BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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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
	)	

To: The Commission

JOINT COMMENTS OF THE
NAMED STATE BROADCASTERS ASSOCIATIONS

The Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, MD/DC/DE Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, The New York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of

Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Virginia Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters (collectively, the "State Associations"), by their attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, hereby jointly submit comments in response to the *Notice of Proposed Rulemaking* issued in the above-referenced proceeding.[1]

Discussion

As the Commission is aware, the participating State Associations, all of which are nonprofit, tax exempt, trade organizations, are chartered to help create and maintain a regulatory and economic environment that is maximally conducive to the growth of the free, over-the-air, locally-based radio and television broadcast industries in their respective states and territories. In order to fulfill this important mission, the State Associations must be able to communicate quickly, clearly, and efficiently with their members, whether by facsimile, email, mail or telephone. The State Associations are interested parties in this proceeding because their ability to communicate by facsimile, and thus to fulfill their important mission, could be adversely affected depending upon how the Commission decides to implement certain aspects of the Junk Fax Prevention Act of 2005 ("Fax Act").[2]

The State Associations are concerned that the Commission may inappropriately apply the "do not fax" provisions of the Fax Act to facsimile communications between nonprofit professional or trade associations and their members. As discussed below, individuals and

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[1] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, CG Docket No. 02-278, FCC 05-206 (Dec. 9, 2005) ("*Notice of Proposed Rulemaking*" or "*NPRM*").

[2] Junk Fax Prevention Act of 2005, Pub. L. No. 109-21 (2005) ("Fax Act").

entities that join nonprofit trade associations, as in the case of the State Associations, do so with the understanding and expectation that they will routinely receive information about industry issues, association activities, and the services offered by such associations in the furtherance of their tax-exempt missions. Accordingly, the State Associations urge the Commission to declare that an individual member's affirmative decision to join a nonprofit professional or trade association itself constitutes "prior express invitation or permission" with the effect that the do-not-fax restrictions of the Telephone Consumer Protection Act ("TCPA"), as modified by the Fax Act, do not apply as between such associations and its members.

Even if the Commission declines to recognize that communications between nonprofit professional and trade associations fall outside the scope of the TCPA's do-not-fax restrictions, the State Associations still urge the Commission to refrain from applying certain provisions of the Fax Act – specifically, those provisions requiring individuals and entities to include an "opt-out" notice in each and every unsolicited facsimile advertisement that they send – to such communications.[3] Fortunately, Congress has given the Commission the authority to create such an exemption.[4] As the notice requirement is both unnecessary to protect the interests of association members, and would harm the interests of associations and their members if applied to communications between them, the Commission should exercise this authority, as suggested in the *NPRM*.[5]

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[3] Fax Act §2(e).

[4] *Id.*

[5] *NPRM* at ¶ 27.

I. THE COMMISSION SHOULD EXPLICITLY DECLARE THAT AN INDIVIDUAL MEMBER'S DECISION TO JOIN A NONPROFIT PROFESSIONAL OR TRADE ASSOCIATION ITSELF CONSTITUTES "PRIOR EXPRESS INVITATION OR PERMISSION"

The TCPA's do-not-fax provisions, as modified by the Fax Act, apply only to "unsolicited advertisements." The definition of "unsolicited advertisements" included in the TCPA explicitly excludes all advertisements for which the recipient has provided "prior express invitation or permission."[6] In the *NPRM*, the Commission seeks comment as to what other forms of invitation or permission should be sufficient to exclude a given facsimile transmission from the scope of the TCPA.[7] For the reasons discussed below, the State Associations urge the Commission to recognize that an individual member's affirmative decision to join a nonprofit professional or trade association itself constitutes "prior express invitation or permission" within the meaning of the TCPA.

The relationship between nonprofit professional and trade associations and their members is a type of contract. Individuals and entities that join such associations do so with the understanding and expectation that their associations will keep them informed not only about the activities of these associations and the issues confronting their industries, but also about the full range of services, existing and new, of which such members may avail themselves. The ability of associations to freely and efficiently communicate with their members, and vice versa, by whatever means, is the sine qua non of associational membership. The volitional act of joining a non-profit professional or trade association represents an express invitation to communicate in this fashion. It is as simple as that.

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[6] 47 U.S.C. §227(a)(5).

[7] *NPRM* at ¶ 30.

Accordingly, the State Associations urge the Commission to recognize that an individual member's decision to join a nonprofit professional or trade association itself constitutes "prior express invitation or permission," such that the do-not-fax provisions of the TCPA, as modified by the Fax Act, are inapplicable.

II. THE COMMISSION SHOULD EXEMPT NONPROFIT PROFESSIONAL AND TRADE ASSOCIATIONS FROM THE FAX ACT'S "OPT-OUT" NOTICE REQUIREMENTS

A. The Opt-Out Notice is Not Necessary to Protect the Interests of Association Members

The relationship between nonprofit associations and their members stands in stark contrast with that which exists between commercial entities and potential customers. Associations are, in a very real sense, extensions of their members and those members' interests; an association without members is no association at all. This special relationship has several consequences that individually and collectively eliminate any need for associations to specially notify members of their right to "opt-out" from receiving future facsimile transmissions from their associations.

