests are honored within 30 days or an alternative period of time. Finally, should we require the fax sender to bear the burden of proof to demonstrate that a consumer provided express invitation or permission to receive a facsimile advertisement after the consumer had previously made a do-not-fax request, the sender would likely need to maintain some record of that permission.[103]

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

61. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[104]

62. In proposing rules to implement the Junk Fax Prevention Act, we also consider alternatives that potentially could minimize the burdens on, or simplify compliance requirements for, small businesses. First, we consider exempting certain classes of small business senders from the requirement to provide a cost-free mechanism for a recipient to transmit a request not to receive future facsimile advertisements.[105] In considering this alternative, we will evaluate the costs to such small businesses of providing the cost-free mechanism and whether such costs are unduly burdensome given the revenues generated by small businesses.[106] We also compare and evaluate alternative "cost-free" mechanisms that businesses might utilize to minimize burdens on small businesses, but still allow recipients to request of any small business that it not send future facsimile advertisements.[107] Finally, in determining whether to limit the duration of the EBR, we consider the costs to small businesses of demonstrating the existence of a limited EBR.[108]

63. In addition, we consider exempting certain nonprofit organizations from the notice requirements in the Junk Fax Prevention Act.[109] This alternative proposal will allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the associations' tax-exempt purpose that do not contain the "opt-out" notice

[102] *See supra*, para. 20.

[103] *See supra*, para. 25.

[104] *See* 5 U.S.C. § 603(c).

[105] *See supra*, para. 22.

[106] *See supra*, para. 22.

[107] *See supra*, para. 23.

[108] *See supra*, para. 18.

[109] Junk Fax Prevention Act, Sec. 2(e).

required by the Junk Fax Prevention Act. Should we determine that such notice is not necessary to protect the ability of members of such associations to stop the sending of any future unsolicited advertisements, this alternative approach could minimize compliance burdens on those professional and trade associations that are small businesses.[110]

64. As described above, the Junk Fax Prevention Act requires that senders of facsimile advertisements include notices stating that the recipients may request not to receive any future unsolicited facsimile advertisements. We are considering alternative time periods within which a sender of unsolicited facsimile advertisements must comply with a request not to receive future facsimile advertisements from the sender.[111] We will compare and evaluate these alternative time periods to ensure that they are the "shortest reasonable time periods" within which senders can comply with the rules and that they are not overly burdensome to small businesses.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule

65. The Commission's proposal in this NPRM to expressly recognize an EBR exemption to the prohibition on sending unsolicited facsimile advertisements appears to conflict with Section 64.1200(a)(3)(i) of the Commission's existing rules. Therefore, this NPRM proposes revising or removing section 64.1200(a)(3)(i), which provides that a facsimile advertisement is unsolicited unless "the recipient has granted the sender prior express invitation or permission to deliver the advertisement, as evidenced by a signed, written statement that . . . clearly indicates the recipient's consent to receive such facsimile advertisements from the sender."[112]

[110] *See supra*, para. 27.

[111] *See supra*, para. 20.

[112] 47 C.F.R. § 64.1200(a)(3)(i).