

**Before the
Federal Communications Commission
Washington, D.C. 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
)	
To: The Commission		

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

I. Introduction.

The National Association of Broadcasters (“NAB”)¹ submits these reply comments in response the Commission’s *Notice of Proposed Rulemaking*² to establish regulations implementing the Junk Fax Prevention Act of 2005 (“JFPA”). The JFPA, enacted on July 9, 2005,³ amended the Telephone Consumer Protection Act (“TCPA”) and the Communications Act to expressly permit the transmission of unsolicited facsimile advertisements to persons with whom the sender has an “established business

¹ NAB is a nonprofit, incorporated association of radio and television stations and networks that serves and represents the American broadcasting industry.

² In the Matter of Junk Fax Prevention Act of 2005, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Notice of Proposed Rulemaking*, CG Docket Nos. 02-278 and 05-338, rel. Dec. 9, 2005 (“*Notice*”).

³ Pub. L. No. 109-21, codified at section 227 of the Communications Act of 1934, 47 U.S.C. § 227.

relationship” (“EBR”).⁴ As discussed below, NAB urges the Commission to (1) refrain from enacting regulations that eviscerate Congress’ intent to permit EBR facsimile transmissions as a normal course of business, and (2) exempt from regulation unsolicited facsimile advertisements sent from non-profit professional or trade associations to their members.

II. The Commission Should Not Adopt Regulations That Undermine The EBR.

Business-to-business faxes are an integral part of everyday commerce in the United States and an everyday part of broadcasters’ normal course of operations with advertisers and other clients. NAB therefore wholly supports the Commission’s proposal to remove section 64.1200(a)(3)(i) of the Commission’s rules, which currently requires fax senders to obtain a signed, written statement from the facsimile recipients with whom they already have an EBR indicating their consent to receive faxed messages. The proposed change comports with Congress’ express recognition of an EBR exemption.⁵ NAB, however, shares the concerns of numerous commenters that many of the Commission’s additional proposed regulations may undermine the EBR exemption.⁶

⁴ Previously, the Commission recognized the EBR exception for its regulation of unsolicited faxes. *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 FCC Rcd 8752 at ¶ 54 (1992)*. However, in 2003, the Commission reversed its prior conclusion that an EBR provides companies with the necessary express permission to send facsimile advertisements to their customers. *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 2001, Report and Order, 18 FCC Rcd 14014 at ¶¶ 189-91 (2003)*.

⁵ *See* Section (2)(a) of the JFPA, amending Section 227(b)(1)(C) of the TCPA by adding an EBR exemption to the prohibition on sending unsolicited facsimile advertisements.

⁶ *See, e.g., In the Matter of Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991, Comments of Consumer Bankers Association, CG Docket Nos. 02-278 and 05-338, Jan. 18, 2006 at 4-6 (“Consumer Bankers Association Comments”); In the Matter of Rules and Regulations Implementing The Telephone*

NAB agrees with Consumer Bankers Association that senders of facsimiles “should not be required to investigate how publishers of fax numbers obtained” those numbers because such a requirement is extremely burdensome to businesses, requires extensive recordkeeping and will likely yield very little commensurate benefit.⁷ Consumer Bankers Association Comments at 5.⁸ Instead, there should be a presumption that an EBR existed prior to the JFPA’s enactment date (July 9, 2005) unless the recipient provides evidence that rebuts the existence of the EBR. This approach is consistent with Congress’ intent that the Commission not insist on new recordkeeping or evidence not required under the Commission’s previous version of the EBR.⁹

Further, NAB supports the National Association of Realtors’ proposal that a facsimile number obtained by a sender from a “publicly available source is presumed to be provided ‘voluntarily’ if the sender has a legitimate basis to believe that the public

Consumer Protection Act of 1991, *Comments of American Road & Transportation Builders Association*, CG Docket Nos. 02-278 and 05-338, Jan. 18, 2006 at 2-5; In the Matter of Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991, *Comments of Staples, Inc.*, CG Docket Nos. 02-278 and 05-338, Jan. 18, 2006 at 2-4 (“Staples Comments”).

⁷ To avail oneself of the EBR provisions, a sender must have “obtained the number of the [recipient’s] telephone facsimile machine through ... the voluntary communication of such number, within the context of such established business relationship or ... a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make its facsimile number available for public distribution.” *Notice* at ¶ 8 (*citing* section 2(a) of the JFPA).

⁸ *See also* Staples Comments at 2-3 (noting “it is unlikely that either a sender or a recipient will be able to produce paper records documenting the date on which a fax number was obtained or provided”).

⁹ *See* S. Rep. No. 109-76, at 6 (2005).

source obtained these numbers voluntarily.”¹⁰ This proposal is practical because it allows senders to rely on facsimile numbers obtained by public sources, rather than imposing substantial costs on businesses to independently access whether a facsimile number was voluntarily obtained.

