

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

In the Matter of	)	
	)	
Rules and Regulations Implementing	)	Docket Nos. 02-278 &
The Telephone Consumer Protection	)	05-338; FCC 05-206
Act of 1991	)	
	)	

**TO: The Commission**

**COMMENTS OF THE AMERICAN SOCIETY OF TRAVEL  
AGENTS, INC.**

**Paul M. Ruden  
Senior Vice President  
Legal & Industry Affairs  
American Society of Travel Agents, Inc.  
1101 King Street  
Alexandria, Virginia 22015  
(703) 739-6854  
pruden@astahq.com**

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**COMMENTS OF THE AMERICAN SOCIETY OF TRAVEL AGENTS, INC.**

The American Society of Travel Agents, Inc. (“ASTA”) submits these Comments pursuant to the Commission’s Notice of Proposed Rulemaking set forth in 70 Fed. Reg. 75102, December 19, 2005.

ASTA was established in 1931 and is today the leading professional travel trade organization in the world. Its current membership consists of approximately 5,800 travel agents across the Nation, with a total membership of 13,700 members in some 138 countries. ASTA's corporate purposes specifically include promoting and representing the views and interests of travel agents to all levels of government and industry, promoting professional and ethical conduct in the travel agency industry worldwide, and promoting consumer protection for the traveling public.

ASTA has provided testimony to numerous legislative committees and fact finding bodies and has appeared in various legal and administrative agency proceedings; it is widely recognized as responsibly representing the interests of its members and the travel agency industry.<sup>1</sup>

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<sup>1</sup> See e.g. Investigation into the Competitive Marketing of Air Transportation, C.A.B. Docket 36595, *aff'd*; *Republic Airlines, Inc. v. C.A.B.*, 756 F.2d 1304 (8th Cir. 1985); *In re Domestic Air*

The National Tour Association (“NTA”), an association for travel professionals who have an interest in the packaged travel sector of the industry, concurs in these comments. With nearly 4,000 members who bring together those who package travel (group as well as individual trips) with suppliers and destinations that represent the various components of a trip, NTA and its members face the same types of issues described by ASTA in these comments.

### SUMMARY OF COMMENTS

The Commission’s document does not contain any actual proposed rules, and largely seeks comments on concepts or ideas for possible regulations. To comply with governing principles of notice and comment in agency rulemaking, ASTA believes the Commission must republish specific proposed rules for evaluation and public input following receipt of comments in this round of the proceeding. This is particularly important in cases where the intention is not merely to mimic the statute in the rules, but

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*Transportation Antitrust Litigation*, 148 F.R.D. 297, 61 USLW 2610, 1993-1 Trade Cas.(CCH) ¶70,165 (N.D.Ga., 1993); *U.S. v. Airline Tariff Publishing Co.*, 1993-1 Trade Cas. (CCH) ¶70,191 (D.D.C., 1993); Testimony of The American Society of Travel Agents, Inc. Before The United States House of Representatives Committee on Transportation And Infrastructure, Subcommittee on Aviation, September 10, 1998; Perspective Of The American Society of Travel Agents On The Nature and Extent Of Competition In The Airline Industry As It Relates To The Distribution System, before the Transportation Research Board’s Committee for a Study of Competition in the U.S. Airline Industry, January 15, 1999; Statement of the American Society of Travel Agents, Inc. before the United States International Trade Commission Re: The Economic Impact of U.S. Sanctions with Respect to Cuba (Inv. No. 332-413), October 2, 2000; Comments of the American Society of Travel Agents, Inc. before the Federal Trade Commission, In the Matter of: Gramm-Leach-Bliley Act Privacy Rule, 16 CFR Part 313, March 31, 2000; *In re Airline Ticket Commission Antitrust Litigation*, 268 F. 3d 619, 2001-2 Trade Cas. (CCH) ¶73,446 (8th Cir. 2001); Upheaval In Travel Distribution: Impact on Consumers and Travel Agents, Report to the Congress and the President by the National Commission to Ensure Consumer Information and Choice in the Airline Industry, November 13, 2002; *In re Airline Ticket Commission Antitrust Litigation*, 307 F.3d 679, 2002-2 Trade Cas. (CCH) ¶73,824 (8th Cir. 2002) rehearing and rehearing en banc denied (Nov 18, 2002); Comments of the American Society of Travel Agents, Inc. before the U.S. Department of Transportation In the Matter of: Computer Reservation Systems (CRS) Regulations, Docket OST-97-2881, 3014, OST-98-4775, and OST 99-5888, March 17, 2003; and Comments of the American Society of Travel Agents, Inc. before the Department Of The Treasury, Financial Crimes Enforcement Network, In the Matter of Anti-Money Laundering Programs for Travel Agencies, RIN 1506-AA28 and RIN 1506-AA38, April 8, 2003.