Nonprofit associations act principally to protect and advance the interests of their own members. Although these pursuits may occasionally prompt associations to "advertise" the availability of certain services to their memberships, such communications are integral to the associations' chartered purpose of protecting and advancing the interests of their own members.[8] Although these communications may fall within the overly broad definition of the "advertisements" prohibited by the Fax Act, they are far from "unsolicited" or from the sort of

[8] For example, from time to time many of the State Associations "advertise" the availability of written materials and seminars intended to advise members with respect to the Commission's regulations. These materials and seminars cover the Commission's EEO rules, political rules, license renewal procedures, and other topics of interest to broadcasters.

objectionable commercialized communication that the Fax Act was designed to prevent.[9] Since the concerns at the heart of Fax Act's prohibition on the transmission of unsolicited advertisements do not apply to the special, noncommercial relationship between nonprofit associations and their members, it follows that the inclusion of an "opt-out" is unnecessary to protect the interests of association members.

As discussed above, individuals and entities that join nonprofit professional and trade associations do so with the understanding that they will receive a full range of services from the associations to which they belong, including regular informational communications. Members expect, among other things, to be kept fully apprised of the benefits that they are eligible to receive as association members, including access to the goods and services often available to members upon special terms or at special rates. Since members expect this information, and typically join associations for the purpose of receiving it, it is unnecessary to inform members of their right *not* to receive such information.

Finally, members of nonprofit associations understand that the associations to which they belong exist to respond to their members' needs and interests. Such responsiveness is implicit in the concept of membership. Members know that they can contact their associations and ask them to cease communicating with them on any particular subject or cease using any particular form of communication, including facsimile transmissions. Furthermore, members know that they may resign from, or "opt out" of, their associations for any reason at any time, in which case communications from those associations would end. In short, because powerful full-scale and

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[9] Section 227(a)(4) defines the scope of the term "unsolicited advertisement" to include "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. §227(a)(4). Unfortunately, this definition is not narrowly tailored to encompass only those types of transmissions that give rise to the concerns the Fax Act was intended to address.

limited "opt out" options are inherent in the association-member relationship, the "opt out" notice provisions of the Fax Act need not and should not apply.

B. The Application of the Fax Act's "Opt Out" Notice Requirement Would Be Harmful to the Interests of Nonprofit Associations and their Members

The application of the Fax Act's notice requirement to nonprofit professional and trade associations is not only unnecessary, it would also be harmful to the interests of such associations and their members.

The application of the notice requirement to nonprofit professional and trade associations would inevitably add overall page length to association facsimile transmissions. When multiplied over the untold number of facsimile transmissions sent by associations in serving their members, the resulting increase in expense would be a significant drain on association resources. At the same time, the notice requirement would indirectly impose added costs on association members themselves, who would be forced to expend additional resources in receiving such transmissions. Since, as discussed above, the "opt-out" notice is unnecessary to protect the interests of association members, these burdens, which would impact the types of organizations least able to bear them, are entirely unwarranted.

Second, the application of the notice requirement to nonprofit professional and trade associations would likely force such associations to err on the side of caution by including the "opt out" notice on virtually all communications to members. There should be no serious dispute that these nonprofit organizations would tend to act conservatively in this area. The Fax Act's notice requirement applies to the transmission of "advertisements" by facsimile.[10] An "advertisement" includes "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior

[10] *See* 47 U.S.C. §227(b)(2).

express invitation or permission."[11] This definition gives rise to numerous sources of confusion, such as: since virtually all facsimile transmissions sent by associations to its members implicitly or explicitly provide information concerning both the availability and quality of the association's own services, what transmissions involve "advertisements" and which do not? If certain services are available commercially, but are available on more favorable terms to members, do informational communications concerning such services constitute commercial "advertisements?"

The extensive use of "opt-out" notices would also create the appearance that the basic nature of the association-member relationship has changed, thereby causing confusion among association members. The use of the "opt-out" notice would likely have adverse effects that would damage the basic relationship between nonprofit professional and trade associations and their members. The presence of an "opt-out" notice on member communications about association services would signal to association members that the communication is a "junk fax" that should be disregarded, even though the communication in fact contains useful member information. Moreover, those members receiving association facsimiles with "opt-out" notices would begin to believe that their associations are acting contrary to their best interests, when in fact these associations are doing nothing of the sort. This, in turn, would inevitably lead to member complaints and threats to drop membership, all of which would require limited association staffs to spend inordinate and previously unnecessary, amounts of time trying to explain things to members. All of this would be avoided if the Commission

[11] 47 U.S.C. §227(a)(4).

recognizes and accepts the distinct nature of the relationship between nonprofit professional and trade associations and their members.

Conclusion

For the reasons discussed above, the State Associations urge the Commission to use its authority under the Fax Act (i) to declare that the affirmative act of a person or entity becoming a member of a nonprofit professional and trade association constitutes "prior express invitation or permission" under the Fax Act with the legal effect that the facsimile restrictions of the Act do not apply to facsimile transmissions between such associations and their members, and, in any event, (ii) to waive the applicability of the Fax Act's "opt-out" notice provision to facsimile transmissions sent to such association members.

Respectfully submitted,

NAMED STATE BROADCASTERS ASSOCIATIONS

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