Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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

COMMENTS OF AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES

I. Introduction

On December 9, 2005, the Federal Communications Commission ("Commission" or "FCC") released its Notice of Proposed Rulemaking and Order ("NPRM") regarding the incorporation of the Junk Fax Prevention Act of 2005 into the Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991. The American Society of Association Executives ("ASAE") respectfully submits the following comments in response to this NPRM.

The American Society of Association Executives represents over 25,000 professionals who manage tax exempt nonprofit organizations and, as the largest organization of association executives and industry suppliers in the world, is considered the "association of associations." Tax exempt nonprofit organizations, of which there are nearly 100,000, exist to serve and provide value to their members and constituencies.

ASAE's interests are vested in the outcome of this proceeding because a primary function – perhaps the most important function – of all associations is the dissemination of information to members, donors, and other constituencies. This dissemination of information utilizes various means of communication, and the sending of facsimile messages is an important and often preferred means of communication. ASAE is concerned that the FCC may inappropriately apply

the provisions of the Junk Fax Prevention Act to facsimile communications between nonprofit associations and their members. As discussed below, ASAE urges the FCC to recognize that an individual's or organization's decision to join a nonprofit association constitutes "prior express invitation or permission," making inapplicable the do-not-fax provisions of the Junk Fax Prevention Act. Moreover, ASAE and countless other associations have been operating on the basis of the current definition of "established business relationship" ("EBR"); changes to this definition have the potential to be insurmountably burdensome to ASAE and other tax exempt nonprofit associations.

While ASAE will address several FCC requests for comment in the order presented by the FCC, we would like to highlight the crucial importance to nonprofit associations of adopting the proposed nonprofit exemption. In addition, the FCC should define "cost-free" opt out mechanism to include Internet or email notification.

The critical importance of the proposed nonprofit exemption is derived from the discrete and unique position occupied by such associations in the United States. Nonprofit corporation status is granted by states under their nonprofit corporation laws to organizations that generally do not issue equity stock and do not seek commercial profit on behalf of shareholders. Federal income tax exempt status is granted by the Internal Revenue Service to organizations that are organized on a nonprofit basis, do not share revenues with individuals, and meet extensive IRS requirements in numerous categories. These features necessitate an exemption for tax exempt nonprofit associations, and make such associations particularly vulnerable to increases in costs of compliance with government regulations, all of which will be discussed in greater detail below.

II. Comments

A. Recognition of an Established Business Relationship Exemption

The FCC has asked under what circumstances it should recognize that a person has voluntarily provided a facsimile number within the context of an EBR.

As an initial matter, the TCPA's do-not-fax provisions as modified by the Junk Fax Prevention Act, apply only to "unsolicited advertisements," which explicitly exclude advertisements for which the recipient has provided "prior express invitation or permission."[1] Individuals and entities join nonprofit associations with the understanding and expectation that they will periodically receive, via fax and otherwise, information about goods and services related to the association's ongoing activities. These communications provide a value-added service to members and it is the duty of associations to send them. Accordingly, ASAE urges the FCC to recognize that an individual or organization's election to join a nonprofit association constitutes "prior express invitation or permission" to receive facsimiles such that the do-not-fax provisions of the Junk Fax Prevention Act are inapplicable to facsimile communications sent to members by or on behalf of nonprofit associations.

In addition, ASAE believes that, if an EBR exists between a sender and receiving individual or entity, then there needs to be a "safe harbor" provision whereby the receiver would be deemed to have voluntarily provided a facsimile number if that number is made available by the receiver in a public manner, such as through publication on a website, brochure, business card, advertisement, public directory, letterhead, etc.

Without a safe harbor provision, nonprofit organizations will be forced to keep large files on each individual and entity with whom they have an EBR. Not only would this result be the

[1] 47 U.S.C. §227(a)(5).

exact opposite from what Congress intended when it enacted legislation such as the Paperwork Reduction Act of 1995[2] and the Small Business Paperwork Relief Act of 2002,[3] it would be extremely burdensome on nonprofit associations, especially small associations with limited staff and resources.

B. Definition of Established Business Relationship

ASAE strongly believes that it is inappropriate to limit the definition of EBR in duration or scope, especially in the context of this NPRM. First, placing new limits on the definition of EBR would create an immense paperwork burden on facsimile senders by forcing them to create unnecessarily voluminous recipient files, a situation which, as noted above, Congress has specifically enacted legislation to avoid.[4] It is also contrary to one of the primary reasons that Congress enacted the Junk Fax Prevention Act, which was to reduce the unnecessary paperwork that the would have resulted from the Commission's new regulations. Establishing a limit on the definition of EBR without overwhelming justification could result in Congress revisiting an issue that it believes it has settled.

