

**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

COMMENTS OF LORMAN EDUCATION SERVICES

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SUMMARY

On July 9, 2005, the Junk Fax Prevention Act of 2005 (“JFPA”) became effective, reversing a 2003 decision of the Commission and creating a statutory “established business relationship” (“EBR”) exception to the general prohibition against sending unsolicited fax advertisements. Congress mandated that the FCC adopt rules implementing the provisions of the JFPA. While the Commission was given limited authority to (i) impose a limit on the duration on EBRs and (ii) allow non-profit trade and professional organizations to omit the opt-out notices required by the JFPA, in both cases Congress required the FCC to make specific threshold findings before it could do so.

Lorman Education Services maintains that in neither case do the facts meet these threshold requirements. Further, taking either such action would be wrong as a matter of policy. Congress carefully weighed the benefits and burdens to senders and recipients, and the JFPA achieves a fair balance and an effectively-working marketplace without amendment. The additional burden to businesses of limiting the duration of EBRs—both the direct loss of revenue due to less repeat business from existing customers and the indirect costs of updating fax “mailing lists” on a daily basis—would be wildly disproportionate to the small benefit that might accrue to some recipients, who already have been given the tools they need to prevent any unwanted future fax advertisements.

In order to empower recipients as envisioned by Congress while maintaining a level playing field among competing providers of products and services, the Commission should refrain from exempting non-profit trade and professional organizations from the opt-out notices required by the JFPA. Such an exemption would, at best, cause members of those groups to waste time and money trying to exercise their right to opt out, and might well confuse them into

thinking that they did not have that right. Additionally, it would mire the FCC in determinations of the “tax exempt purpose” of every organization that faxed its members, and even of each fax sent.

The Commission should adopt definitions taken directly from the statute, to ensure that Congress’s intentions are fulfilled. The FCC should also adopt rules that give businesses and their customers flexibility in the way that they form business relationships—by phone, by mail, by e-mail, by fax, and in person—in recognition of the many and varied ways business is conducted in the information age.

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Lorman Education Services (“Lorman”), a division of Lorman Business Centers, Inc., hereby respectfully submits its comments in response to the Notice of Proposed Rule Making (“NPRM”) in Docket No. 05-338, released on December 9, 2005.¹ Pursuant to the Junk Fax Prevention Act of 2005 (“JFPA”),² which amends the Telephone Consumer Protection Act of 1991 (“TCPA”),³ the NPRM seeks comment on a number of issues related to the forthcoming, statutorily-directed implementation by the Federal Communications Commission (“FCC”) of regulations implementing the JFPA.⁴

The TCPA required that senders of facsimile advertisements obtain the “express invitation or permission” of recipients. According to the FCC’s 1992 interpretation, when an

¹ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 [and] Junk Fax Prevention Act of 2005*, Notice of Proposed Rulemaking and Order, CG Dkt. 02-278, 05-338, FCC 05-206 (rel. Dec. 9, 2005) (“NPRM”); 70 Fed. Reg. 242 (Dec. 19, 2005).

² Pub. L. No. 109-21, 119 Stat. 359 (2005).

³ Pub. L. No. 108-10, 117 Stat. 557 (2003), codified at 47 U.S.C. § 227.

⁴ Pursuant to Section 2(h) of the JFPA, the Commission must issue implementing regulations no later than April 5, 2006.

“established business relationship” (“EBR”) exists between the sender and the recipient, a fax “can be deemed to be invited or permitted by the recipient.”⁵ In 2003, the FCC revisited this interpretation and reversed itself, determining that, prospectively, an EBR would not constitute “express invitation or permission” to send unsolicited advertisements.⁶

This reversal of position by the FCC raised significant concerns in the business community and elsewhere. Because of the enforcement and penalty structure of the TCPA, senders of unsolicited advertisements were at substantial risk of having to defend against costly nuisance suits.

