

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

REPLY COMMENTS OF EVERETT LABORATORIES, INC.

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Everett Laboratories, Inc., (“Everett”) submits these Reply Comments to the Opening Comments filed in response to the Notice of Proposed Rulemaking (“NPRM”)¹ released December 19, 2005, in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY OF ARGUMENTS

As indicated in its Opening Comments, Everett is a small pharmaceutical company based in New Jersey that develops, markets and sells various prescription-only nutritional supplements throughout the United States. Like other pharmaceutical companies, Everett has used fax machines to alert and educate medical professionals about its prescription products. Everett recognizes the Federal Communication Commission’s (“Commission” or “FCC”) interest in adopting balanced, fair and equitable regulations, and therefore files the following Reply Comments that propose

¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 02-278, 05-338, *Notice of Proposed Rulemaking*, 70 Fed. Reg. 75,102 (rel. Dec. 19, 2005) (“NPRM”).

ways in which the Junk Fax Prevention Act (the “Act”)² can be implemented in a manner that protects both businesses and consumers. Everett begins by opposing the few comments that advocate a heavy-handed anti-business approach to this rulemaking. Everett continues by endorsing proposed methods through which the Commission can protect small businesses, given its limited flexibility to implement the Act. Next, Everett urges the Commission to follow the procedural requirements mandated by Congress prior to enacting the rulemaking process. Everett follows these arguments by suggesting that the Commission refrain from unnecessarily defining terms contained in the Act, given the disparate businesses that operate under its purview. Finally, Everett asks the Commission to clarify that federal action in this arena preempts action on behalf of the states.

II. THE COMMISSION MUST BALANCE THE INTERESTS OF CONSUMERS AND BUSINESSES

While a few parties submitted Opening Comments describing the annoyance and expense associated with the receipt of unwanted faxes,³ the vast majority of the Opening Comments echoed the concerns expressed by Everett. These comments point to the dangers of over-regulating and the potential for profiteering and abuse by individuals or groups seeking to use the Act for improper gain. Parties that flatly oppose the use of fax

² Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005) (the “Act”). The Junk Fax Prevention Act was signed into law on July 9, 2005.

³ See McKenna Comments at p. 2 (“I estimate that several thousand dollars of fax supplies are non-consensually destroyed each and every day in my community. Multiply that by every community across the Untied States, and we’re talking about many millions, likely billions, of dollars in destroyed property, every year, as part of a scourge of automated abuse of the telephone network and equipment attached hereto); *see also* Before the Federal Communications Commission, CC Docket No. 05-338, *Comments of Jimmy A. Sutton* (Jan. 12, 2006) (“Sutton Comments”); Before the Federal Communications Commission, CC Docket No. 05-338, *Comments of Wayne G. Strang* (Jan. 6, 2006) (“Strang Comments”) and Before the Federal Communications Commission, CC Docket No. 05-338, *Comments of Robert Biggerstaff* (Jan. 9, 2006).

transmissions as legitimate business measures⁴ vastly overstate their arguments and too bluntly and heatedly⁵ attempt to solve a delicate problem that has potentially dire consequences for small businesses. Though some of these parties raise valid concerns, the methods through which they propose the Commission respond to them are infeasible and often outside the scope of the Commission's mandate.⁶ Everett urges the Commission to assess these comments carefully and create solutions to these problems that protect both consumers and businesses.

For instance, several parties claim that businesses transmit faxes and then attempt to cobble together an established business relationship ("EBR")⁷ after the recipient files a complaint regarding the unwanted fax. Everett questions the unscientific nature of the data offered in support of this claim.⁸ However, should this practice occur, the Commission is able to provide for these situations on a case-by-case basis that protects businesses' ability to stay connected with their relevant markets. As written, the Act provides an ample remedy for people who have received junk faxes and the opt-out mechanism enables them to avoid receipt of additional unwanted faxes.

Some parties claim that they regularly receive multiple faxes from a handful of "spoof" entities, yet simultaneously complain that they are unable to maintain records of

⁴ Examples of legitimate business uses are detailed in the Opening Comments filed by the National Association of Wholesaler Distributors. *See* Before the Federal Communications Commission, CC Docket No. 05-338, *Comments of the National Wholesaler-Distributors* (Jan. 18, 2006) at p. 3 ("NWD Comments").

