

## **JUNK FAX PREVENTION ACT OF 2005, CG Docket No. 05-338**

### **COMMENTS OF THE NATIONAL INDEPENDENT AUTOMOBILE DEALERS ASSOCIATION DIRECTED TO THE FEDERAL COMMUNICATIONS COMMISSION**

#### **SECTION A. BACKGROUND**

The Junk Fax Prevention Act of 2005 was signed into law on July 9, 2005 and amends section 227 of the Communications Act of 1934 which deals with unsolicited facsimile advertisements. The Act provides that "not later than 270 days after the date of enactment of this Act, the Federal Communications Commission shall issue regulations to implement the amendments made by this section." The Junk Fax Prevention Act codifies and defines an established business relationship exemption to the prohibition on sending unsolicited facsimile advertisements and requires that facsimile transmissions contain notice and contact information allowing a recipient to opt-out of future transmissions. The Act further directs the Federal Communications Commission to consider determining the shortest reasonable time within which a sender must comply with an opt-out request and to consider whether classes of small businesses and professional or trade associations should be exempt from certain provisions of the Act. In furtherance of this goal, the FCC has requested comment on the established business relationship (EBR) exception to the rules, the requirement to include an opt-out notice and contact information on facsimile advertisements, and other rules implementing the Junk Fax Prevention Act.

The potential impact of the Junk Fax Prevention Act and the FCC's implementing rules is two-fold for the National Independent Automobile Dealers Association (NIADA). The NIADA is a non-profit Trade Association and, as such, it has relationships with Affiliated State Associations and with independent motor vehicle dealers located across the Country who are members of the NIADA. In that capacity, the NIADA has an interest as to how the Act and the FCC's rules will impact the NIADA's ability to communicate information to its State Affiliates and members. In addition, the NIADA and its State Affiliate Associations represent more than 19,000 independent motor vehicle dealers located across the United States, many of whom have an interest in communicating with potential and existing customers via facsimile solicitations. Therefore, the NIADA hereby submits the following comments with respect to the FCC's proposed rule.

#### **SECTION B. COMMENTS ON THE PROPOSED RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991**

##### **1. Recognition of an Established Business Relationship Exemption**

Section 2 of the Junk Fax Prevention Act entitled "Prohibition on Fax Transmissions Containing Unsolicited Advertisements" amends section 227(b)(1)(C) of the Communications Act of 1934 by adding an established business relationship (EBR) exemption to the prohibition on sending unsolicited facsimile advertisements. This section states that an unsolicited advertisement may not be sent unless (i) the sender has an EBR with the recipient or (ii) the sender obtained the number of the recipient, within the context of such EBR, through the voluntary communication of such number from the recipient or from a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution; and (iii) the unsolicited advertisement contains the required notice. With regard to the EBR exemption from the Act, the FCC has requested comments regarding: (a) the parameters defining what it means for a person to provide a facsimile number "within the context of an established business relationship"; (b) the circumstances under which the FCC

should recognize that a person has voluntarily made a facsimile number available for public distribution; and (c) for purposes of the exception that permits a sender to send a facsimile without demonstrating how it obtained a facsimile number if the EBR was formed prior to July 9, 2005, how the FCC should verify that a sender had an EBR and the recipient's facsimile number before that date.

- a. It is not Necessary for the FCC to Define What it Means for a Person to Provide a Facsimile Number "Within the Context of an Established Business Relationship"

In lieu of the EBR exception recognized by Congress in the Junk Fax Prevention Act, the FCC has proposed to remove Section 64.1200(a)(3)(i) of the FCC's rules, which provides that a facsimile advertisement is unsolicited unless "the recipient has granted the sender prior express invitation or permission to deliver the advertisement, as evidenced by a signed, written statement that...clearly indicates the recipient's consent to receive such facsimile advertisements from the sender." The FCC specifically asked those submitting comments to address whether it should establish parameters defining what it means for a person to provide a facsimile number "within the context of [an] established business relationship." The NIADA does not believe it is necessary to establish such parameters. The term "established business relationship" is already defined to have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that the term shall include a relationship between a person or entity and a business subscriber and the relationship will be subject to any time limitation established by the FCC. Therefore, it is apparent by definition that a person is provided a facsimile number within the context of an established business relationship if "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 previously terminated by either party."