In response to the 2003 TCPA Order, business interests deluged the FCC with comments and petitions seeking to reverse the Commission’s action. Protests were also registered in Congress, where businesses lobbied for relief. The Commission four times stayed enforcement of the controversial fax provisions of the 2003 TCPA Order,⁷ originally to give fax senders time to obtain written consent from customers and later in apparent contemplation of legislation abrogating the FCC’s prospective denial of the ability to rely on an EBR.⁸

Congress drafted the JFPA as a direct response to the FCC’s 2003 TCPA Order, specifically to reverse the FCC’s position and to mandate creation of a clear EBR exception to the TCPA’s general prohibition against sending facsimile advertisements without the express

⁵ 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, ¶ 54, n. 87 (1992) (“1992 TCPA Order”).

⁶ *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”). The fax provisions were largely lost in the bulk of that proceeding, which mainly dealt with rules adopted at the direction of Congress to implement the National Do-Not-Call Registry and to amend the FCC’s rules regarding telephone solicitation to make them consistent with the Federal Trade Commission’s Telemarketing Sales Rule. Lorman was one of the few commenters to address the fax provisions during the comment and reply period.

⁷ The most recent stay remains in effect through the conclusion of the present rulemaking proceeding. NPRM at ¶ 32.

⁸ See 150 Cong. Rec. H6089-02, speech of Congressman Upton.

invitation or permission of the recipient.⁹ Congress directed the FCC to adopt regulations implementing its mandate to create an EBR exception. While the FCC was given some flexibility to review any record of complaints and, if certain specific thresholds are met, to amend the mandates within parameters also specified by Congress, the Commission was not given the flexibility to ignore, reverse, or impede what Congress decided.

Furthermore, any weakening of the EBR envisioned by Congress and articulated in the JFPA would be bad policy. Congress carefully balanced the burdens and benefits to senders and recipients of unsolicited fax advertisements under the JFPA, and has produced a rule that is fair to all interests. Placing greater burdens on business interests would upset this balance of burdens without proportional benefits for consumer interests.

Lorman urges the Commission to adopt rules in keeping with the pronouncement and intent of Congress in enacting the JFPA. In particular, Lorman advocates that the FCC adopt definitions and substantive rules closely based on the statute. Congress provided very detailed prohibitions and allowances in the JFPA, and the rules adopted by the Commission should reflect this detail.

For several compelling reasons, Lorman urges the Commission to refrain from imposing a time limit on EBRs relied on by fax senders. Under the statute, there is not, nor could there be at this time, evidence sufficient to justify imposing a limit. Further, limiting the duration of EBRs would be an undue burden on senders, without a corresponding benefit to recipients. Businesses do not want to endanger their relationships with their existing customers, and the JFPA's requirement that senders provide opt-out notices and honor opt-out requests achieves the correct balance of burdens and benefits between senders and recipients in that situation.

⁹ The JFPA also reversed the 2003 TCPA Order's requirement that express invitation or permission must be in writing and signed by the recipient. *See* JFPA at Section 3(g), codified at 47 U.S.C. § 227(a)(5) (2006).

The Commission should adopt rules that give businesses and their customers flexibility in forming relationships and entering transactions. Records kept in the normal course of business should create a presumption that an EBR exists, and when it began.

Finally, the Commission should not exempt non-profit trade and professional associations from the notice requirements of the JFPA. Such an exemption would confuse and burden association members, would disadvantage businesses offering similar products and services, and would mire the Commission in determinations of the “tax-exempt purpose” of every association that wanted to fax its members and, indeed, of every fax they send.

I. BACKGROUND

Lorman is a leading provider of continuing education seminars in the United States. Lorman’s seminars educate professionals and business employees on compliance issues (*e.g.*, applicable laws, regulations, and best practices) governing their industries or fields of knowledge. Founded in 1987, in its first full year of operation Lorman hosted 60 seminars on a few topics at several locations. Currently, Lorman presents thousands of seminars every year, on hundreds of topics, to hundreds of thousands of attendees in all 50 states. Lorman’s growth has resulted from its dedication to providing value-added seminars to an ever-growing number of customers who appreciate the quality of Lorman’s offerings.

Traditionally, Lorman has marketed its seminars by mailing potential customers a brochure advertising a single seminar. For example, a continuing legal education seminar is marketed by mailing a brochure describing that seminar to attorneys, from sole practitioners to members of large law firms. Several years ago, Lorman, in reliance upon the FCC’s “established

business relationship” doctrine,¹⁰ began sending facsimile reminders to some of the recipients of the initial mailing. These facsimiles were sent only to customers who had previously enrolled in one or more Lorman seminars—the very definition of people with whom Lorman has an EBR. Consistent with good business practices and customer expectations, Lorman on its own maintained a “do-not-fax” system to suppress further facsimile reminders to anyone who requested it.