⁵ Although it opposes the untargeted and unnecessarily wide dissemination of faxes used by so-called "spoofers," Everett finds little basis for the assertion that entities who transmit unwanted faxes have committed trespass or conversion (*see* Sutton Comments), or that unwanted faxes result in constant violations of a company's inherent rights (*see* Before the Federal Communications Commission, CC Docket No. 05-338, *Comments of Douglas M. McKenna Concerning Implementation of the Junk Fax Prevention Act of 2005* (Jan. 9, 2006) ("McKenna Comments").

⁶ For instance, one party suggested that "the Commission use words of no more than two syllables so that the industry cannot pervert their meaning." Strang Comments at p. 2.

⁷ Codified in the Junk Fax Prevention Act, at note 2.

⁸ *See, e.g.*, Sutton Comments, McKenna Comments.

the entities that send them fax transmissions because the volume of records to maintain would be too great.⁹ These parties fail to appreciate that, in virtually every circumstance, business practicalities prevent legitimate enterprises from repeatedly contacting customers in such an individualized manner. Because unwanted faxes are likely rare and easily spotted, and the recipient has an “opt-out” option and a statutory remedy, Everett again urges the Commission to leave the burden of tracking this contact with the fax recipient.

III. THE COMMISSION SHOULD PROTECT SMALL BUSINESSES

A. Business-to-Business Communications Should Be Permitted

Many of the Opening Comments weighed strongly against over-regulating business-to-business communications. Everett shares this view. Business-to-business communication enables countless industries to achieve higher levels of profitability, efficiency and innovation. Such communication is particularly important to small businesses, which comprise the majority of the American economy.¹⁰ Small businesses often rely on fax transmissions to further their businesses. Preventing small businesses from using this method will impede their abilities to succeed in the competitive marketplace, as larger-scale forms of communication (such as television advertisements or local sales representatives) are infeasible for entities with limited means and budgets.

The excessive regulation of business-to-business fax transmissions are especially dangerous when applied to industries that promote the health, education and welfare of the American public. Many of the Opening Comments submitted to the Commission

⁹ See, e.g., McKenna Comments, Strang Comments, Sutton Comments.

¹⁰ The Small Business Administration states that small businesses employ more than half of the American workforce. See the Small Business Administration’s Small Business Statistics, <http://www.sba.gov/aboutsba/sbastats.html>.

describe the manner in which health care providers, educational service providers, news services, transportation providers, banks and employment agencies will be negatively affected by the Act. Provisions in the Act could be read to prevent these entities from contacting members of trade groups or industries directly related to their products. In turn, potentially interested parties will remain uninformed about important industry break-throughs and safety-enhancing product improvements. As multiple parties noted, most industry groups are attempting to build long-lasting and mutually beneficial relationships with closely related entities, and therefore have built-in incentives not to “blast fax” broadly and indiscriminately.¹¹

While Congress protected business interests by softening the impact of the EBR in the Act, businesses need more flexibility to continue to operate and succeed. The Commission can protect consumer privacy while simultaneously permitting businesses to conduct operations as they have for years. By interpreting Congress’ language to include a limited business-to-business exception, the Commission more adequately balances Congress’ intended protection of both consumers and businesses. The Commission should implement the Act in a way that allows businesses to continue relying on faxes as a meaning of communication channels while protecting consumers from unwanted faxes in their homes.¹²

¹¹ Rather, as many parties noted, entities who widely and indiscriminately transmit fax messages routinely “spoof” their recipients – that is, they purposely and effectively mask their business names and contact information so that recipients are unable to opt out of future communications. Everett and similarly situated companies do precisely the opposite: because they have limited budgets and because they hope to create lasting and profitable relationships with fax recipients, they narrowly target their recipients and include prominently the companies’ names and contact information.

