

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Junk Fax Prevention Act of 2005)	CG Docket No. 05-338
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278

COMMENTS OF THE DIRECT MARKETING ASSOCIATION

The Direct Marketing Association, Inc. ("DMA"), hereby submits these comments in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking to establish regulations implementing the Junk Fax Prevention Act of 2005 ("JFPA").¹

DMA urges the Commission to adopt an exemption permitting nonprofit professional and trade associations to send unsolicited fax advertisements to their members without including an opt-out notice. DMA also takes this opportunity to comment on a few issues of general applicability and, in addition, supports the comments filed by Reed Elsevier Inc.

I. Exemption for Nonprofit Trade and Professional Associations

In enacting the JFPA, Congress recognized that trade and professional associations stand in a different relationship to their members than companies promoting goods or services to the general public. The JFPA thus expressly permits the Commission to exempt such associations from providing an opt-out notice in facsimiles

¹ In re Junk Fax Prevention Act of 2005, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Notice of Proposed Rulemaking and Order*, FCC 05-206 (Released Dec. 9, 2005) (hereinafter "NPRM at ¶ ___").

sent to members in furtherance of the associations' tax-exempt purposes, as long as the Commission determines that such notices are not necessary to enable association members to stop the association from sending unwanted faxes.²

A. Association Communications With Members

Trade and professional associations, including DMA, are *highly* accountable to their membership. Association members are responsible for electing association leadership, are a tremendous source of expertise and direction for staff and leaders, and represent a primary source of income to many associations. Indeed, a recent study by the American Society of Association Executives found that member dues payments are the largest revenue source that associations have; they receive on average about 40 percent of their total revenue from dues.³ Any failure to be accountable to members places into jeopardy a substantial source of expertise, direction, and revenue for associations.⁴ In order to remain accountable, associations are in frequent communication with their members, through a variety of methods.

Virtually any of these points of contact may present an opportunity for an association to communicate information about members' communications choices generally, and fax opt-out choices in particular. For example, associations provide opt-out information when explaining membership information or benefits to prospective members or upon renewal; in a section of a website devoted to providing other key

² Specifically, the JFPA amends 47 U.S.C. §227(b)(2) by authorizing the Commission to include such an exemption in its regulations if the Commission determines that the opt-out notice otherwise required "is not necessary to protect the ability of members of such associations to stop such associations from sending any future unsolicited advertisements."

³ American Society of Association Executives *Operating Ratio Report, 12th Edition* (2003).

⁴ The idea that communication by nonprofit entities is constrained by the nonprofit's need to establish an ongoing relationship and respect its contributors' wishes is not new. The Federal Trade Commission recognized this distinction when it exempted charitable callers from its do-not-call rules. 68 Fed. Reg. 4637 (Jan. 29, 2003). This sensitivity is heightened when an entity is seeking to retain a member and not just a potential donor.

information to members; in newsletters or other publications (electronic or otherwise); at conferences, seminars, trade shows, or other events; or through special notices. For some organizations and their members, one or more of these alternative modes of communication may prove more effective or cost-efficient for providing opt-out information than including a notice on a facsimile.

Members of trade and professional associations have equal opportunities to convey their preferences, and associations are poised to honor them. Listening and responding to members' needs and interests is fundamental to the existence of trade and professional associations, whose members look to them to advocate their views and amplify their voices on matters of concern, to furnish timely information and guidance, and to provide venues for communicating with different stakeholders about topics of common interest. Thus, members of these associations have many avenues for conveying their wishes. DMA submits that members will promptly hold their associations *directly* accountable if the ir associations do not adequately respect their privacy interests, regardless of whether there is any opt-out notice included on an unsolicited facsimile.

B. Rebuttable Presumption of Relatedness

In light of the inherent diversity of the missions and purposes of various nonprofit associations, DMA believes the Commission should not attempt to adopt an exclusive list or classification of facsimiles or activities that further a nonprofit association's tax exempt purpose. Rather, the Commission should adopt a rebuttable presumption that a facsimile solicitation sent by such an association to one or more of its own members *is* "in furtherance of the association's tax exempt purpose." Once again, the only facsimile solicitations at issue in this situation are communications from an association to

individuals or businesses that have chosen, some at considerable cost, to join the association sending the fax. These recipients expect to receive frequent communications from the association; it is part of the reason they pay for membership.