Lorman’s facsimile reminder program was a success, for both the company and its customers. The use of facsimile transmissions resulted in more timely awareness of seminars by Lorman’s existing customers, as shown by Lorman’s marketing analysis. Furthermore, many of Lorman’s customers came to rely upon these facsimile transmissions to make them aware of useful new seminars offered by a company with which they had already done business, and many appreciated the timely reminder of an update session on a topic they had previously studied or on new developments in the area.

From time to time, however, Lorman received a letter a from plaintiffs’ attorney representing a facsimile recipient alleging a violation of the proscription against unsolicited facsimiles contained in the TCPA, despite the existence of an established business relationship. Over the years, these letters totaled fewer than ten. In response to each letter, Lorman suppressed the facsimile number in question with respect to any future communications and responded by explaining that Lorman was in compliance with the TCPA, enclosing with the correspondence a copy of the FCC’s publication “Unwanted Faxes – What Can You Do?,” which, at the time, stated:

If however, you have “an established business relationship” with a

¹⁰ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8771 (1992) (“1992 TCPA Order”).

person or entity then, in effect, you've given consent to receive unsolicited faxes from that person or entity.¹¹

Following adoption of the 2003 TCPA Order, even though the FCC stayed enforcement of the new rules and stated that senders could rely on EBRs for the duration of the stay, the reversal of position emboldened plaintiffs' lawyers to the point where many businesses, like Lorman, concluded that the risks of private suits from relying on EBRs were too great to justify continuing to send fax advertisements. Lorman therefore ceased sending faxes to its customers reminding them of upcoming seminars.

After Congress clearly established an EBR exception through enactment of the JFPA on July 9, 2005, Lorman resumed faxing to its existing customers, who have responded positively to again receiving seminar reminders. Consequently, as discussed below, Lorman is in an excellent position to comment knowledgeably on the economic burdens of being forced to forego communicating with its customers by facsimile, and to offer comments based on actual experience.

II. ARGUMENT

A. Congress Directed the Commission to Adopt Regulations Implementing a Workable Established Business Relationship Exception to the General Prohibition Against Sending Unsolicited Advertisements

It is noteworthy for purposes of this proceeding that Congress passed the JFPA at the request of business interests, specifically to prevent what Congress agreed would be the harsh effects of the fax regulations set forth in the 2003 TCPA Order. It was clearly the consensus in both houses of Congress that businesses must have a workable EBR exception to the general prohibition on unsolicited advertisements. Congressman Upton spoke on the House floor: "If we

¹¹ "Unwanted Faxes – What Can You Do?" at < <http://ftp.fcc.gov/cgb/consumerfacts/unwantedfaxes.html> > (visited May 5, 2003). That web page has been updated several times and now refers to the JFPA.

do not reinstate the FCC’s previous rules, the cost of complying with the FCC’s new rules will be enormous, and it will severely hamper legitimate fax communications between businesses and their consumers and between associations and their members.”¹² And again, “The logistical and financial costs of the new FCC rules, particularly to small business and nonprofit associations, would be enormous.”¹³ Senator Burns stated that “[t]his legislation is vital in preserving a valuable small business tool”¹⁴

Furthermore, the JFPA was supported by an impressive bipartisan coalition of Senators and Representatives.¹⁵ Accordingly, there can be no ambiguity regarding the intent of Congress—it meant to reverse the Commission’s 2003 TCPA Order and mandate that EBRs be available in the context of unsolicited fax advertisements, while adding notice and opt-out provisions to allow consumers to control faxes received even from entities with which they do business.

1. Congress Established and Defined “Established Business Relationship” and Gave the Commission Only Limited Discretion to Limit its Coverage

Congress defined “established business relationship” in the JFPA by specifying that the term “shall have the meaning given the term in [47 C.F.R. § 64.1200], as in effect on January 1, 2003,” except that it was to be amended to include business, as well as residential, subscribers. The FCC was authorized to place a limit on the duration of EBRs as they apply to facsimile advertisements, but only if the FCC were first to determine, after notice-and-comment rulemaking and a review of complaints received by the FCC, (a) that the very existence of the

¹² 151 Cong. Rec. H5262-04, speech of Congressman Upton.