¹² These concerns are exacerbated by the fact that, in some states, class action lawsuits can be filed against businesses that send fax transmissions potential or actual customers. The Commission should prevent claimants, most of whom received one or two faxes from sending entities, to file spurious and malicious joint claims that easily bankrupt small businesses. Instead, the Commission should preempt state action in this area by clarifying that the individual remedies outlined by Congress are exclusive. See, e.g., Before the Federal Communications Commission, CC Docket No. 05-338, *Comments of The American Hotel &*

The Commission stringently regulates phone solicitation in residential situations.¹³ Businesses, however, can use the telephone to initiate and strengthen contacts with potential and actual business customers. The Commission should recognize that this necessary and routine contact often occurs via fax in many industries. The Commission should therefore enlarge the EBR exception to accommodate this type of commercial contact.

Because the Commission has not published complaints it has received under the Act,¹⁴ neither consumers nor businesses are able to address accurately or precisely the issues raised in any such objections. Congress also lacked information regarding complaints received about the EBR definition, and therefore declined to place a time limit on the EBR.¹⁵

The Commission should follow Congress' lead and decline to place a time limit on the EBR, unless and until it completes the procedures outlined in Section IV, below. Everett agrees with the American Road and Transportation Builders Association, America's Community Bankers, the National Multi Housing Council and National Apartment Association, and the American Hotel and Lodging Association, among others, that eloquently raise this point.

Congress urges the Commission to consider the Small Business Administration's concerns if it decides to limit the EBR by imposing an expiration period. As the Small Business Administration indicated, attempting to uniformly classify entities sending faxes

Lodging Association (Jan. 18, 2005); Before the Federal Communications Commission, CC Docket No. 05-338, *Comments of The Housing Policy Council of the Financial Service Roundtable* (Jan. 18, 2006); Before the Federal Communications Commission, CC Docket No. 05-338, *Comments of the Securities Industry Association* (Jan. 18, 2006).

¹³ See Before the Federal Communications Commission, CG Docket No. 02-278, FCC 03-153, *Report and Order* (June 26, 2003).

¹⁴ See procedural argument at Section IV, *infra*.

¹⁵ See Act, *supra* note 2; NPRM, *supra* note 1.

would be difficult administratively.¹⁶ Because these entities operate in different environments under different timeframes, a single time limit will not address their needs.

B. Small Businesses Should Not Be Subjected to Onerous Record-Keeping or Burden of Proof Requirements

As Everett stated in its Opening Comments, placing the burden on small businesses to maintain records of past communication with interested parties and customers would be unnecessarily burdensome and expensive. Furthermore, requiring businesses to vouch for the creation methods of contact lists is logistically and practically impossible and will likely chill the creation of such lists. Many of these lists have substantial economic and social value. Several parties noted that people join industry groups largely to gain access to programs, products and services.¹⁷ The Commission should not interfere unnecessarily with the creation and success of these relationships. In addition, the burden for proving the creation methods of contact lists clearly must rest with the entity that actually creates and often profits from their use. Everett urges the Commission to follow Everett's comments on these issues, as well as those of the International Foodservice Distributors Association, the Newspaper Association of America, and the Mortgage Finance Coalition.

IV. THE FCC MUST FOLLOW THE PROCEDURES REQUIRED BY CONGRESS IN SUBSECTION (f) OF THE ACT

Prior to proposing any changes to the definition of EBR, the Commission

¹⁶ See Before the Federal Communications Commission, CC Docket No. 05-338, *Comments of The Small Business Administration*.

¹⁷ See Before the Federal Communications Commission, CC Docket No. 05-338, *Comments of Lorman Education Services* (Jan. 18, 2006) at p. 5 ("Lorman's customers came to rely upon these facsimile transmissions to make them aware of useful new seminars offered . . ."); Before the Federal Communications Commission, CC Docket No. 05-338, *ACA International Comment Regarding the Junk Fax Prevention Act of 2005 Proposed Rule* (Jan. 18, 2006); Before the Federal Communications Commission, CC Docket No. 05-338, *The Society for Human Resource Management* (Jan. 18, 2006).