- b. Senders Should not Assume the Burden of Establishing that a Facsimile Number was Voluntarily Made Available for Public Distribution

The FCC has sought specific comment regarding the circumstances under which it should recognize that a person has voluntarily agreed to make a facsimile number available for public distribution and whether the burden should rest with the sender to establish that a recipient has agreed to make the number publicly available. The NIADA proposes that the burden should not rest primarily with the sender to establish that the recipient has agreed to make a facsimile number available to the public where the number has been obtained from a directory, advertisement, or site on the Internet that compiles such numbers. Just as an entity is entitled to rely upon a telephone number published in a telephone directory as having voluntarily been made publicly available, an entity should be able to rely upon a number obtained from a directory, advertisement or web site as having voluntarily been made public unless it is notified otherwise either by the publisher of the number or the recipient of a facsimile.

Requiring a sender to confirm with an entity that compiles lists of facsimile numbers that the recipients have "voluntarily" agreed to allow them to be made public would be unnecessarily burdensome and costly for senders. It may be difficult to obtain information regarding the publisher of the materials and even after such information is obtained, it could take substantial amounts of time for senders to obtain confirmation that the information was voluntarily obtained. A recipient is in a better position to know if he or she voluntarily provided the information to the entity and to resolve the issue if it was not provided voluntarily. For purposes of the FCC's

rules, it should be sufficient, and the NIADA would support a proposal requiring the sender to, upon request, provide the recipient with information regarding the source where it obtained the facsimile number. This information should include the name of the directory, advertisement, or Internet site and, if available, information regarding how the recipient may contact the publisher. The recipient should bear the burden of contacting the compiler of the information if there is any question as to whether the number was provided voluntarily.

- c. The FCC Should not Specify the Manner in which a Sender Must Verify that it had an EBR and the Recipient's Facsimile Number Before July 5, 2005

Under the Junk Fax Prevention Act of 2005, if an EBR was in existence and the sender possessed the facsimile number before the date of enactment of the statute, the sender is not required to demonstrate how it obtained the facsimile number. The FCC proposes amending its rules consistent with this exception, but has requested comments on how it should verify that the sender had an EBR and the recipient's facsimile number prior to July 5, 2005.

The NIADA supports the FCC's adoption of this exemption, but submits that the FCC should not specify the manner in which senders must verify that they had an EBR and the recipient's facsimile number prior to the effective date of the Act in the FCC's rules. As the FCC points out, there is no ongoing reporting requirement associated with the proposed rule. Rather, if a complaint is filed involving the existence of an EBR or the duration of the EBR, the facsimile sender may need to obtain and produce records it kept in the usual course of business evidencing the duration of the EBR. Placing this burden upon a sender should be sufficient. Prior to the statute's enactment, no specific verification requirements were imposed and, as a result, there are a vast number of ways entities could have collected and maintained information pertaining to how and when facsimile numbers were obtained. If a complaint is filed against an entity for sending faxes to an individual who alleges that it does not have an EBR pursuant to the exemption, then the burden would be on the sender to prove the relationship existed prior to enactment of the statute by whatever means available to it. The sufficiency of the evidence should be determined on a case-by-case basis.

## **2. Definition of Established Business Relationship**

Section 2(b) of the Junk Fax Prevention Act defines the term "established business relationship" as having the meaning given the term in Section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that the term shall include a relationship between a person or entity and a business subscriber and the relationship will be subject to any time limitation established by the FCC pursuant to paragraph (2)(G) of the Act. Paragraph 2(G) refers to Section 2(f) of the Act and provides that the FCC may limit the duration of an EBR after it has evaluated its complaint data to determine whether the EBR exception has resulted in a significant number of complaints regarding facsimile advertisements and whether such complaints involve facsimile advertisements sent based on an EBR of a duration that is inconsistent with the reasonable expectations of consumers. Since the FCC has not yet conducted these evaluations, it may be premature to consider limiting the duration of the EBR exception.

- a. The FCC Should Take into Consideration the Various Relationships Covered by the Act when Determining Whether it is Necessary to Limit the Duration of the EBR

Should the FCC conclude after conducting its evaluation that it is necessary to limit the duration of the EBR as it applies to unsolicited facsimile advertisements, the NIADA proposes that the

FCC consider this necessity separately as it applies to relationships between residential and business subscribers, two businesses, and trade associations and their members. As the FCC points out, the difference between the EBR definition for telephone solicitations and fax solicitations is that the EBR exemption applies to both residential and business subscribers, not just to residential subscribers as in the telephone solicitation rules.