¹³ 150 Cong. Rec. H6089-02, speech of Congressman Upton.

¹⁴ 150 Cong. Rec. S8110-02, Senator Burns, *Cosponsorship of S. 2603*.

¹⁵ *See, e.g.*, 151 Cong. Rec. H5262-04, speech of Congressman Upton (thanking members for two years of bipartisan cooperation); *id.*, speech of Congressman Markey (thanking members of both houses—“We truly passed this legislation in a bicameral, bipartisan fashion.”).

EBR exception “has resulted in a significant number of complaints” from recipients of advertising faxes; (b) that “a significant number of any such complaints” resulted from advertisements sent based upon EBRs that were “longer in duration than the Commission believes is consistent with the reasonable expectations of consumers”; (c) that the benefits to recipients of creating a specific time limit would outweigh the costs to senders of tracking and proving the time limit for each individual EBR; and (d) that the costs of imposing such time limits “would not be unduly burdensome” with respect to small businesses.¹⁶ Having had to reverse the Commission’s previous ruling with respect to faxing customers based on an EBR, Congress was careful not to allow the Commission to lapse back to its earlier inclinations. The FCC can take only limited action with respect to the EBR exception, and then only if significant hurdles are overcome that require such action.

By defining “established business relationship” in the JFPA, Congress left the Commission very little latitude to modify the definition in its regulations. The FCC now proposes to define “established business relationship” in its rules as follows:

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 subscriber regarding products or services offered by such person or entity, which relationship has not been terminated by either party.¹⁷

This language is identical to that of 47 C.F.R. § 64.1200 as in effect on January 1, 2003, apart from (i) the subsection reference in the first sentence and (ii) the addition of “business or” in two places, to apply the regulation to business as well as residential recipients as mandated by

¹⁶ JFPA § 2(f), codified at 47 U.S.C. § 227(b)(2)(G).

Congress. Other than the possibility of limiting the duration of EBRs, which is discussed below, this would appear to be the extent of modifications permitted by the JFPA. Accordingly, the Commission should adopt this definition without further change.

2. Congress Specified the Circumstances Under Which Businesses May Send Unsolicited Advertisements to Recipients With Whom They Have an Established Business Relationship

The JFPA specifies that a business may send an unsolicited advertisement to a recipient with whom it has an EBR as long as (1) the sender obtained the recipient's fax number either (a) through the voluntary communication of the recipient within the context of the EBR, (b) from a "directory, advertisement, or site on the Internet" by which the recipient voluntarily agreed to make the number "available for public distribution," or (c) before July 9, 2005, if the EBR was also established before that date; and (2) the unsolicited advertisement contains a notice meeting certain requirements.¹⁸

Again, by specifying the EBR exception to the general prohibition against unsolicited advertisements in such detail, Congress has left the Commission very little latitude to alter the substance of the exception. The NPRM proposes "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."¹⁹ Lorman urges the Commission to import the language of 47 U.S.C. § 227(b)(1)(C) essentially verbatim into 47 C.F.R. § 64.1200(a)(3), making only such changes as are necessary to fit the provision

¹⁷ NPRM at ¶ 14.

¹⁸ JFPA § 2(a), codified at 47 U.S.C. § 227(b)(1)(C); NPRM at ¶ 8.

¹⁹ NPRM at ¶ 9.

grammatically into the structure of §64.1200²⁰ and to conform references to the proper code sections instead of the comparable statutory sections.

B. The Commission Has Only Limited Authority to Limit the Duration of Established Business Relationships; That Authority Should Not Be Exercised Today

The NPRM seeks comments regarding the possibility of imposing a limit on the duration of EBRs. Lorman urges the Commission to refrain from doing so for several reasons. First, there is not, nor can there be at this time, a sufficient evidentiary basis for the Commission to make the threshold determinations that Congress imposed as conditions precedent to establishing any time limits on EBRs. Second, time limits would unduly burden senders and would not provide a corresponding benefit to recipients, particularly in light of the JFPA's requirement that senders provide opt-out notices and honor opt-out requests. Additionally, the context of fax communications differs substantially from that of telemarketing. Even if the Commission were to impose time limits on EBRs in the fax context, the particular limits in effect for telemarketing would not be appropriate.

