



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

**In the Matter of** ) **CG Docket No. 05-338**  
**Rules and Regulations Implementing** ) **(CG Docket No. 02-278)**  
 )  
**The Telephone Consumer Protection Act of 1991)**

**Comments of the National Association of Wholesaler-Distributors**

The following comments are submitted in response to the Notice of Proposed Rulemaking on the Junk Fax Prevention Act of 2005 published in the Federal Register on December 19, 2005.

The National Association of Wholesaler-Distributors (NAW) is a national trade association with membership that includes Direct Member companies, over 100 national line-of-trade associations representing virtually all products that move to market via wholesale-distribution, and approximately 50 regional, state and local wholesale distribution associations; collectively totaling more than 40,000 wholesale distribution companies.

According to recent data provided by Dr. Adam Fein, President of Pembroke Consulting, revenues in the wholesale distribution industry in 2005 were \$3.6 trillion, and wholesale trade was 6.7% of private (non-government) U.S. Gross Domestic Product. The wholesale distribution industry has contributed 25 percent of the total productivity gains in the U.S. economy during the past 15 years, making a disproportionately large contribution to the nation's productivity. With total employment of 5 million, wholesale distribution accounts for one out of every 22 U.S. workers.

NAW's member associations and companies have been involved individually, through NAW, and through the Fax Ban Coalition, in the effort leading to enactment of the Junk Fax Prevention Act of 2005, Public Law No. 109-21. We believe that law represents a common-sense approach that will facilitate the reasonable use of facsimile communication among and between legitimate businesses, customers and vendors without legitimizing the "junk" and "blast" faxing which was and remains illegal.

After the Commission's regulations were released in 2003, we surveyed NAW members to determine how the companies use commercial faxes to communicate with their customers and vendors. The respondents provided a surprisingly long list of the type of material they still send by fax. Specifically, they fax:

Purchase orders, copies of orders, order acknowledgements and confirmations  
Price quotations, pricing changes, special offers, confirmation of verbal quote  
Invoices and copies of invoices  
Product information and specifications (esp. to buyers without internet access)  
Drawings and artwork proofs  
Sales tax exemptions  
Credit applications and inquiries  
Terms of sale changes  
Notification of upcoming classes, seminars, open houses, training programs  
Material Safety Data Sheets and other safety information  
EPA certifications  
Warranty information and product announcements  
Recall notices and repair bulletins  
Shipping and tracking information

As this list makes clear, our members are not prospecting or sending advertising or promotional material to unwelcoming fax machines; these communications are customer- or vendor-specific, most would clearly be considered commercial in nature, and they demonstrate the need for an established business relationship (“EBR”) exception to the TCPA ban.

**Recognition of an Established Business Relationship Exemption:**

We strongly support the Junk Fax Prevention Act (“JFPA”) granting of a statutory EBR exemption to the ban on unsolicited faxes; in fact this statutory exemption was the primary objective in the legislative effort.

The language in the statute governing the means by which fax numbers must be obtained for use in the context of an EBR was the result of complex negotiations. Senators and their staff raised a concern that, under the original draft of the legislation, a mass retailer would be permitted to purchase a bulk fax list and fax advertisements to every number on it under the EBR exemption because “everyone has purchased something at a Wal-Mart.”

We support the language of the statute clarifying that fax numbers being used under the EBR must be obtained through the described means and in a manner other than through the purchase of bulk fax lists. We do not believe that the Commission should attempt to “establish parameters” or further define that statutory language. For example, if the Commission were to create an inclusive list of the sources from which it would be permissible to obtain a fax number, that list would almost certainly invite confusion and conflict from those who believe it includes inappropriate listings or that there are serious omissions. We believe this is an instance where “do no harm” is the best course and the statutory language should speak for itself.

Should the Commission decide to further regulate on this matter, NAW urges the Commission to refrain from attempting to compile an inclusive list of acceptable sources of fax numbers, but rather itemize sources which are clearly permissible under all

circumstances and allow marketplace flexibility within the intent of the law. The mandatory opt out will be a clear disincentive to the use of fax numbers obtained from an inappropriate source.

Moreover, we would argue against a regulation requiring that a business using fax numbers from a legitimate public source verify how the fax numbers were obtained by that source. If a wholesaler-distributor needs to fax a price change notification to an established customer and obtains that customer's fax number from a public business directory or a website, it is wholly unreasonable to expect or require that seller to identify and locate the publisher of the directory, the individual who collected the data for publication, or the company's webmaster, to determine if the fax number was in fact meant to be used. If the seller/sender can't identify or reach the appropriate "compiler," would sending the fax therefore be illegal? How would the sender know what would constitute a "reasonable effort" to determine how the fax number was obtained, and how would the sender prove that such an effort had been made?