rather to interpret the terms used in the statute or to limit its provisions by, for example, specifying a duration for the established business relationship (“EBR”).

The Commission should not impose a limit on the duration of the EBR in this proceeding because the mandatory statutory steps of complaint evaluation and causation analysis have not been completed and published for public input.

#### **I. THIS PROCEEDING IS AN INSUFFICIENT BASIS FROM WHICH TO ADOPT FINAL RULES.**

ASTA notes at the outset that while this proceeding is presented as a “Proposed Rule,” there are no actual rules proposed except for a few cases where the rules are to be essentially copies of the statutory provisions. The questions presented are usually open-ended requests for comments on aspects of implementation of the Junk Fax Prevention Act (“JFPA”). There may be considerable variation in the comments proposed as to the details of such implementation, ranging from those who want every detail of compliance prescribed in advance to those who prefer the flexibility of their own analysis of the statute and the resultant risk-taking of a “no guidance” approach. To simply adopt final rules in the wake of such diversity of input would effectively deprive many parties of a meaningful opportunity to comment on proposed regulations that is assured by the Administrative Procedure Act. There is no basis for concluding that Congress, in mandating implementing rules by April 5, 2006, intended to supersede the notice and comment opportunity provided for non-emergency federal regulations.

ASTA will therefore treat this as what it really is – an Advance Notice of Proposed Rulemaking – with the expectation that, to the extent the Commission desires to adopt actual rules, it will present those rules, and their specific rationale, for public comment prior to adoption.

## **II. THE COMMISSION’S REGULATIONS SHOULD CONFORM TO THE JUNK FAX PROTECTION ACT REGARDING “ESTABLISHED BUSINESS RELATIONSHIPS.”**

The Commission’s first proposal is to remove sec. 64.1200(a) (3) of its rules to conform the rules to the Junk Fax Prevention Act regarding the means by which consent may be given to the receipt of commercial faxes. It is now clear that federal law does not require a signed written consent to receive fax advertisements. The proposed rule change is therefore not only wise but essential.

The real question is whether the Commission should go further and “establish parameters defining what it means for a person to provide a facsimile number “within the context of a [an] established business relationship.””<sup>2</sup> ASTA’s answer to this question is twofold: (1) while advance Commission guidance on such matters could be helpful, the specifics of such ideas should be presented for comment before they are incorporated into the rules, and (2) it would be a mistake to presume that every business situation could be anticipated in advance; the possibility should therefore be left open to identify in, for example, an enforcement action, additional circumstances wherein the context disclosure was appropriate or a voluntary undertaking to make a fax number available for public distribution could be found to exist.

Our response is the same with respect to the question of requiring efforts to confirm the practices used to compile a list of fax numbers. The Commission should avoid the temptation to prejudge commercial practices until those have been fully illuminated on the record of this or some other proceeding. If, for example, a sender wants to use a fax list obtained from a directory, there are no apparent practical steps that can be expected beyond a simple inquiry of the directory vendor. The imposition of

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<sup>2</sup> Hereafter an “established business relationship” will be referred to as an “EBR.”

onerous and costly investigation requirements would effectively nullify the commercial opportunity to use third-party compiled lists and would therefore be contrary to the express statutory language. Any such requirements that are to be considered should, therefore, be presented with specificity for comment before adoption.

**III. VERIFICATION BY THE COMMISSION OF THE EXISTENCE OF AN EBR AND THE POSSESSION OF FAX NUMBERS PRIOR TO JULY 9, 2005 IS UNNECESSARY.**

The Commission proposes to amend its rules to permit fax advertisement senders to transmit to persons within an EBR prior to July 9, 2005, when the fax number was also in the sender's possession prior to that date. If it is helpful for the rules to emulate the statutory language, there seems no basis to object to this.