The JFPA states expressly that an exemption from providing an opt-out notice with every fax will apply only to “tax-exempt” nonprofit organizations. A prerequisite for qualifying as a tax-exempt association under the Internal Revenue Code of 1986 (the “Tax Code”) is that the organization's activities must be substantially in furtherance of tax-exempt purposes. If more than an insubstantial amount of an organization’s activities is not in furtherance of its tax-exempt purposes, then it no longer qualifies as tax-exempt.⁵ Thus, in order to comply with the requirements of the Tax Code, tax-exempt organizations already engage in no more than an insubstantial amount of activity that is unrelated to their tax-exempt purposes. Failure to comply with such requirements carries very steep penalties, including significant back taxes and complete revocation of exempt status. Since tax-exempt associations are required to comply with applicable Tax Code provisions in order to maintain their exempt status, there is a strong and established basis for the Commission to presume that communications between associations and their members are in furtherance of such associations’ tax-exempt purposes.

DMA recognizes that there may nevertheless be rare occasions when an association would communicate via fax with members on matters unrelated to such tax-exempt purposes. Thus, the Commission's regulations could allow the Commission to rebut the initial presumption that a communication is in furtherance of an association’s tax-exempt purposes. Again, referring to the Tax Code is instructive. The Tax Code

⁵ See, e.g., Internal Revenue Service General Counsel Memorandum 39108, holding that a Tax Code Section 501(c)(6) association must have meaningful support in the form of dues and revenues from related activities in order to remain exempt.

establishes a tax for organizations that are otherwise exempt from federal income taxation when such organizations regularly carry on a trade or business that is not substantially related to the organizations' tax-exempt purposes.⁶ Rather than establish new definitions and criteria for determining whether an organization's activities are "related," the Commission should apply the definitions and criteria established in the Tax Code and its accompanying regulations. This will avoid imposing undue burden on the Commission, while at the same time help eliminate confusion that would arise from the establishment of a separate, different definition of what constitutes a "related" activity.

In addition, the Commission might consider providing "safe harbor" treatment for certain obvious examples of activities that plainly further an association's tax-exempt purposes – activities that are at the core of these associations' missions, such as facsimiles announcing upcoming association-sponsored events (e.g., trade shows, conventions, seminars, or the like) or notifying members about association publications (e.g., newsletters or bulletins, briefings, member guides or codes of conduct or other self-regulatory materials). Yet, while these examples might invariably further an association's tax-exempt purpose, it is impossible for the Commission to identify every conceivable example in its regulations. Thus, apart from highlighting illustrations or affording safe harbor treatment for clear-cut examples, the Commission should not attempt itemize or classify specific facsimiles or activities that will further associations' tax-exempt purposes.

In light of their status and the special relationship they have with members, nonprofit trade and professional associations should have the flexibility to provide opt-out information and opportunities by means that take into account not only their unique

⁶ 26 U.S.C. § 512(a).

financial considerations, but also the needs and preferences of members. Including a notice with each fax is not necessary to enable association members to stop receiving any unwanted faxes from their association in the future. The Commission should, therefore, exempt associations from the obligation to provide an opt-out notice in faxes sent to members.

II. Established Business Relationship

A. Business-to-Business Faxes

DMA strongly supports the Commission's proposal to extend the EBR definition to permit faxes sent to businesses on that basis. Business-to-business faxes are an integral part of day-to-day commerce in the United States. It is imperative that businesses with an established relationship be permitted to maintain their contact with one another by fax without the necessity of the sender obtaining some new consent.

There are some differences between a solicitation faxed to a business and other forms of marketing by telephone that warrant recognition. In particular, the vast majority of facsimile advertising is sent from one business to another. Any "intrusion" that results is, therefore, of a fundamentally different nature and, in any event, inherently less "personal."

A fax sender should be permitted to rely on consent provided by any member of a business recipient's personnel with apparent authority to act on its behalf. A sender should not be subject to liability for sending an unsolicited fax if, unknown to the sender, an employee exceeds their actual authority when providing consent.

In the same vein, senders should honor an opt-out request by an employee of a business with apparent authority to submit such a request. In this regard, however, the Commission's rules should make clear that for faxes sent to a business, the sender may indicate that an opt-out will apply only to specific personnel indicated on the opt-out at the number(s) specified, and only for the period that individual is employed at that business. This is not to suggest that a business may not, if it elects, opt-out from receiving any unsolicited faxes, addressed to any of its personnel. A business should be permitted to opt-out of receiving any unsolicited facsimiles. Yet, some businesses largely consist of individuals who predominantly act on their own behalf. Perhaps most notably, individuals acting as brokers – whether for real estate, insurance, financial products, investments, or other matters – may operate within the same facility yet function almost entirely independently of one another. An opt-out from one such individual should not automatically apply to others using the same facility.