The NIADA does not oppose the imposition of limitations on the duration of the EBR as between businesses and residential subscribers. The NIADA asserts, however, that any such limitations should be consistent with the 18/3 month limitations imposed by both the Federal Trade Commission and the FCC with respect to telephone solicitations. Adopting consistent limitations will be less confusing for residential subscribers, many of whom may already be familiar with the limitations imposed on telephone solicitations. It will also help to minimize the potential costs and burdens that may be incurred by covered entities since many of them will already have developed effective policies and procedures in order to comply with the requirements of the Telephone Solicitation Rules.

The NIADA does not believe that the duration of an EBR relationship should be limited with respect to business-to-business or association-to-member solicitations. The application of the telemarketing restrictions only to residential phones reflects a policy determination that the expectation of privacy is greater in residences than in businesses. In addition, businesses do not have the same financial constraints with respect to the costs associated with receiving facsimile advertisements and they have the resources necessary to opt-out of receiving facsimiles of unsolicited advertisements if they so choose.

The relationship between trade associations and members is likewise different than the relationship between businesses and residential subscribers. Association/member relationships are not formed based on an "inquiry, application, purchase or transaction," rather they are formed when an individual or business voluntarily completes an application and, in most cases, pays some form of consideration to become a member. Therefore, they would not have the same expectations of privacy as residential subscribers who merely enter into a transaction or make an application or inquiry to a business. Additionally, members of associations benefit by not having limits imposed on the duration of the EBR. Associations frequently send time sensitive information to their members via facsimile, including information regarding legal, legislative and regulatory developments, as well as information pertaining to the Association, upcoming industry events and educational opportunities.

### **3. Notice of Opt-Out Opportunity**

Section 2(c) of the Junk Fax Prevention Act is entitled "Required Notice of Opt-Out Opportunity" and adds language to the Communications Act of 1934 requiring senders of unsolicited facsimile advertisements to include a notice on the first page of the facsimile that informs the recipient of the ability to opt-out of receiving further transmissions. The opt-out notice must be clear and conspicuous and include a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender, as well as a cost-free mechanism for a recipient to transmit an opt-out request. The telephone and facsimile numbers and cost-free mechanism must permit an individual or business to make such a request at any time on any day of the week. With regard to these requirements, the FCC has requested comments on (a) whether it is necessary to set forth in the rules under what circumstances a notice will be considered "clear and conspicuous;" (b) the "shortest reasonable time" within which a sender of unsolicited facsimile advertisements must comply with a request not to receive future facsimile advertisements from the sender; (c) whether to exempt certain classes of small business

senders from the requirement to provide a cost-free mechanism for a recipient to transmit a request not to receive future facsimile advertisements; and (d) whether the FCC needs to enumerate specific “cost-free” mechanisms for a recipient to transmit a do-not-fax request.

a. The “Clear and Conspicuous” Standard Should Remain Flexible for Opt-Out Notices

Section 2(c)(D)(i) of the Junk Fax Prevention Act requires that a notice be “clear and conspicuous and on the first page of the unsolicited advertisement.” The FCC seeks input on whether it is necessary for it to set forth the circumstances under which an opt-out notice is deemed to be “clear and conspicuous.”

The NIADA proposes that the FCC define the term “clear and conspicuous” such that covered entities retain flexibility in determining how best to meet the clear and conspicuous standard, while providing examples of the methods that may be utilized to make notices clear and conspicuous. This approach is consistent with that taken under the Gramm-Leach-Bliley Act (GLB Act), as well as the implementing rules adopted by the Federal Trade Commission. Like the Junk Fax Prevention Act of 2005, the GLB Act is geared toward protecting the privacy of individuals and mandates that consumers be provided with an opportunity to opt-out of having their non-public personal information shared with third parties that are not otherwise entitled to obtain the information pursuant to the Act or by law. Neither the GLB Act nor the FTC’s Privacy Rules mandate that specific form notices be utilized or require the use of any particular technique for making the notices clear and conspicuous. Instead, they provide guidance on how the mandated disclosures should be presented and the types of words that customers have found readily understandable. For instance, the GLB Act and Privacy Rules clarify that information should be presented in clear, concise sentences, paragraphs and sections, the type size and style should be easy to read, and boldface or italics should be used for key words.

While the NIADA would prefer that the FCC not specifically set forth what is necessary for an opt-out disclosure to be “clear and conspicuous,” the NIADA is not necessarily opposed to the FCC providing model notices or adopting a mandated type size requirement, provided that it is geared toward the end goal, which is to ensure that a consumer’s attention is drawn to the notices. The NIADA believes that the use of a type size that is no smaller than the type size of the principal text on the same page, when combined with requirements that the typeface be distinct from other typeface used on the same page and be set apart from other text on the page, accomplishes this goal and would be effective in notifying consumers of their opportunity to opt-out of receiving further unsolicited facsimile advertisements.

