

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

In the Matter of

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Petition for Declaratory Ruling of the Fax Ban Coalition	)	DA -05-2975
	)	
Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338

**JOINT COMMENTS OF THE DIRECT MARKETING ASSOCIATION,  
AMERICAN ASSOCIATION OF ADVERTISING AGENCIES,  
ASSOCIATION OF NATIONAL ADVERTISERS, INC., AND MAGAZINE  
PUBLISHERS OF AMERICA**

The Direct Marketing Association, Inc. ("DMA"), American Association of Advertising Agencies, Association of National Advertisers, Inc., and Magazine Publishers of America ("Joint Association Commenters"), hereby submit these joint comments in support of the petition filed by The Fax Ban Coalition ("Coalition"), requesting that the Federal Communications Commission ("FCC" or "Commission") has exclusive authority to regulate interstate commercial fax messages. Throughout this proceeding, Joint Association Commenters, some of which are also members of the Coalition, have maintained that the TCPA and this Commission's implementing regulations displace any state law purporting to regulate interstate telemarketing matters that are governed by the TCPA. The arguments that DMA, for instance, has set forth in its prior comments in the Commission's TCPA rulemaking, and which are incorporated herein by reference, apply with equal force to the provisions of the Junk Fax Prevention

Act of 2005 ("JFPA"), and Commission regulations that govern the interstate use of facsimiles.

Prior filings in this proceeding demonstrate that the Communications Act of 1934, as amended, confers upon this Commission exclusive jurisdiction over interstate telemarketing. At a very minimum, the Commission may rely on its plenary power over interstate communications, expanded and complemented by the power to regulate intrastate telemarketing activity conferred by the TCPA, to preempt all state telemarketing standards insofar as they address or are applied to matters governed by the TCPA and involve interstate communications. Congress intended that the TCPA occupy the field of telemarketing matters that the TCPA addresses, having given the Commission broad powers to ensure a consistent balance of interests and uniformity in regulation. And in any event, since one of the goals of the TCPA was “to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations,”<sup>1</sup> any state law that governs matters addressed by the TCPA, yet differs from TCPA standards, is inherently in conflict with the federal standard and frustrates the objectives of the TCPA.

The same principles and standards apply to state laws and regulations purporting to govern interstate facsimiles. In fact, state law conflict with the JFPA is perhaps even more pernicious to the extent that states seek to override the established business relationship exemption recognized by the JFPA; state efforts to eliminate an EBR exception even *after* enactment of the JFPA are most striking.

---

<sup>1</sup> Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, 18 FCC Rcd. 14014, ¶ 83 (2003) (“R&O”).

In 2003, this Commission had determined to remove a long-standing rule that permitted organizations to send unsolicited ads by fax when contacting someone with whom the sender had an established business relationship ("EBR"). Congress, however, quite purposefully *reversed* the Commission's decision: The JFPA reinstated and codified the EBR exception and directed the FCC to promulgate rules to implement it.

The Senate Commerce Committee's very first finding, reflected in the Report to accompany S. 714, explicitly states that the purposes of the legislation include "creat[ing] limited statutory exemption to the current prohibition against the faxing of unsolicited advertisements to individuals without their 'express invitation or permission' by permitting such transmission by senders of commercial faxes to those with whom they have an established business relationship."<sup>2</sup> Thus, Section 2 (a) of the JFPA expressly amended the Communications Act of 1934 to reinstate the EBR exception, and permit the use of facsimiles to send unsolicited advertisements when the sender has an EBR with the recipient.<sup>3</sup> At the same time, Congress conditioned the exception, and the Commission must also adopt rules to ensure that recipients are, when appropriate, given the means to stop future unwanted faxes based on an EBR.

Congress thus carefully balanced the interests of different stakeholders after full consideration of the issues. The JFPA unmistakably allows the interstate use of facsimiles subject only to the conditions the JFPA itself imposes. One need not, for instance, have signed written permission to send advertisements and may send such faxes to a recipient on the basis of an EBR. States may not disregard this Congressional action or disrupt the balance it struck.

---

<sup>2</sup> S. Rep. 109-76 at 1 (2005).

<sup>3</sup> Pub. L. 109-21 *to be codified at* 47 U.S.C. § 227(b)(1)(C).

Congressional intent in enacting the JFPA is unmistakably clear and all state laws or regulations that differ, including those that do not recognize this EBR, are in direct conflict with the JFPA and must be preempted as to interstate facsimiles.

Respectfully submitted,

Gerald Cerasale  
Senior Vice President, Government Affairs  
The Direct Marketing Association, Inc.  
1111 19<sup>th</sup> Street, N.W., Suite 1100  
Washington, DC 20036  
(202) 955-5030

Adonis Hoffman  
SVP & Counsel  
American Association of Advertising Agencies  
1203 19th Street, NW  
Washington DC, 20036  
202-331-7345

Dan Jaffe  
Executive Vice President  
ANA  
1120 20th Street NW  
Suite 520 South  
Washington DC 20036

Rita Cohen  
Senior VP /Legislative and Regulatory Policy  
Magazine Publishers of America  
1211 Connecticut Avenue, NW  
Washington, DC 20036  
202-296-7277

Ian D. Volner  
Heather L. McDowell  
Venable LLP  
575 7<sup>th</sup> Street, N.W.  
Washington, DC 20004-1601  
(202) 344-4800  
**Counsel for The DMA**

January 13, 2006