The language of the statute is reasonable on its face and was intended to prevent the purchase and use of bulk or mass-mailing lists by blast faxers. A requirement that the sender of a fax verify how a third party obtained the fax numbers that are published in a directory is unworkable and unfair, and would have legitimate and responsible businesses

running in circles or violating the law while the blast faxers who willfully violated the TCPA's ban prior to enactment of the JFPA would likely be equally unresponsive to this new regulation.

**Definition of Established Business Relationship:**

We are frankly concerned that the Commission is even seeking comment on this matter. The language of the Junk Fax Prevention Act was negotiated over a two-year period of time. It was written and re-written, compromises were agreed to, and the final legislation passed both Houses of Congress without dissenting votes. The statute does not place a time definition on the EBR. That was not accidental, or an oversight; it was the intent of Congress.

We contend, and Congressional negotiators were persuaded, that business transactions that are communicated by fax under the EBR exemption do not fall into time categories that lend themselves to regulation. JFPA therefore did not place time limits on the EBR. However, to ensure that the EBR exemption is not significantly abused, Congress added language to JFPA giving the Commission the authority to revisit the issue. That authority, however, was not to be exercised unless and until a strict four-part

test is met. The Commission's NPRM acknowledges that none of the steps of the test has been met, yet seeks comment as if they were – or in unwarranted anticipation that they will be. NAW believes that the Commission should “determine” that it has received significant complaints about faxes sent under an EBR and meet the other three tests imposed by the statute before seeking comment on regulations that it may well never be authorized to write. The Commission suggests that they MAY at some point be permitted to write these regulations, so NAW must assume that this request for comments is to make that subsequent rulemaking more convenient. With due respect to the Commission, it is not the responsibility, nor in the best interest, of the regulated entity to comment in advance on prospective regulations to convenience the regulatory agency.

Since we believe this part of the rule-making is inappropriate and contrary to the JFPA at this time, we will not engage in a dialogue on what would be an acceptable time limit. We reiterate the discussion we had with Members of Congress and their staffs over many months: business transactions do not fall into uniform or quantifiable time cycles.

In a survey NAW conducted prior to filing these comments, we asked our members to comment on the specific impact of a possible time-limit on the duration of an EBR. A sampling of the verbatim responses from some of our members follows.

- “Imposition of a time limit on EBR would pose an issue for us as some of our products are not purchased every 18 months, especially the larger purchases made by cities and municipalities for major projects. We also have many locations where the transaction amount is small (under \$100) and occurs daily or weekly, often in cash, usually by an employee and not the owner of the company. This makes it difficult to capture the data necessary to track all of the transactions and maintain that data to backup the EBR time frame”
  
- “For equipment that we sell, service needs to be done periodically. A customer may want to defer maintenance past 18 months. . . . [T]he length of time between an inquiry and purchase is often more than 3 months. Not being able to fax updated information would be a disservice to the customer. Some of the product we sell is equipment that lasts longer than 18 months; some is in service for 10 years. Our customers believe that we are obligated to provide support and service on these products as long as they are using them. . . . It is common for one person at a company to have us fax material to someone else in the company; we don't want the recipient to complain because they have no knowledge that we sold the equipment. Justifying whether a fax was solicited or not will require us to keep records that will be very costly. Also,

we can't respond to a customer as quickly as they would want. We have had recalls of some equipment more than 2 years since the equipment was purchased. . . . Where are the abuses that these proposed rules are trying to fix?"

- “This is just another issue to track and maintain yet another data base. Our faxing we do is at the request of the customer, copies of information, invoices, order acknowledgements, maybe some vendor information. How are we to keep a document process in place for 18 months, and I am sure it will change again. Go after the businesses that really do solicit business from a fax machine and leave the businesses that use technology to cut down transaction costs and drive more efficiencies.”
  
- “[I]t is stupid to try and define an established business relationship to 18 months given some of our product cycles. Some customers buy every 5 years. This will just drive people to use email and the web and bury the fax process. This will harm many small customers that need information via fax. It will hurt customers more than suppliers. . . .”

One of our members has a sales force that follows up on phone inquiries, but the individual sales person does not know whether that inquiry was received 3 months earlier, or 6 months. Another said that “given the sales cycle and touch points of our sales representatives with customers and target customers it would be too complex to track an inquiry since the definition of an inquiry is fairly loose.” And another responded: “[L]arge equipment purchases may happen once every few years and normally go into a budget before they are approved. The 3 month limit might not be long enough in this instance.” And one other commented that “This one is tough, it may be 3 to 5 years between transactions. Keeping records is harsh and unproductive. .YES, HAVING TO "RE-CERTIFY" AND KEEP UP WITH THE RECORD-KEEPING WOULD PROVE BURDENSOME. ISN'T THE OPT-OUT SUFFICIENT?”