But the Commission goes on to ask how it should verify that sender had an EBR and the recipient's fax number before July 9. This posing of the question is ambiguous. It could refer to the possibility of creating a rule that prescribes the steps, including record generation and retention, that a sender must undertake before sending a fax in reliance on the "prior EBR-/prior possession" concept. Or it could refer to the question of how the factual determination of "prior EBR-/prior possession" will be resolved in an enforcement proceeding when a challenge is made to specific faxes.

ASTA believes that in either case it is unnecessary and not constructive to attempt to resolve these types of issues now. This is an area where experience will be invaluable and there is insufficient experience under the statute to address the questions effectively at this time. There are likely to be very substantial and numerous variations in the factual circumstances that firms of all kinds face in determining whether they meet the "prior

EBR-/prior possession” standard. Efforts to encapsulate them into a rule in the time available under the JFPA are likely to do more harm than good.

#### **IV. IT IS PREMATURE TO CONSIDER LIMITING THE DURATION OF THE EBR.**

The Commission asks “whether it is appropriate to limit the EBR duration for unsolicited facsimile advertisements in the same manner as telephone solicitations. 70 Fed. Reg. 75106. The clear answer is ‘no,’ it is not appropriate to consider such limits. There are two reasons: (1) the statutory process, which prescribes the required steps for such evaluation, has not been undertaken, and (2) the opt-out notice requirements of the statute provide a simple means by which any question of EBR duration can be summarily resolved by a fax recipient at any time.

Looking first at the process mandated by the JFPA, section 2(f) of the law sets out four steps that must be followed in exercising the Commission’s power under Paragraph 2(G) of the JFPA to limit the EBR duration. These steps are not discretionary. They are the necessary preconditions for the Commission’s exercise of authority to limit the EBR duration.

The very first step – determining whether the EBR exception “has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines” – has not been completed, as far as we know, even if it has begun. Moreover, ASTA believes that the determinations prescribed by section 2(f) were not intended to be made by the Commission in isolation from public input by all affected parties. We believe that the necessary implication of the statute is that if any limitation of the EBR duration is considered, the data claimed to support that limitation should be set out for public examination and comment.

Similarly, under paragraph 2(G)(i)(II), the Commission has not stated and explained what it believes to be a duration of EBR that is “consistent with the reasonable expectations of consumers.” If neither paragraph 2(G) (i) (I) or (II) have been established, it is premature and wasteful to try to address the issues raised in the remainder of the section regarding compliance with a time-limited EBR. The most that can be said at this point is that any time limitation will increase the cost of reacquiring permission to fax from, among others, regular customers and association members in order to recreate what the statute was designed to provide in the first place – a haven from the unnecessary costs of acquiring consents from persons who have already effectively given it.

In any case, since there are no complaint analyses in the record and no evidence governing the Commission’s view of the reasonable expectations of consumers with respect to faxes specifically, it is premature and inconsistent with the statutory mandate to entertain, at this time, any limitation on the duration of the EBR.

On the second point, the opt-out notice requirement provides a simple non-regulatory method by which any fax recipient can put an end to faxed advertisements. This method has the great advantage that it is not arbitrary as to everyone, in contrast to an agency-imposed limitation which, unavoidably, impacts all senders the same way even though the circumstances attending most of their faxing may be quite varied. Congress inserted the opt-out to enable fax consumer self-help and avoid the necessity for the FCC to engage in a complex and controversial analysis.

**V. CRITERIA FOR “CLEAR AND CONSPICUOUS” SHOULD BE PUBLISHED FOR COMMENT.**

The Commission asks whether its rules should define the specific circumstances under which an opt-out notice will be considered “clear and conspicuous” as required by the JFPA. ASTA welcomes helpful guidance in this area but again we believe that having parties submit their ideas here, with the Commission then adopting some of them in a final rule, is not an appropriate procedure. There are a variety of acceptable possibilities for a “clear and conspicuous” notice in the context of a fax, but the fax sending community should have a fair opportunity to comment on the choices that the Commission is considering, before those choices are enshrined in a final rule.

