

REPLY COMMENTS OF WAYNE G. STRANG, NOTICE OF PROPOSED RULEMAKING (NPRM)
IN THE MATTER OF THE TELEPHONE CONSUMER PROTECTION ACT (TCPA)/ DOCKET
#05-338

Background

I would like to thank the Commission for giving me the opportunity to reply to comments generated by the recent Notice of Proposed Rulemaking (NPRM). This rulemaking process will result in rules and regulations implementing the Junk Fax Prevention Act of 2005 and will have significant impact upon facsimile machines throughout the country.

These comments will take the form of observations and suggestions on each topic the Commission set forth in the NPRM. I would particularly like to comment on the submission of the Office of Advocacy of the Small Business Administration (hereinafter "the Office"). Adoption of their recommendation has the potential to completely eviscerate the junk fax provisions of the TCPA.

Comments of the Office

EXEMPTION FOR SMALL BUSINESSES

The Office, amidst the fluffery, would like the Commission to exempt certain small businesses from the requirement to establish a cost-free method to "opt-out" of junk faxes. The Office developed its position after consulting with numerous small businesses¹. Of course they did not get "the other side of the story", input from consumers who have been victimized by junk faxes for more than a decade.

The Office recommended that the FCC base the definition of "small business" for the purposes of the JFPA using the number of employees as a standard, and not by using the SBA's definition which is based on revenue. The Office then recommends defining a small business, for the purposes of the JFPA, as any business having 100 employees or less. This number was arrived at by equating the \$6.5M in gross revenue used to define a small business based on annual revenue, to the number of employees at such a firm. What resulted is a definition based on revenue. The only difference from basing the definition on number of employees is that the business will remain exempt from certain TCPA requirements no matter how much its revenue grows, so long as it employs 100 people or less. According to the Office's own admission, this would result in 5.6 MILLION firms being exempt from TCPA requirements.²

Should the Commission adopt this position, it would be a windfall for the junk fax industry. Fax.com, the most notorious TCPA violator cited by the FCC, was a small business and could have easily qualified for exemption under this method. **Any** junk faxer could easily comply simply by keeping their payroll under the 100 person limit. Additional positions could be filled by consultants, or a "sister company" could provide some services.

¹ Office of Advocacy comments, page 2 and Note 3

² Comments, page 5

Today's model is for one company to sell the faxing service, another to provide the design services, yet another to do the actual faxing, and another company to receive, and sometimes screen, incoming calls. Which of these companies would need to have less than 100 persons to be exempt from the requirements of the JFPA? How does a consumer identify each of these companies? How do you assign responsibility for the fax? These questions and many more, need to be answered before the Commission exempts small business entities from the rules.

Should the Commission decide to provide such an exemption, it should be based on the **number of faxes sent by or on behalf** of the small business entity. A relatively low number should be selected. For example, the small business exemption would apply only if the small business transmitted less than 1000 advertising faxes per month in total. It should be noted that if only 1% of the small businesses identified by the Office were to send their allotment of faxes under this rule, the result would be 56 MILLION faxes per month.

Another, though poor, alternative would be to limit the exemption to faxes that were **manually dialed**. Admittedly this would be overly cumbersome for those businesses with fairly large customer groups, but the aim of the TCPA is to protect the consumer, not the business.

Of course, the Commission could also make clear that the small business entity may use the facilities of the fax broadcaster for their remove program. Most junkers claim to have this mechanism already in place, and the cost is covered in the purchase price of the service. Of course to be valid, the Commission must require that any cost-free service available must identify³ the broadcaster **and** the particular advertiser the remove request applies to, along with the name of the entity claiming the EBR. The small business, of course, should be held liable for any failure of the broadcaster to comply with the JFPA removal provisions.

Finally, in order to claim the exemption, the fax **must** specifically identify the entity that is claiming the EBR for the purposes of the fax. This should be done in language that is clear⁴, and in a manner that makes it easy for the recipient to locate.

EXPIRATION OF THE ESTABLISHED BUSINESS RELATIONSHIP (EBR)

The Office echoes the false claims of the small business entities they consulted, that even an 18-month/3-month time limit on the expiration of an EBR would be "burdensome".⁵ They claim that because most small businesses don't track inquiries, so it would be difficult to change their systems to do so. This conveniently ignores the fact that they do **not** have to track anything if they don't send advertising faxes, and even then the only time they will have a problem is if one of the people they claim **wants** these faxes containing such valuable

³ "Identify" when used in reference to the identity of an advertiser or sender, means the name of the entity as registered with the State Corporation Commission or equivalent regulatory agency, and the address where the entity is physically located.