must first show that the EBR has resulted in a “significant number of complaints” to the Commission.¹⁸ Everett is unaware of any complaints that have been filed, and the Commission has failed to make the results of any evaluation it has undertaken public. The Opening Comments filed with the Commission clearly illustrate the difficulty businesses have with the current implementation. Everett joins other concerned small businesses in requesting that the Commission follow the protocol mandated by Congress by undertaking a review of the complaints received about the EBR definition prior to initiating rulemaking on the issue. Like other parties, Everett feels that currently there is no clear connection between the EBR definition and the issue of unsolicited faxes; if anything, the current definition unnecessarily restricts communications between legitimate businesses and potential customers.¹⁹ Should the Commission have determined otherwise, Everett urges it to present its reasoning and relevant data to the public so that a solution balancing consumer and business interests can be reached.

V. THE COMMISSION SHOULD DECLINE TO OVER-DEFINE TERMS IN THE ACT

In several instances, the Commission sought comment on whether it should define various terms that will bind parties under the Act.²⁰ Everett encourages the Commission to accept the approach advocated by several commenting parties, including Everett, the National Association of Realtors, ACA International, and the Consumer Bankers Association. As Everett and these parties stated in their Opening Comments, the

¹⁸ Act at §§ 2(b) and 2(f).

¹⁹ This is true despite numerous comments from individuals and small businesses claiming to have been “spoofed.” *See supra* note 10; *see also* Before the Federal Communications Commission, CC Docket No. 05-338, *Verizon’s Comments on Proposed Rules Implementing the Junk Fax Prevention Act of 2005* (Jan. 16, 2006) (ways businesses are attempting to curb junk faxes (while simultaneously using faxes to promote their own businesses products)).

²⁰ NPRM at p. 10.

relationships between businesses, customers and potentially interested entities are subjective and industry-specific. Any attempt by the Commission to define the terms governing these relationships will result in confusion while failing to solve the problem of junk faxes.

Instead, as many parties suggested, the Commission should consider enforcing the forfeiture options currently in place to stop the “spoofers” that aggravate recipients.²¹ As one party stated, “Congress clearly intends for this Commission to pursue abusers of the fax machine, not legitimate business users.”²²

VI. THE COMMISSION SHOULD ACKNOWLEDGE THAT STATES CANNOT REGULATE FAX TRANSMISSIONS

Everett strongly urges the Commission to acknowledge explicitly that the Act preempts state action attempting to regulate fax transmissions. Congress’ intent to regulate cohesively the arena of interstate and intrastate fax transmissions is clear through the overarching goal of the Act. Moreover, the Commission can protect small businesses that lack sophisticated legal monitors by eliminating the possibility of unnecessarily confusing and potentially conflicting state legislation. As one party commented, “Allowing efforts by states to limit commercial facsimile communications would prove to be prohibitively costly and confusing for small businesses while rendering Federal law

²¹ As the National Newspaper Association and the Newspaper Association of America stated, the Commission receives about 1,500 complaints per month alleging egregious junk fax violations. However, Bureau Chief Dane Snowden testified that it has issued only 233 citations out of roughly 75,000 complaints over four years. In addition, the Commission has yet to collect on the citations it issues, including one for \$5.4 million. See Before the Federal Communications Commission, CC Docket No. 05-338, *Comments of the National Newspaper Association and Newspaper Association of America* (Jan. 18, 2005) at p. 4 (“NNA Comments”); see also Before the Federal Communications Commission, CC Docket No. 05-338, *Comments of Harold Holocaine* (Jan. 17, 2005).

²² NNA Comments at p. 3.

ineffectual.”²³ Everett supports these comments of the American Hotel and Lodging Association, as well as those of the Securities Industry Association, the Housing Policy Council, and Coastal Training Technologies Association.

VII. CONCLUSION

Everett urges the Commission to once again consider the beneficial and necessary ways that fax transmissions keep businesses and business consumers connected. Everett respectfully requests that the Commission address and protect the needs of businesses – particularly small businesses – as it adopts regulations implementing the Act.

Respectfully Submitted,

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²³ See Before the Federal Communications Commission, CC Docket No. 05-338, *Comments of the American Hotel and Lodging Association*, (Jan. 18, 2005) at p. 3.