This random sampling of verbatim responses is from companies both large and small in the wholesale distribution industry. The reaction is certain to be similar in virtually every other industry, as is indicated by the membership of several hundred trade associations in the Fax Ban Coalition. Making it more difficult for responsible businesses like those represented above to function efficiently will impose an unfair burden on those who least warrant it and in all likelihood not deter those determined to violate TCPA. We would welcome an opportunity to work with the Commission in pursuit of a viable means to stop the spam. A time limit on EBR is not that means.

**Notice of Opt-Out Opportunity:**

We support the requirement that an opt-out mechanism be provided to recipients of unsolicited commercial faxes. Having said that, NAW urges the Commission to proceed with these regulations mindful that the mission is to facilitate the cessation of unwelcome faxes, not to facilitate a new rash of nuisance lawsuits. We urge the Commission to promulgate regulations which are clear and uncomplicated and with which our small business members can readily comply.

We are advised that the requirement that there be a cost-free mechanism for opting out may be seriously problematic for small businesses which do not have toll-free phone numbers or use internet email. We urge the Commission to consider the impact of the regulation on the smaller companies which rely most heavily on faxing for their everyday communication with customers and vendors.

**Request to Opt-Out of Future Unsolicited Advertisements:**

We believe that an opt-out request should be honored irrespective of whether or not the recipient continues to do business with the sender. Any other conclusion would

deny a repeat customer who simply wishes not to receive faxes any means to rid him/herself of the unwanted facsimile transmissions. The Commission also seeks comment on whether an opt-out sent in response to a third-party –transmitted fax should apply to the underlying business. With all respect to the Commission, it seems to us that the question is backwards. NAW would argue that the third-party transmitter of that fax has merely provided a service to the actual “sender” and that while the underlying business should absolutely honor the opt-out, the third-party vendor should not be required to do so. The “back end” service providers who send faxes on behalf of clients should not have an opt-out directed at one of their clients deny another of their clients the ability to continue to reach those customers who have not opted out of further receipt of their material. The fax service companies are not the culprits in the fax-spam abuse problem, and putting them out of business by making them responsive to each opt-out their clients receive will not stop the spam.

The Commission asks if opt-out requests which are transmitted by means other than those specified should be honored. The Commission should not regulate on this issue. Were the Commission to issue regulations mandating that any request to opt out, no matter however and to whomever it is delivered, must be honored, you would create a whole new cottage industry among trial lawyers advising their clients to scotch-tape opt-

out requests to the front door of target companies in an inconspicuous place. The methods specified in the JFPA as prescribed by the sender (i.e., a domestic telephone and facsimile number and a cost-free method) are sufficient.

On the question of who has the burden of proof in the case of a fax recipient who once exercised an opt-out but later gave express permission to receive faxes, the question is academic. Given the private right of action of the fax recipient, and the cottage industry of nuisance lawsuits filed by lawyers and enterprises who make a career out of suing legitimate businesses because the junk faxers cannot be found to sue, no businessman or businesswoman in possession of his or her senses would rely on the recipient to prove that his opt-out had been superseded by express permission to fax. Regulations on this point seem unnecessary.

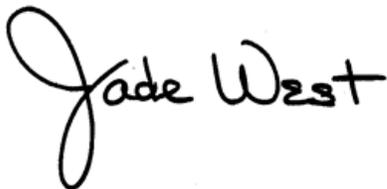
We appreciate the effort of the Commission to promulgate regulations that will bring this 2 ½ year exercise to a close (although we reiterate that seeking comment on time limits on EBR is inappropriate and premature).

In closing, we restate our firm belief that the type of junk faxing that justifiably annoys recipients and clogs fax machines is not sent under a legitimate EBR exemption. That exemption is properly exercised when there is a legitimate two-way relationship

between sender and recipient. Junk and “blast” faxing, prospecting for customers by fax, and random faxing has been and remains illegal; sadly, enforcement action and tougher laws against those who violate the TCPA have done little to stop the abuse and invasion of unwelcoming fax machines.

We hope the Commission will issue regulations which do not impose unnecessary and costly burdens which would make it more difficult for responsible business to comply with the law, and hope that a means can be found to reach those who ignore it.

Respectfully submitted,

A handwritten signature in black ink that reads "Jade West". The signature is written in a cursive, flowing style.

Jade West  
Senior Vice President-Government Relations  
National Association of Wholesaler-Distributors (NAW)  
1725 K Street NW #300  
Washington, DC 20006  
TEL: 202-872-0885  
FAX: 202-296-5940

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