⁴ The exact language should be specified by the Commission.

⁵ Office comments, page 7

information, complains. Also, if they are basing they EBR exemption on an inquiry, they must have **by the plain language of the law** have obtained the fax number at the time the inquiry was made. It is then a simple matter to project that date downstream by a certain length of time to determine when that EBR expires.

Not only should the Commission retain a time-limited definition of the EBR, it should **lower** time limit to something that takes into account the efficiency of database use, and the relative pain experience by the consumer that by definition does not want the faxes. A DNF request should be honored within 7-days of receipt. A slightly higher limit may be allowed for DNF requests submitted by mail, but in no case should it exceed 14 days.

CLEAR AND CONSPICUOUS NOTICE

The Office asks the FCC to adopt standards that are reasonable when it comes to the "clear and conspicuous notice" requirements proposed by the Commission.

I concur. However, as noted in my original comments, the Commission **must** specify the exact wording required, a general location on the page, font size and type, and a requirement that the notice must be black on white. This is the only way to ensure that the requirement is met. "Fuzzy" requirements will be stretched beyond recognition by junk faxers. Just as telemarketers stretched the definition of "automatic telephone dialing system" to mean that a dialer operating from a database was permissible, they will stretch whatever rule the Commission establishes in order to evade it.

TIME PERMITTED TO RESPOND TO A DO-NOT-FAX REQUEST

The Office advocates a 30-day time period before a DNF request is required to be honored.

This ignores the fact that if the business is only faxing valuable information to customers that want it, there won't be many DNF requests to process. Because there won't be that many requests, it would be easy to stop faxing **immediately** upon receipt of the request.

The Office also ignores that their definition of a small business would encompass some fax broadcasters that may send **millions** of faxes each day. To accomplish this, the junk faxer uses computer systems to do the transmitting. Faxes are designed and formatted on a computer, a computer dials the fax number from a database, and then transmits the fax when a connection is made.

It would therefore be a simple matter to **immediately** add a do-not-fax request to a DNF database, and add a step that scrubs the "to be called" number against the latest DNF database and orders the software to skip that number if there is a match.

There is absolutely no reason that any entity should take any more than 7 days after receipt to honor a DNF request. The Commission may allow some latitude if a method other than the telephone or fax was used to transmit the DNF request, but in no case should it exceed 14 days.

COST-FREE MECHANISM FOR DO-NOT-FAX REQUESTS

The Office advocates an exemption for small businesses from the JFPA's requirement to establish a cost-free "opt-out" system to prevent future cost-shifted advertising to a consumer. This idea is repugnant to the TCPA's purpose of preventing such cost-shifted advertising.

As earlier noted, the term "small business" is a misnomer leading the reader to believe the business either has very few employees, or has very little gross revenue. This is a patently false impression. Under Small Business Administration guidelines, Fax.com was a "small business". As the Commission is well aware, Fax.com transmitted tens of millions of faxes each year and at one time boasted having a database of over 30 million fax numbers with the capacity to transmit 3 million faxes per day. Clearly, exempting such a business from the requirement to maintain and honor do-not-fax requests would eviscerate the meager protections Congress has left for the consumer.

Further, should the Commission adopt this ill-advised exemption, there will be **no way to stop junk faxes illegally transmitted outside of an EBR** and originated by a small business, even if they are eventually transmitted to hundreds of thousands of consumers by a large business.

By what mechanism would a consumer revoke express permission that had been previously granted? For example, a homeowner may specifically request that his real estate agent fax him synopses of different homes available. Once he purchases a home, he cannot rescind the permission because the realtor, as a small business, is exempt from the requirement to have a mechanism to "opt-out". The only way to solve this problem is to require **all** small businesses to establish and maintain do-not-fax lists, and honor do-not-fax requests. This **may** be accomplished by a third party, such as a fax broadcaster, but the small business must understand that it is ultimately liable for do-not-fax violations.

Finally, businesses no matter what size should **not** be allowed to choose their own cost-free method of accepting do-not-fax requests. The Commission should establish a list of acceptable methods and the **consumer** should choose which method to use. The Commission needs to understand that it is the public's fax machines that are being invaded by the advertiser. The public is not invading the property of the advertiser. As noted earlier, the Commission may wish to establish slightly longer periods before a do-not-fax request must be honored if the consumer mails his/her request. Other than that there should be no difference in the process no matter the size of the business.