1. There is No Evidence to Justify Limiting the Duration of an Established Business Relationship

One of the points of debate as Congress considered its response to the 2003 TCPA Order was whether to place limits on the duration of EBRs, and if so, what those limits should be. Congress decided not to impose any such limits and to allow businesses to maintain continuing relationships and communications with their customers. Instead, should the need arise to do so based on marketplace abuses, Congress gave the Commission the ability to react to such developments. The decision to leave that determination to the Commission following certain

²⁰ In particular, removing the initial preposition "to" to match § 64.1200(a)'s "No person may..." structure instead of § 227(b)(1)'s "It shall be unlawful...to..." structure.

conditions precedent was explained on the House floor:

The legislation will permit the Commission to put in place a [duration limit on] the established business relationship, *after the FCC implements the new opt-out policy and it gets a track record on what is happening in the marketplace*. In particular, the Commission will examine consumer complaints to the agency *during this period* with an analysis as to whether junk faxes from entities with whom consumers have an established business relationship constitute a significant number of complaints.²¹

The FCC will not even have “implement[ed] the new opt-out policy” until the conclusion of this rulemaking. According to Congressional intent, the time period during which any pattern of new complaints is to be evaluated will not even begin until then. Congress intended the FCC to base its determinations under Section 2(f) of the JFPA²² on complaints received “after the FCC implements its new opt-out policy and it gets a track record on what is happening in the marketplace.”²³

It is doubly significant that Congress intended the FCC to consider the number and causes of complaints during the period when *the Commission’s notice and opt-out policy* was in effect, not merely when EBRs were first recognized in the Act. First, Congress was apparently interested in whether the notice and opt-out requirements, which did not exist with respect to unsolicited fax advertisements until enactment of the JFPA, would obviate the need to limit the duration of EBRs, which would prove burdensome to senders. Even if one were to consider the period beginning with the *enactment* of the JFPA instead of the FCC’s *implementation* of the notice and opt-out rule, there has not been sufficient time since enactment of the JFPA on July 9, 2005 to acquire statistically significant complaint data and to analyze it to make the

²¹ 150 Cong. Rec. H6089-02, speech of Congressman Markey (emphasis added).

²² 47 U.S.C. § 227(b)(2)(G).

²³ 150 Cong. Rec. H6089-02, speech of Congressman Markey.

determinations required before the FCC is authorized to impose time limits. And second, in mandating that any analysis look at complaint data based on faxes sent under the new rules, Congress likely recognized that the erratic history of EBRs in the fax context has potentially tainted the existing body of complaint data compiled from 1992 to the present. Accordingly, there is not, nor can there be at this time, evidence sufficient to meet the threshold requirements of the JFPA and justify the FCC's imposition of a time limit on EBRs pursuant to Section 2(f) of the JFPA.

2. The Burden Imposed on Businesses by Limiting the Duration of Established Business Relationships Would Vastly Outweigh Any Benefit

As noted above, Lorman began sending fax reminders to existing customers under the rule announced in the 1992 TCPA Order, discontinued the practice following release of the 2003 TCPA Order, then resumed following enactment of the JFPA. Lorman has thus seen both the decrease in revenue from discontinuing its fax reminder program as well as the increase in repeat customer attendance and consequent increase in revenue from resuming. Lorman is, therefore, in an excellent position to comment on the effects of removing significant numbers of customers from a company's fax program, as would happen if a limit on the duration of EBRs were to be imposed. Note that general figures are provided in the discussion below, with the more specific business data given in the Appendix for which confidential treatment is requested.

At present, Lorman's fax database includes well over 100,000 customers with fax numbers obtained in compliance with the JFPA. Imposing, for example, an 18 month limit on the duration of EBRs would eliminate over two-thirds of the total customers Lorman could contact and cause a revenue loss of over \$500,000 each year, based on the rate of sign-ups for seminars by past attendees that Lorman enjoys from its fax reminder program. Even a three-year EBR limit would eliminate almost half of the customer base who could be sent fax seminar

notices and cause a revenue loss of over \$300,000 per year. Finally, a five-year limit on EBRs would still eliminate over 20% of Lorman's previous attendees who could be sent seminar reminders and would cause a revenue loss measured in the hundreds of thousands of dollars.