Second, the topic of limiting EBRs is very complicated, and it is premature to adopt limitations on EBRs without further study to determine whether such limits would have any efficacy. Indeed many – if not most – junk faxes sent today are illegal under current laws. ASAE is greatly concerned that the FCC may limit EBRs, without adequately studying and receiving comments on the consequences of such restrictions, in an attempt to "do something" to combat junk faxes that are already illegal under existing law. The difficulty in curbing faxes sent by senders willing to violate current laws should not result in restrictions that create unnecessary

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[2] Public Law 104-13.

[3] Public Law 107-198.

[4] See, e.g., the Paperwork Reduction Act of 1995, Public Law 104-13.

burdens for law-abiding entities. ASAE believes that the prevention of junk faxes requires a more holistic approach, including public education, greater enforcement of existing laws, etc.

Third, if the FCC is intent on limiting EBRs, then it should hold a separate rulemaking procedure to deal with this highly complex issue. This would give all parties concerned a better opportunity to arrive at a well-informed, effective solution, whereas addressing EBR limitation in this NPRM is likely to lead to confusion and a hasty decision with potentially disastrous consequences.

Finally, ASAE stresses that because tax exempt nonprofit organizations are unique among entities in the United States, they should be exempt from new limits on EBRs if any new limits are adopted.[5]

C. Notice of Opt-Out Opportunity

1. 30 Days is the Shortest Reasonable Period for Name Removal

ASAE believes that 30 days is the shortest reasonable time within which a sender of unsolicited facsimiles can comply with a request from a recipient not to receive future facsimile advertisements. Many associations are lightly-staffed and depend upon the generosity of volunteers to conduct their operations. Indeed, more than 173 million volunteer hours in community service are documented annually by associations.[6] Mandating a shorter time period for compliance would be unrealistic and overly burdensome on nonprofit associations.

2. Any Small Business Exemption Should Include Small Associations

If the FCC exercises its authority to create a small business exemption from the requirement to provide a cost-free "opt out" mechanism, small nonprofit associations should be included in the exemption.

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[5] *See infra*, Section D.

[6] *See* ASAE's website, *at* http://www.asaenet.org/GeneralDetail.cfm?ItemNumber=8247.

Authority for exempting small nonprofit associations is found in the Regulatory Flexibility Act, which requires federal agencies to consider the effects of their regulatory actions on small businesses and other small entities, including small nonprofit trade associations, and to minimize any undue disproportionate burden upon them.[7] The primary reason for exempting small businesses from the cost-free "opt out" requirement is the significant financial limitations of small businesses and the disproportionate burden placed on them when they are required to comply with costly government regulations. As small nonprofit associations face many of the same cost constraints as small businesses – often to a greater degree than small businesses – it is appropriate that small nonprofit associations receive exemption from the cost-free "opt out" requirement under the provision for small businesses.

3. Internet and Email Must Satisfy the "Cost-Free" Opt Out Requirement

The Junk Fax Protection Act requires "a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement." This cost-free mechanism is in addition to the requirement that facsimile senders provide "a domestic contact telephone and facsimile machine number" for purposes of transmitting an opt out request.

It is clear from the statute that Congress envisioned cost-free mechanisms in addition to toll-free phone numbers, since a requirement for a toll-free number is not specified. The general reference to "a cost-free mechanism" is in sharp contrast to related statutory language specifying the availability of certain telephone options. The fact that a toll-free telephone number is not specifically mentioned in the provision mandating a cost-free mechanism for opting out makes it clear that other options, such as email or Internet-based mechanisms, can satisfy this requirement.

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[7] See 5 U.S.C. 601-12.

Congress does not limit the cost-free mechanism to a toll free telephone number, and neither should the Commission. ASAE believes that Internet or email communications must qualify as a sufficient "cost-free" mechanism to transmit a do-not-fax request. First, the costs associated with providing a toll-free number would be prohibitively high for many small associations and could jeopardize their very ability to perform their nonprofit functions. Many nonprofit organizations have very small operating funds and depend almost exclusively on membership dues to meet their expenses.

Second, email and the Internet have become nearly as ubiquitous as telephones and fax machines. Thus, if an individual or entity has a fax machine, they almost certainly have access to email or the Internet. Moreover, since 2001, the number of wireless phone subscribers has exceeded the number of wireline subscribers.[8] These wireless customers often have email and essentially cost-free long distance calling capabilities included in their price plans; they can "opt out" at no additional cost to themselves using their phone's email or calling capabilities – without access to a computer. In the rare instance where this is not the case, free Internet access is usually as close as the nearest public library, and such a minor inconvenience is outweighed by the potentially crippling costs to nonprofit associations of forcing them all to maintain toll-free phone numbers.