If the FCC should decide to provide model opt-out notices or to provide examples of circumstances under which a notice would be considered “clear and conspicuous,” those senders that elect to follow these models or examples should have the benefit of a safe harbor from administrative enforcement actions and consumer and regulatory challenges regarding the notice. Encouraging the use of the format and language of the model notices would benefit both recipients and senders.

b. 30-Days Should Be the “Shortest Reasonable Time” to Comply with Opt-Out Requests

Section 2(c)(D)(ii) states that in order to comply with the Act, the recipient of an unsolicited facsimile advertisement must be able to make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a facsimile machine or

machines and that failure to comply, within the shortest reasonable time, is unlawful. The FCC has requested comment on whether a 30-day limitation is the shortest reasonable period in which a sender should comply with a request not to receive future unsolicited facsimile advertisements. The NIADA agrees that the 30-day limitation is the shortest reasonable period in which to expect senders of unsolicited facsimile advertisements to honor a do-not-fax request. Thirty days is a reasonable time period within which a sender should be able to comply with an opt-out request and having the same time period to honor a request under both the do-not-call and do-not-fax rules help to minimize the potential costs and burdens that may be incurred by covered entities.

c. Small Businesses Should Not be Exempt from the Requirement to Provide Cost Free Mechanisms for a Recipient to Transmit Opt-Out Requests if the FCC Includes the Examples of Cost-Free Mechanisms Proposed

Section 2(c)(D)(iv)(III) of the Junk Fax Prevention Act of 2005 requires an opt-out notice to include a cost-free mechanism for a recipient to transmit a request pursuant to an opt-out notice. The FCC seeks comment on whether to exempt certain classes of small business senders from the requirement to provide a cost-free mechanism for a recipient to transmit a request not to receive future facsimile advertisements. The FCC also seeks comment on whether it needs to enumerate specific "cost-free" mechanisms for a recipient to transmit a do-not-fax request, and if so, what those specific mechanisms should be.

The NIADA believes that would be difficult for the FCC to enumerate all of the possible "cost-free" mechanisms for a recipient to transmit a do-not-fax request. The NIADA requests, however, that the FCC provide illustrative examples of acceptable cost-free mechanisms in the rule and that such examples include: completing the opt-out notice in person at the time of the transaction/inquiry, hand delivering the request to the sender, calling a local or toll-free telephone number, sending the request by mail or to a local or toll-free facsimile number or, if the recipient conducts a transaction or inquiry electronically or otherwise consents to receive communications electronically, via a website or email address. If the FCC includes these examples, the NIADA does not believe that it will be necessary to exempt certain classes of small businesses from the requirement to provide a cost-free mechanism for a recipient to transmit a do-not-fax request. The majority of small businesses will send such advertisements to local recipients and/or to individuals or businesses with whom they have an established business relationship. The above-listed mechanisms should not be unduly burdensome for either recipients wishing to opt-out of receiving faxes or senders, including small businesses. Should the FCC decide to exempt certain classes of small business from the requirement, the NIADA supports the FCC's use of the classifications utilized by the Small Business Administration.

4. **Request to Opt-Out of Future Unsolicited Advertisements**

Section 2(d)(E) of the Junk Fax Prevention Act of 2005 adds language that sets forth when a request not to send future unsolicited facsimile advertisements complies with the Act. It states that the FCC shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirement if the request identifies the phone number of the facsimile machine to which the request relates, the request is made to the telephone or facsimile number of the sender of the unsolicited advertisement or by any other method of communication as determined by the FCC, and the person making the request has not provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements at the telephone facsimile machine. The FCC seeks comment on whether: (a) its rules should reflect that a do-not-fax request terminates the EBR exemption with the sender

of the facsimile even if the recipient continues to do business with the sender; (b) it should specify that if the sender of the advertisement is a third party agent or fax broadcaster that any do-not-fax request sent to that sender will extend to the underlying business on whose behalf the fax is transmitted; (c) a sender should be required to honor an opt-out request made pursuant to a method not specified by the sender in the facsimile advertisement; and (d) whether there are situations in which a consumer that has made a do-not-fax request of a sender subsequently provides express invitation or permission to receive facsimile advertisements from that entity.

a. The FCC's Rules Should Reflect that a Do-Not-Fax Request Terminates the EBR Exemption