Why are the revenue losses so large even for a company as small as Lorman? It is because former seminar attendees appreciate receiving reminders of future programs and respond in great numbers by signing up for new seminars. Some customers attend seminars annually, some only every few years, and some episodically. But in all cases, fax notices are an effective and timely reminder and means for customers to sign up for new programs of interest. Those revenues would be lost by artificial and unwarranted time limits.

These are, of course, only the direct burdens from loss of repeat sales. Additionally, senders would need to track the dates that customers provide their fax numbers, as well as the dates of every "inquiry, application, purchase or transaction" by every customer, in order to stop sending unsolicited faxes when the last such event for each individual customer matched whatever artificial cutoff date. Businesses would have to change their databases daily and alter their fax "mailing lists" every day. Small businesses are likely to find such detailed recordkeeping to be a particularly difficult burden. Furthermore, all businesses would have to be prepared to produce in discovery their fax list as of any given day in the past, and the "inquiry, application, purchase or transaction" date for each person on that list.

As discussed in the following subsection, Lorman believes that the JFPA provisions requiring companies to maintain company-specific do-not-fax lists, to provide opt-out notices, and to honor opt-out requests achieves the proper balance of burdens and benefits between senders and recipients of unsolicited advertisements, without the need to unduly burden senders with time-limited EBRs.

3. Opt-Out Notices and Company-Specific Do-Not-Fax Lists Afford Recipients All Necessary Protection in the EBR Context

The FCC has recognized the need to balance the reasonable privacy expectations of customers with the needs of the economy for efficient and cost-effective commerce. Lorman believes that required opt-out notices and company-specific do-not-fax lists achieve the proper balance—the privacy expectations of recipients will be in balance with the commercial benefits of efficient communications, while the recipient will at all times retain ultimate control over whether (s)he will receive any future facsimile advertisements. Under the JFPA, companies sending faxes are required to maintain do-not-fax lists. This is a burden on senders; but unlike keeping track of the date of receipt of each fax number and the date of each customer inquiry or transaction, it is a manageable burden. In fact, Lorman has maintained just such a system for its fax reminders without difficulty for a number of years.

Under the JFPA, if a customer wants to stop receiving fax advertisements from a vendor with whom (s)he has a relationship, (s)he merely contacts the sender to opt-out of future messages. Vendors want their customers to be happy—apart from the potential penalties for violating the JFPA, senders already have an incentive not to send faxes to *their own customers* who have opted out or to annoy in any way the very people who provide their continuing livelihood. Furthermore, under the JFPA, contact information for the sender and a cost-free opt-out mechanism must be included on each fax transmission. While there is some burden on recipients when dealing with a company with which they have previously done business, it is a minimal burden and balances the burdens and benefits equitably between senders and recipients where a business relationship exists. There is no need to unduly burden senders with a time limit on EBRs.

4. The Telemarketing Limitation on the Duration of Established Business Relationships Would Not be Appropriate in the Fax Context

The FCC's telemarketing rules impose a time limit on EBRs of 18 months for transactions such as purchases and 3 months for product inquiries from potential customers. While these limits may be appropriate for telemarketing, that context is very different from the fax context in important ways. First and foremost, the telemarketing rules protect only residential subscribers, while the fax rules apply to both residential and business subscribers. Even today, many more businesses than residential consumers have fax machines. Accordingly, the largest part of the transactions affected by the fax rules are business-to-business transactions, which are not even proscribed in the telemarketing context. Additionally, the utility to businesses of receiving facsimile advertisements from their vendors is correspondingly greater than the comparable utility to residential consumers, just as businesses generally deal with many more vendors than do residential consumers. This largely business-to-business orientation of the legitimate fax advertiser, which is restricted by the JFPA to existing customers or others who have given the sender express invitation or permission, argues for a less-restrictive time limit on EBRs in the fax context, even should the FCC decide a time limit is necessary at all.