Additionally, NAB urges the Commission to refrain from establishing duration limits for the EBR exemption. The Commission proposes to limit the duration to 18 months following a purchase or transaction and three months after an inquiry. *See Notice* at ¶ 16. However, as the Office of Advocacy, U.S. Small Business Administration points out, the Commission is required by the JFPA to limit the EBR exemption only if it has first, among other things, determined that the EBR exemption resulted in a significant number of complaints, and has conducted a cost/benefit evaluation of the EBR.¹¹ Because the *Notice* provides no such analysis, any regulation governing EBR time limits is premature.

In lieu of additional regulations governing the EBR, NAB agrees with the National Association of Realtors¹² that the Commission should instead affirmatively uphold Congress’ stated intent for enacting the JFPA:

The purpose of this legislation is *to preserve the established business relationship exception currently recognized under the TCPA ... We*

¹⁰ In the Matter of Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991, *Comments of the National Association of Realtors*, CG Docket Nos. 02-278 and 05-338, Jan. 18, 2006 at 4 (“National Association of Realtors Comments”).

¹¹ *See* In the Matter of Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991, *Comments of Office of Advocacy, U.S. Small Business Administration*, CG Docket Nos. 02-278 and 05-338, Jan. 18, 2006 at 5-7 (“U.S. Small Business Administration Comments”).

¹² National Association of Realtors Comments at 2-3.

believe that this bipartisan bill strikes the appropriate balance in providing significant protections for consumers from unwanted unsolicited fax advertisements and *preserves the many benefits that result from legitimate fax communications*.¹³

Thus, to ensure that legitimate business facsimile practices can continue under the recently enacted JFPA, the Commission should both refrain from imposing unreasonable restrictions on legitimate communications between businesses and their customers, and clarify that communications covered by the EBR are exempt from unsolicited facsimile restrictions as expressly contemplated by Congress.

III. The Commission Should Exempt From Its Do-Not-Fax Regulations Nonprofit Professional Or Trade Associations.

In addition to communications sent by businesses to their consumers, NAB agrees with several commenters that the Commission should exempt nonprofit professional or trade associations from the opt-out notice requirement for facsimiles sent to their members.¹⁴ As the Commission itself notes, section 2(e) of the JFPA authorizes the Commission to consider exempting nonprofit organizations from opt-out notice requirements. *Notice* at ¶ 26. Such an exemption is appropriate because trade associations are in constant communication with their members, providing information on publications, programs, activities, meetings and conventions, as well as other member-

¹³ 151 Cong. Rec. S3280-01 (daily ed. Apr. 6, 2005) (statement of Sen. Smith) (emphasis added).

¹⁴ *See* In the Matter of Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991, *Joint Comments of the Named State Broadcasters Associations*, CG Docket Nos. 02-278 and 05-338, Jan. 18, 2006 at 2-6 (“State Broadcasters Associations”); National Association of Realtors Comments at 14-15; U.S. Small Business Administration Comments at 9; In the Matter of Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991, *Comments of the American Society of Association Executives*, CG Docket Nos. 02-278 and 05-338, Jan. 18, 2006 at 3-4 (“ASAE Comments”).

oriented benefits. Individuals and members that pay dues or fees to professional or trade associations expect regular communications from their associations, and readily have means to communicate with their associations should they no longer wish to receive faxed information. In fact, it is the very nature of an association to be responsive to the needs of its membership – paramount among these needs is communicating with membership through their preferred channel of communication (*i.e.*, email, facsimile, phone, or mail). Thus, an opt-out provision for nonprofit association members is unnecessary.

Not only are they unnecessary, the opt-out provision may hinder efficient communications between associations and their members. Specifically, opt-out provisions on regular facsimile correspondence to membership impose additional transaction costs on associations as the length of facsimiles increases to accommodate the opt-out notice, and could create confusion to members that may assume that any correspondence containing such notice is a “junk fax.” *See* State Broadcasters Associations Comments at 6-8.

In addition to providing an opt-out exemption for nonprofit association facsimiles, the Commission should further streamline its regulations. NAB agrees with ASAE that membership to a nonprofit association constitutes “prior express invitation or permission,” thereby making all of the JFPA’s do-not-fax provisions inapplicable. ASAE Comments at 2. NAB thus urges the Commission to exempt nonprofit trade and professional organizations in the same manner as their telephone solicitations are exempted under the TCPA. *See* 47 U.S.C. § 227. Such an exemption would provide regulatory certainty and continuity to trade associations that communicate both by

telephone and faxed communications to their membership as a normal course of doing business.

IV. Conclusion.

For the above-stated reasons, the Commission should not unreasonably limit the EBR exemption by imposing burdensome recordkeeping requirements or prematurely defining EBR time limits. Further, the Commission should expressly exempt from its rules, including the opt-out notice, facsimile communications sent by nonprofit professional or trade associations to their membership.

Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**

1771 N Street, NW
Washington, DC 20036
(202) 429-5430



Marsha J. MacBride
Jane E. Mago
Jerianne Timmerman
Ann West Bobeck

Michael Saperstein
NAB Law Clerk

February 2, 2006