At the other end of the spectrum, an opt-out by an employee of Company X, who receives a fax in their capacity as an employee (e.g., as purchasing agent), is not personal and should not be extended to that individual if he or she leaves the Company and joins another company. The JFPA makes clear that the FCC's regulations must provide that an opt-out is valid only if it specifies the telephone number or numbers to which the opt-out relates. The Commission's rules should clarify that an opt-out must identify a particular business number or numbers when a fax is received at a business, or particular residential number(s) when a fax is received at a residence. The Commission should further clarify that attempts to submit generic requests, such as "all faxes sent to Jane Doe in area code NXX," or the like are inadequate under JFPA and need not be honored.

B. Durational Limit

DMA supports Reed Elsevier's view that for purposes of the JFPA rules, an EBR need not be subject to the same durational limits as general telephone solicitations under the TCPA. There is no evidence to support the imposition of a durational limit when the JFPA itself did not impose one. Moreover, as noted above, fax solicitations are used differently than general telemarketing calls, and a longer period to send faxes is warranted.

If, however, the Commission determines to impose a time limit on EBRs for sending faxes, it must be *at least* as long as that applicable to telephone solicitations generally. Thus, at a very minimum, the Commission should permit a sender to send a fax advertisement for 3 months after an inquiry and for 18 months after a purchase or other transaction.

III. Opt-Out Requirements

The Commission should *not* require a fax sender to honor an opt-out sent by any means other than the method(s) specified in the opt-out notice the sender includes on its facsimiles (or that an exempt association provides elsewhere). To ensure compliance, an organization absolutely *must* be able to control the flow of data in a way that enables the organization to properly manage opt-out requests, including communicating such requests to all parties involved in ensuring that such requests are honored, and that the information is appropriately handled and safeguarded. This may include communications with not only a variety of internal personnel, but also outside vendors, marketing partners, or others. Moreover, some organizations, and especially small entities, simply

may not be equipped to handle requests received from different communication sources. The fact that an entity maintains a website and provides an e-mail address for certain customer service inquiries does necessarily mean it can accommodate fax opt-out requests sent to that e-mail address. Certainly some organizations can accept opt-out requests communicated by alternative methods; offering alternatives may be encouraged as long as they are feasible, and the FCC rules should permit senders to offer such choices. But the regulations should neither mandate the use of any specific means (apart from requiring that they be cost-free), nor oblige a sender to accept opt-requests unless they are communicated by a method the sender has specified.

DMA supports a 30-day limit for complying with an opt-out request applicable to unsolicited fax advertisements. While there are some differences between fax solicitations and other telephone solicitations that warrant different regulatory treatment, the two techniques typically are not so different in this respect that separate standards are warranted. There is no evidence that organizations can process fax opt-outs more rapidly than they can implement do-not-call requests. And applying the same standards to fax advertising and other telephone solicitations, when otherwise appropriate, will promote consistency, which in turn should facilitate compliance.

DMA also agrees that a local telephone call, even if it might result in a modest time, connection, or local toll charge should be deemed "cost free" for recipients in that local area. We also propose that requiring recipients to send a postcard or some other mailing that would require applications of modest first-class postage – presently 39 cents - should be permitted. In DMA's experience, for some organizations the best way to

ensure the validity of opt-outs, maintain good records, and guard against competitive abuses is to insist that opt-outs be communicated in a simple mailing.

Beyond this, however, the Commission should not attempt to identify an exhaustive list of cost-free alternatives senders may specify for recipients to communicate opt-out requests. A non-exhaustive list of possibilities – which might include a toll-free number, a local phone number, a postcard or letter, or a website or email address – may be helpful to marketers and others. Yet, as technology and marketplace trends change, so too may the mechanisms for communicating an opt-out. These kinds of changes invariably outpace the speed of regulatory modification, which may constrain innovation. As long as the method selected is "cost-free," it will meet the JFPA standards and should be permitted.

CONCLUSION

For the foregoing reasons, DMA believes the Commission should exempt nonprofit professional and trade associations from the requirement to include an opt-out notice in unsolicited fax advertisements they send to members. The JFPA expressly authorizes the Commission to establish this exemption, and the special relationship between such associations and their members warrants it. DMA also urges the Commission to extend the EBR definition to permit faxes sent to businesses and to avoid imposing a time limit on EBRs for purposes of the fax rules. The Commission should allow senders at least 30 days to honor unsolicited facsimile opt-out requests. Finally, the regulations should not require a fax sender to honor an opt-out sent by any means other

than the method(s) the sender specifies on its facsimiles, or in any way restrict the "cost-free" mechanisms for communicating opt-out requests.

Respectfully submitted,

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