This distinction was articulated by Congress as well. One long-circulating draft of the JFPA provided that the Commission could, after the determinations and the notice-and-comment procedure described above, "limit the duration of the existence of an established business relationship to a period not shorter than 5 years and not longer than 7 years after the last occurrence of an action sufficient to establish such a relationship"²⁴

Because fax marketing is oriented largely toward business customers, the time limits that the Commission found appropriate when applied to residential consumers would not be

²⁴ 150 Cong. Rec. H6089-02.

appropriate as applied to senders of fax advertisements to customers. Accordingly, even if the Commission makes the required findings and ultimately determines that a time limit is necessary, Lorman urges it not to reflexively impose the same time limit, but rather to take note of the important differences between the two contexts and impose a five-year limit. However, as explained above, Lorman firmly believes that no time limit is necessary or appropriate in the fax context.

C. The Commission Should Adopt Rules for Determining the Existence of EBRs That Give Both Vendors and Customers Flexibility in How They Do Business

Lorman urges the Commission to leave businesses substantial flexibility in how they receive fax numbers from customers and how they prove that they have received a fax number from a particular customer. In particular, it should not matter whether the customer provides the fax number in writing, by e-mail, over the Internet, over the phone, or in person. Customers today buy products and services many different ways, and that commerce should not be unnecessarily impeded.

Nor should it matter what kind of transaction the exchange was part of. For example, providing one's fax number on a seminar registration or product order form, on a product registration or warranty card, when providing a seminar or product evaluation, when registering or ordering by telephone or in person, or when seeking customer service, should all count as voluntarily providing the number in the course of an EBR. Vendors should be required, if necessary, to prove that they were voluntarily given the fax numbers, but they should be able to do so through a variety of means appropriate to their business, such as written or recorded proof, proof of business practices or customer service scripts.

1. Records Kept in the Normal Course of Business Should Create a Presumption That an Established Business Relationship Exists and When it Began

Senders that (1) adopt compliant policies, scripts, and/or forms for processing fax numbers received from customers, (2) train the relevant employees in their policies, scripts, and forms, and (3) in the normal course of business keep records of receiving fax numbers from customers should be presumed to have received fax numbers in the manner and on the date reflected in those records, absent a preponderance of evidence to the contrary. Companies should not be burdened with having to produce additional documentation without reason to conclude that their normal business records cannot be relied upon.

2. Numbers Obtained From Directories, Advertisements, and the Internet Should Be Presumed to be Voluntarily Made Available for Public Distribution

If a recipient publishes its fax number in an advertisement, the number should be presumed to have been made available voluntarily “for public distribution.” Advertisers control the content of their ads, and ads are by their very nature public. Therefore, advertisers cannot plausibly claim that their fax number, published in an advertisement benefiting themselves, has not been made available for public distribution.

The same principle—control asserted by the subscriber—should be applied in the case of directories and the Internet as well. Lorman proposes that if the fax sender (the recipient of the fax number) does not know and cannot reasonably be expected to have known that a listee did not voluntarily contribute its number to a publicly-available directory or a publicly-available Internet source, there should be a presumption that the number was made available voluntarily “for public distribution.” On the other hand, in cases where the fax sender (the recipient of the fax number) knows, or reasonably should have known, that a listee did not voluntarily contribute its number to a publicly-available directory or a publicly-available Internet source, there would be no such presumption. Examples would be directories or web pages that appear to contain

unauthorized collections or compilations, non-public web pages, or materials marked as non-public or proscribing their dissemination and/or use for marketing purposes.

D. The Commission Should Not Exempt Trade and Professional Organizations From the Notice Requirements of the Junk Fax Prevention Act

In many cases, non-profit trade and professional organizations offer products and services for sale to their members that are similar or even identical to the products and services marketed by businesses. Members of not-for-profit trade and professional organizations should be equally empowered through notice and opt-out requirements to decide whether they do or do not want to continue to receive offers of products and services from such entities.