EXEMPTION FOR NONPROFITS

There should be **no** exemption for nonprofit entities. As many commenters have noted, members of these organizations may indicate their desire to receive faxed advertising when they establish or renew their membership. If, as the Office and many other groups insist, these faxes are wanted by the members, there will be no requests to stop faxing, therefore no burden on the nonprofits. Requiring members

to continue receiving unwanted faxes, or to pay for the "privilege" of not receiving them would be unfair to the member.

As the Commission well knows, many "legitimate" nonprofits have been established solely for the purpose of taking advantage of the current exemption for prerecorded messages that was wrongfully established by the Commission in 1992. These tax-exempt, nonprofits were set-up to shill for for-profit company's, most notably debt consolidation and home mortgage lenders.⁶ When consumers choose to take action in court, they claim that because the call was made by a tax-exempt, nonprofit organization the call is exempt from the FCC regulations.

If the Commission chooses to adopt this onerous exemption it must be made clear that it applies only to faxes soliciting donations for a cause and not to those sent for any other purpose.⁷

Other Entity's Comments

The industry comments in general seem to coalesce around certain ideas and most submissions are self-contradictory.

They also cite several ways that members of the industry use their fax capabilities, most of which are completely lawful under the original TCPA. Their unjustified cries of "wolf" however, gained the attention of Congress and the JFPA was born. Now the Commission seeks to implement the new law and in doing so should consider the source when evaluating the various comments submitted.

EXPIRATION OF THE EBR

The industry would like to see the 18-month/3-month duration of a forced expiration of the EBR currently applied to other forms of telemarketing, retained. Several, however, support the ridiculous notion that the EBR should have no expiration unless someone complains.⁸ This proposal ignores the fact that these advertisers are in effect charging consumers for the "privilege" of being solicited. It also ignores plausible "wrong number" scenarios where the beleaguered recipient will not be able to complain.

They do not acknowledge that they may be dialing a wrong number, and the recipient of their fax cannot issue a do-not-fax request. What do they do if the number has "turned over" and is now a voice line? Will they continue faxing ad infinitum subjecting the called party to

⁶ The reverse is also true with for-profit companies being set up solely to solicit for a "nonprofit" company. See Utah Division of Consumer Protection v. Flagship Capital, --- P.3d ---, 2005 TCPA Rep. 1395, 2005 WL 2978928 (Utah Nov. 8, 2005) (Reversal) The for-profit company then claims exemption because it was soliciting for a nonprofit.

⁷ The plain language of the TCPA allows for autodialed or prerecorded calls to a residential telephone line only if those calls do not contain an unsolicited advertisement. Congress allowed exemption of tax-exempt, nonprofit organizations only in the definition of telephone solicitations.

⁸ See e.g. Reed Elsevier comments at page 6, American Community Bankers comments at page 2

picking up the phone to hear fax tones? What if they enter the number in their database incorrectly? What if one of their "customers" gives them a bad fax number, either accidentally or otherwise?

VERIFICATION THAT A FAX NUMBER HAS BEEN VOLUNTARILY SUPPLIED

One commenter, Countrywide Home Loans, even advocates not verifying that a fax number has been voluntarily supplied⁹. Thus they could obtain a number from the internet and engage in the practice of "fax first, then find an excuse" that is widely used in the industry.¹⁰

Another, American Business Media, also sees no reason for verification because, "...at worst, [a "bad guess" by a faxer] will cause the recipient to receive a single fax before opting out if additional faxes are unwanted."¹¹ The fallacy of this position of course, is that they assume all the numbers on their calling list belong to members of their association. This is a patently false assumption. As the Commission itself has noted, "The length of time that [DNC database] registrations remain valid also directly affects the accuracy of the registry **as telephone numbers change hands over time.**" [emphasis added] Thus "fax to" lists become stale over time, increasing the chances that a subscriber's voice line will be dialed. Since that consumer does not receive the fax, they have no way of contacting the sender to get them to stop calling. ABM's innocent "single fax" becomes an ongoing source of annoyance.

The above also assumes that the faxing is legitimate in the first place. The vast majority of advertising faxes in this country are sent by fax blasters who tend to fold up their tent and go away when it gets too hot for them. Another significant number are those like 1 Home Lending, Inc. (which Countrywide Home Loans supports in their unwanted, prerecorded ad campaigns), that engage in a "blast first, manufacture exemption later" policy.

30-DAY "GRACE PERIOD"

The industry is almost monolithic in its support of a 30-day "grace period" before a do-not-fax request must be honored. This is patently absurd.