The FCC's rules should reflect that a Do-Not-Fax request will terminate the EBR exemption with a sender, even if the recipient continues to do business with the sender. This will ensure that senders understand that when a recipient opts not to receive further advertisements, the EBR no longer applies, regardless of the future business relationship between the parties. Any other interpretation would deny recipients their right to stop receiving unwanted facsimile advertisements simply because they elect to continue a business relationship.

b. If the Sender of an Advertisement is a Third Party Agent or Fax Broadcaster, Any Do-Not-Fax Request Sent to that Sender Should Extend to the Underlying Business on Whose Behalf the Fax is Transmitted

The answer to the FCC's inquiry as to whether it should specify that if the sender of the advertisement is a third party agent or fax broadcaster, any do-not-fax request sent to that sender will extend to the underlying business on whose behalf the fax is transmitted will depend in part on how the FCC elects to define "sender." The FCC noted in the request for comments regarding the "Notice of Opt-Out Opportunity" section that the FCC's rules currently require senders of facsimile messages to identify themselves on the message, along with the telephone number of the sending machine or the business, other entity or individual sending the message and sought comment on the interplay between this identification requirement and the notice requirement for senders of unsolicited facsimile advertisements.

As the FCC points out, the identification and opt-out notice requirements are separate requirements. The NIADA interprets these requirements as mandating that "sender" be defined so as to make clear that while a business on whose behalf faxes are sent is responsible for complying with the Junk Fax Prevention Act and the FCC's rules, a third party who transmits faxes on behalf of the business may be as well.

It is commonplace in the motor vehicle industry for businesses to retain outside marketers to send solicitations on behalf of the business. In many cases, these third parties agree to assume responsibility for creating the solicitations, compiling the list of potential recipients, sending the solicitations, and compiling the list of recipients who opt-out of receiving solicitations in the future. In such instances, both the third party agent or fax broadcaster and the underlying business on whose behalf the fax is transmitted should be required to honor any do-not-fax request as it pertains to further solicitations from that business. Without this rule, third party agents or fax broadcasters may escape both responsibility and liability for their negligent, or even intentional, acts and omissions.

Arguably, issues of responsibility and liability may be negotiated and shifted from one party to another in a contractual agreement between the parties, but the NIADA respectfully suggests

that it was not the intent of Congress when enacting the Junk Fax Prevention Act to relieve entities that transmit faxes on behalf of other businesses from liability under the Act, nor is such an interpretation consistent with the goals of the Telephone Consumer Protection Act. The FCC should have the ability to bring a regulatory action against any entity that engages in the business of and profits from sending unsolicited facsimile advertisements, whether it does so on its own behalf or on behalf of others. It is not overly burdensome to identify both the entity transmitting the fax message and the facsimile machine number from which the message is sent and the name of the business, entity or other individual on whose behalf the message is sent. In many cases the name and facsimile number of the machine from which the message is sent will be automatically transmitted and appear at the top of the message when it prints on the recipient's machine.

c. A Sender Should Not Be Required to Honor an Opt-Out Request Made in a Manner not Specified by the Sender in the Facsimile Advertisement.

As stated above, the NIADA does not believe it is necessary for the FCC to prescribe other methods of communication for making a do-not-fax request other than those required in the notice section, which include a domestic contact telephone and facsimile number and a cost-free mechanism. As to whether senders should be required to honor opt-out requests transmitted by means that are not specified by the sender in the facsimile communication's opt-out notice, the NIADA maintains that they should not. This position is consistent with that taken by Congress in the GLB Act and the Federal Trade Commission in its Privacy Rules implementing the Act. Senders cannot be expected to establish policies and procedures for honoring opt-out requests from every medium possible. In many instances, personnel will be designated to receive such requests and maintain the appropriate records. Given that the Junk Fax Prevention Act and the FCC's rules mandate that a sender include specific information to enable recipients to opt-out of receiving such solicitations in the future, senders should only be required to honor requests that are submitted via one of the designated methods of communication.

d. Senders Should be able to Rely Upon an Oral or Written Invitation or Permission to Receive a Facsimile, But Should also Accept the Burden of Proving Such Permission was Granted

Finally, the FCC has requested input on situations in which a consumer that has made a do-not-fax request and subsequently provides express invitation or permission to receive facsimile advertisements from that entity. In addition to providing written permission, the FCC should recognize that a consumer has a right to provide express invitation or permission to receive facsimile advertisements orally and by other means. The burden of proving that such permission was granted, however, should rest with the sender if a complaint is filed. The NIADA maintains that senders should have the ability to develop policies for recording express invitations or permission to send facsimiles taking into account the type of business the sender engages in and the means by which they communicate with consumers. For example, some businesses may confirm this permission in writing or electronically after a verbal communication is received, while others may simply record the request as part of their do-not-fax communication log. The NIADA does not propose that the FCC specify how the burden of proof be met, but rather requests that it provide illustrative examples of the types of evidence a

sender may wish to obtain and keep in the usual course of its business. The sufficiency of the evidence should be determined on a case-by-case basis.