**VI. A MINIMUM 30-DAY PERIOD TO HONOR AN OPT-OUT REQUEST IS REASONABLE.**

The Commission asks for comment on the “shortest reasonable period” in which to expect fax senders to honor an opt-out request, noting that the telemarketing rules use a 30-day period. ASTA believes that is a reasonable compromise and that consistency in the rules, by itself, justifies retention of the 30-day period in the fax regulations.

**VII. E-MAIL SHOULD BE CONFIRMED AS AN ACCEPTABLE “COST-FREE” MECHANISM FOR OPT-OUTS.**

The Commission asks whether it needs to enumerate specific “cost-free” mechanisms for a fax recipient to use in opting-out. As long as “enumerate” does not mean “prescribe,” ASTA supports this proposal. Because of its near-universal adoption in commerce, even among small businesses, ASTA believes that the enumeration should make clear that an e-mail address is, by itself, as sufficient “cost-free” mechanism to offer. Other mechanisms should also be acceptable if voluntarily employed by the sender, including websites, toll-free numbers and, in appropriate cases, local telephone

numbers. It would, however, be unreasonable for the Commission to require that any one of these mechanisms be included. The cost of adding a toll-free number in a small business, for example, would be out-of-proportion to any gain, especially if e-mail is an alternative.

#### **VIII. NOTICE TO A BROADCASTER IS NOT NOTICE TO THE UNDERLYING SENDER.**

The Commission seeks 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. ASTA is strongly opposed to such a rule. We do not believe such a rule is authorized by the JFPA.

This idea raises the specter that every sender who relies upon a third party to actually send fax messages, a very common practice in the current marketplace, will have to enter complex agreements specifying that opt-out notices must be forwarded and essentially requiring every broadcaster to indemnify the sender against the consequences of a failure to pass through an opt-out. This will drive up the cost of faxing through third parties, an avoidable result given that the opt-out can simply provide the underlying sender’s contact information so that the opt-out notices go directly to that party.

For the same reasons, it is not reasonable to require senders to honor opt-outs sent to addresses not provided by the sender in its out-going faxes. Such a regime would task each sender with the obligation to manage opt-out messages coming in from, potentially, dozens of sources, including multiple phones in departments that have nothing to do with, and are not even aware of, the faxes being sent. The costs of doing this in a company of any size would be huge and the number of errors large, exposing the company to lawsuits

alleging non-compliance with the opt-out messages. A well-balanced and fair regime both requires the inclusion of opt-out notice in the outbound fax and the use of the opt-out notice contact information to act on the notice.

**IX. THE COMMISSION SHOULD CLARIFY THAT E-MAIL IS AN ACCEPTABLE METHOD OF GIVING PERMISSION TO FAX.**

The proposal asks what forms, other than “written,” should be allowed to overcome the “unsolicited” rubric. While ASTA does not object to oral notice being permitted, our major concern is that the Commission make absolutely clear that an e-mail is a “written” permission, or, alternatively, if e-mail is deemed not to be “written,” then it should clarify that e-mail is an acceptable “other” form of permission that will overcome a claim that a fax was unsolicited.

The superior economics of e-mail over other forms of communication, including the fact that it, in effect, creates the record of its existence at no additional cost, is so overwhelming that it will be the vehicle of choice for receiving opt-outs by many fax senders. The Commission’s rules should recognize those economics by specifying that possession of an e-mail granting permission to fax is sufficient, without more, to authorize subsequent faxes.

## CONCLUSION

Except for those limited issues where an immediate and final decision can be made at this stage of the rulemaking, all of the specific Commission regulatory proposals to implement JFPA should be submitted to the public for comment in a subsequent rulemaking proposal in sufficient time to permit comment and decision prior to April 5, 2006.

Respectfully submitted

American Society of Travel Agents, Inc.

By: \_\_\_\_\_

Paul M. Ruden  
Senior Vice President  
Legal & Industry Affairs  
American Society of Travel Agents, Inc.  
1101 King Street  
Alexandria, Virginia 22015  
(703) 739-6854  
pruden@astahq.com

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