As noted on many occasions, junk faxing by its very nature is a completely automated process. It should also be stated that if circumstances are as these people represent to the Commission, that these faxes provide "legitimate and crucial business communications"¹², there will be no calls for removal and therefore no burden. In addition, the vast majority of these faxes are actually transmitted by fax broadcasters. The advertiser could use the broadcaster's removal

⁹ Countrywide Home Loans comments, second unnumbered page.

¹⁰ Notably, Countrywide has in the past assisted a mortgage broker in evading the TCPA by furnishing the broker with a letter saying they had an "affiliation" because the broker occasionally placed loans with them.

¹¹ ABM comments at page 7

¹² Reed Elsevier comments at page 6

services, provided they are also held liable for any TCPA violations committed by the broadcaster.

The Commission should not be buffaloed by these comments. There is no earthly reason a company cannot respond to a do-not-fax request within 7-days (5 business days)¹³ or sooner. In some instances, the request could be entered immediately. They will experience a one time charge to develop the software, but there is no continuing burden on them if a short "grace period" is adopted.

SPECIFICITY OF REMOVE REQUESTS

Countrywide, attempting to set the hook, encourages the Commission to require that an "opt-out" request contain each and every individual number the recipient wishes to "opt-out" from receiving their trash. Adopting this suggestion would be insane. Countrywide would be able to fax each and every fax machine at General Motors for example, and not have to stop even after GM made it clear that they didn't want **any** faxes. Entities should be able to "opt-out" fax numbers by specifying a block of numbers.

Several commenters also request that the Commission not require any specific manner of including the required "do-not-fax" information on the fax. This preposterous request if granted, would open the door to "opt-out" information that was completely unreadable or difficult to find. The Commission should specify the exact language, font, size, contrast, and location of the information. The location should parallel current practice and be required either on the first page of the fax, excluding the cover sheet, or on all pages of the fax.

Conclusion

Most industry commenters wail that it's a minority of faxers that cause the problem. That may be true, but **that is also the problem that the Commission has primary responsibility to address.** The vast majority of unwanted advertising faxes are transmitted by a few bad apples. It is the Commission's mandate to address the majority of unwanted faxes, not to satisfy the majority of faxers. The Commission must not bow to the cries and false representations of the industry.

The Commission must also recall that it is the **transmission of the fax**¹⁴ that triggers the private right of action in the TCPA. The rules should therefore reflect that reality and make absolutely clear that a consumer has a right of action against the sender even if no fax is received. A consumer receiving fax calls on a voice line could identify the sender by some means, most likely by temporarily attaching a fax machine to the line, and prosecute a TCPA violation against that advertiser/sender.

The JFPA was enacted to give legitimate businesses some leeway in faxing their existing customer base. It was not enacted to establish "safe havens" or to relax requirements so that junk faxers find it easier to evade the TCPA. Included with that leeway is a

¹³ As I have previously suggested, a slightly longer period may be justifiable for mailed requests.

¹⁴ 47 USC 227(b)(1)(C)

responsibility to ensure that it is **only** their customer base that they fax to. They must therefore establish procedures that verify they are faxing the right numbers, and periodically review their fax lists for accuracy. They must honor a do-not-fax request in an absolute minimum period of time. The "opt-out" notice given to consumers **must** be specified by the Commission and must be exact in its wording, placement, font size and contrast. There should be an expiration date, not to exceed 3-months under any circumstances, for the EBR exemption.

The Commission should not be lulled into a sense of security by the statements of the industry. Time and again they have proven that they cannot police themselves and will evade, or outright flout, the law at every opportunity. If the industry was able to police themselves there would have been no need for the TCPA, the FTC's TSR, the national do-not-call database, and even for the JFPA. The industry is simple incapable of acting responsibly.

Finally, as noted by American Business Media, "Only effective enforcement will solve the problem of unwanted faxes."¹⁵ This will not be accomplished by establishing **any** "safe harbors" that will shield unscrupulous faxers from liability. Apart from the EBR itself, the Commission should not tell the industry, "If you do this, you may advertise by fax". The Commission must tell the industry, "If you advertise by fax, you might not be liable if..." The Commission should also stop mollycoddling previously cited entities such as 1 Home Lending, Inc. When complaints are received after a citation has been issued, forfeitures should follow in short order when complaints are received.

This is the only way the TCPA will be an effective deterrent to these hated advertising methods.

Wayne G. Strang

¹⁵ ABM comments at page 4