## 5. Authority to Establish Nonprofit Exception

Section 2(e) of the Junk Fax Prevention Act authorizes the FCC to allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii). The FCC asks whether it should consider exempting such organizations from the notice requirements and, if so, how it should determine whether an unsolicited advertisement is sent "in furtherance of the association's tax exempt purpose".

a. The FCC Should Exercise its Authority to Exempt Professional or Trade Associations from the Opt-Out Notice Requirements with Respect to Faxes Sent in Furtherance of the Organization's Tax-Exempt Purposes

The FCC should exercise its authority to exempt professional or trade associations from the opt-out notice requirements with respect to faxes sent in furtherance of the organization's tax-exempt purposes. For the most part, facsimile solicitations will be sent to the organization's members and the opt-out notices are not necessary to protect members' from being inundated with unwanted faxes. The relationship between trade associations and their members is different in that it is an ongoing relationship that is formed when an individual or business voluntarily completes an application and, in most cases, pays some form of consideration to become a member. Additionally, members of associations often expect, and prefer, to be sent time sensitive information via facsimile, including information regarding legal, legislative and regulatory developments, as well as information pertaining to the Association, upcoming industry events and educational opportunities. One of the easiest and most effective ways to communicate with a large number of contacts is through facsimile transmissions. Those individuals who do not wish to receive faxes will have the opportunity to opt-out of providing fax information at the time of applying for the membership and, upon becoming a member, will have contact information for the association readily available to opt-out at any time. Members could transmit a do-not-fax request by telephone, fax, or electronically. Forcing nonprofit organizations to provide opt-notices to members to whom it sends unsolicited advertisements would be unnecessary and unduly burdensome.

b. Whether or not a Facsimile Advertisement is Sent "In Furtherance of the Association's Tax-exempt Purpose" Should be Determined on a Case-by-Case Basis

Nonprofit associations send a wide array of information to their members and no single definition could encompass every item that may be considered "in furtherance of the association's tax-exempt purpose." Therefore, whether or not a facsimile advertisement is sent in furtherance of an association's tax-exempt purpose should be determined on a case-by-case basis. However, when determining whether or not a facsimile advertisement is in fact sent in furtherance of the association's tax-exempt purpose, the FCC could look to the Internal Revenue Services (IRS) rules and guidelines on unrelated business taxable income for guidance.

## 6. Unsolicited Advertisement

Section 2(g) of the Junk Fax Prevention Act amends section 227(a)(5) of the Communications Act of 1934 by defining an "unsolicited advertisement" as "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, in writing or otherwise." The FCC requested comments regarding the phrase "prior express invitation or permission;" namely, whether other forms of permission should be permitted under the rules in addition to written permission and, if so, whether the facsimile sender should bear the burden of proof to demonstrate that it had the consumer's prior express invitation or permission.

The NIADA's answer to both questions is "yes"- senders should be able to respond to an express invitation or permission to send information via facsimile whether it is given orally, in writing, or by some other means, but they should also assume the burden of proving such permission was granted. If, for example, an individual provides his fax number when completing an application for membership in an association or a consumer takes a vehicle for a test drive and provides his fax number on the test drive agreement, that person can be deemed to have provided an express invitation or permission to have information sent to that fax number. As is more fully explained above, the NIADA does not propose that the FCC specify how a sender meet its burden of proof, but rather requests that it provide illustrative examples of the types of evidence a sender may wish to obtain and keep in the usual course of its business. The sufficiency of the evidence should be determined on a case-by-case basis.

NIADA would like to thank the FCC for the opportunity to comment with respect to its Proposed Rules implementing the Junk Fax Prevention Act of 2005. Any questions the FCC has regarding NIADA's comments and the position taken herein may be directed to NIADA's Legal Counsel, Keith E. Whann or Deanna L. Stockamp, of the Law Firm Whann & Associates located at 6300 Frantz Road, Dublin, Ohio 43017.