D. Authority to Establish Nonprofit Exceptions

1. The FCC Should Create a Nonprofit Organization Exemption

ASAE strongly encourages the FCC to exempt nonprofit organizations from the "opt-out" notice requirements for faxes sent in furtherance of the association's tax exempt purposes in

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[8] Richard O. Levine, Joseph S. Kraemer, and Randolph J. May, *Special Report: Trends in the Competitiveness of Telecommunications Markets: Implications for Deregulation of Retail Local Services*, The Progress & Freedom Foundation, December 2003, *at* http://www.pff.org/issues-pubs/books/031211specialreportcontestability.pdf.

the same manner as tax exempt nonprofit organizations are exempt from telephone solicitation requirements under the Telephone Consumer Protection Act.[9]

The Telephone Consumer Protection Act ("TCPA") restricts the ability of telemarketers to make unsolicited telephone advertisements by placing numerous constraints on such telemarketers. Congress recognized the unique status and purposes of tax exempt nonprofit organizations when it exempted telephone calls made by or on behalf of such nonprofit organizations from the definition and attendant requirements of "telephone solicitations" in the TCPA.

First, as in the TCPA, exemption for tax exempt nonprofit organizations is appropriate here because of their fundamental difference in character from for-profit businesses. The primary purpose of tax exempt nonprofit facsimile communications is to provide information and resources that are consistent with their tax exempt nonprofit purposes to their members, donors, and other constituencies, rather than to carry on a trade or business which is the chief objective of for-profit taxable entities. Indeed, unlike for-profit businesses, most associations have an obligation – essentially a contractual obligation under their Bylaws and membership requirements – to send information to their members and constituencies in order to notify them of meetings, conventions, industry alerts, etc. Requiring "opt-out" notices in all nonprofit organizations' facsimile messages has the potential to cause great confusion among their memberships and prevent the associations from fulfilling their obligations to members. For example, a member could unknowingly "opt out" of receiving all facsimile communications, creating a serious problem that may prevent a nonprofit association from faxing notices of annual meetings, etc., in violation of the association's membership duties and obligations.

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[9] See 47 U.S.C. 227.

Second, tax exempt nonprofit organizations should be exempt from the "opt-out" notice requirement because such a measure is not necessary to protect the ability of members of such associations to stop the associations from sending future unsolicited advertisements. Nonprofit organizations have established, legitimate constituencies with whom they routinely communicate through facsimile messages. Such constituencies include dues-paying members, present or former donors, or others who have voluntarily associated themselves with the special tax exempt nonprofit missions of these organizations and desire to receive communications from them. This creates a strong incentive in the associations to be responsive to the wishes of those to whom they send facsimile messages. Thus, if a member wishes to receive only certain types of communications from the nonprofit association, it is highly likely that the association will comply. If the nonprofit organization ignores these needs, the member can terminate membership in, and financial support of, the organization. This, in effect, is the ultimate "opt-out" mechanism.

Accordingly, not only is the opt-out notice requirement unnecessary to protect members in the case of nonprofit organizations, but Congress already exempts nonprofit organizations from the telephone solicitation requirements of the TCPA and it would be arbitrary and inequitable for such nonprofit organizations to be exempt from TCPA phone provisions and not from FCC regulations regarding facsimile transmissions.

2. A Framework Already Exists to Determine if a Fax is "In Furtherance" of an Organization's Tax Exempt Purposes

The FCC can determine whether a facsimile sent by or on behalf of a tax exempt nonprofit organization is "in furtherance of the association's tax exempt purpose" by looking to the framework used by the Internal Revenue Service in assessing the unrelated business income tax ("UBIT") for guidance.

The Internal Revenue Code and corresponding regulations provide that when a tax exempt organization conducts business activities on a regular basis and those activities are not "substantially related" to the organization's exempt purposes, the organization must pay taxes on the net return as unrelated business income.[10] Application of the UBIT rules turn on whether the tax exempt nonprofit organization's activity is consistent with, or substantially related to, its tax exempt nonprofit purposes.[11] The FCC could use a similar formulation to ensure a facsimile message is "in furtherance of the association's tax exempt purposes."

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[10] *See* I.R.C. § 511-513; Treas. Reg. 1.513-1(b)-(d).

[11] *See, e.g., United States v. American College of Physicians*, 475 U.S. 834 (1986).

For the foregoing reasons, ASAE urges the Commission to use its authority under the Junk Fax Prevention Act to exempt nonprofit associations from the Act's "opt-out" notice requirement, to include small nonprofit associations in any small businesses exemption from – and include Internet and email communications in defining – the "cost-free" opt out mechanism requirement, and to not limit the definition of EBR in this proceeding.

Respectfully submitted,

AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES

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