1. Exempting Trade and Professional Organizations from the Notice Requirements Would Not Adequately Protect Their Members

If non-profit trade and professional organizations were exempted from the notice requirements of the JFPA, members of such organizations would be disadvantaged if they wanted to prevent future unsolicited advertisements from the organizations. The information needed to opt out would not be present on the received fax—indeed, the recipient might not even know that (s)he had a right to opt out, much less how to do so. This would be confusing, particularly since faxed offers for similar products and services from other providers with whom they do business would contain such a notice. After learning by experience that fax advertisements contain opt-out information, consumers receiving an unsolicited advertisement from a trade or professional association might even think that, for some reason, they *did not* have a right to opt out, “because otherwise it would say so and tell me how.” It would be contrary to consumers’ expectations that they have the right and ability to control who sends faxes to them. At best, consumers would be forced to search for the right number to call, and may not know that there is a cost-free way to opt out, so they would waste both time and money or be deterred from exercising their rights.

In order to empower consumers fully to decide whether or not to continue to receive faxes, the Commission must not take away the tools Congress provided them. Therefore, it should *not* exempt non-profit trade and professional organizations from the notice requirement.

2. Exempting Trade and Professional Organizations Would Disadvantage Businesses Offering Similar Products and Services

Lorman is acutely aware that non-profit trade and professional organizations sell products and services in direct competition with businesses—for example, many of them offer continuing education seminars in direct competition with Lorman and some market seminars as their own which are actually given by commercial organizations, receiving commissions or fees for doing so. Additionally, many non-profit trade and professional organizations offer credit cards, rental cars, office supplies, and a cornucopia of other products to their members, again often in cooperation with commercial organizations, completely blurring the distinction between non-profit and for-profit merchants.

Because recipients of unsolicited advertisements from non-profit trade and professional organizations will not be as likely to opt out of future messages from those organizations as they will be to opt out of future messages from Lorman and other commercial providers, either because they cannot find out how to opt out or, worse, are led to believe that they do not have that right, the non-profit trade and professional organizations will presumably sell more products and services at the expense of competing commercial providers. There is simply no reason that Lorman and other commercial providers should be put at a competitive disadvantage compared to other entities that offer similar products and services and send similar unsolicited advertisements to the same consumers with whom each has an ongoing relationship. The Commission should not exempt non-profit trade and professional organizations from the notice requirement.

3. There is No Practical Way to Determine Whether a Message is Sent “In Furtherance of an Association’s Tax-Exempt Purpose”

Each non-profit trade and professional organization has a unique charter, which presumably states the purpose of the organization. If the Commission were to decide that non-profit trade and professional organizations were not required to comply with the notice requirement for messages sent “in furtherance of” their tax-exempt purpose, in complaint proceedings it would find itself asked to interpret the charters of myriad organizations large and small, and perhaps the United States tax laws as well. Is offering a VISA Platinum card to association members “in furtherance of” an organization’s tax-exempt purpose? What if the organization’s chartered purpose includes “promoting the well-being of members”? Does offering the card properly fall within “promoting the well-being of members”? What if the fees for this card are higher than those available in the marketplace? Even if *this* action arguably may be within a charter that was broadly drafted, does it actually qualify as part of the organization’s *tax-exempt* purpose? How about a rental car, a vacation cruise, or a magazine subscription being offered?

Lorman suggests that these sorts of inquiries are not proper subjects of the Commission’s attention; nor should the FCC bear the burden of adjudicating the scope and meaning of the charter of every non-profit trade and professional organization that wishes to send fax advertisements to its members. Accordingly, the Commission should *not* exempt non-profit trade and professional organizations from the notice requirement.

III. CONCLUSION

For the reasons given above, Lorman respectfully urges the commission to adopt definitions verbatim from the statute, making modifications only to adjust section references and correct grammatical construction; to refrain from imposing a time limit on EBRs in the fax

context; to adopt rules recognizing that EBRs can be formed by telephone, fax, e-mail, and mail and give businesses and their customers flexibility to conduct the many different transactions that make up our diverse economy; and to insist that non-profit trade and professional organizations provide their members the same notice and opt-out information they receive from commercial entities with whom they have business relationships.

Respectfully submitted,

Dated: January 18, 2006

_____/s/_____
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APPENDIX

CONFIDENTIAL TREATMENT REQUESTED

NOT FOR PUBLIC DISCLOSURE

The Appendix has been redacted from the publicly-filed Comments