



Office of Advocacy
U.S. Small Business Administration
409 Third St., S.W.
Washington, DC 20416

March 14, 2006

Via Electronic Filing

Marlene Dortch
Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

Re: Notice of *Ex Parte* Presentation in CG Docket No. 05-338 (Junk Fax Prevention Act of 2005)

Dear Ms. Dortch:

On March 13, 2006, Charles Maresca, Director of Interagency Affairs, and Eric Menge, Assistant Chief Counsel for Telecommunications, met with the following officials of the Federal Communications Commission (FCC or Commission): Erica McMahon, Acting Chief of the Consumer Policy Division of the Consumer & Governmental Affairs Bureau; Jay Keithley, Deputy Bureau Chief of the Consumer & Governmental Affairs Bureau; Carolyn Williams, Director of the Office of Communications Business Opportunities; and Eric Malinen, Liaison to the SBA of the Office of Communications Business Opportunities.

Advocacy discussed the Commission's implementation of the Junk Fax Prevention Act (JFPA).¹ Our comments were consistent with our earlier filings on the record,² and Advocacy made the following recommendations to help the Commission implement the act.

Small Businesses and Fax Communications

- Advocacy is cognizant that small businesses send and receive faxes in the ordinary course of doing business. The fax machine is a tool that allows

¹ See Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005).

² Comments of Office of Advocacy, U.S. Small Business Administration to the *Notice of Proposed Rulemaking* in CC Dkt. No. 02-278, CG Dkt. No. 05-338 (January 18, 2006).

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small businesses to communicate with their business partners and their customers. Any restriction on communications is an impediment to commerce which will have an economic cost for small businesses.

- Advocacy is also aware that small businesses often receive junk faxes and that these unwanted communications cost small businesses money to receive and print the faxes. These costs can be significant.
- Advocacy's purpose in this rulemaking is to help the FCC restrict junk faxes which will save small businesses time and resources while imposing as few regulatory restrictions and costs as possible on small businesses that utilize legitimate fax communications.

Purpose of the Junk Fax Prevention Act

- One of the main purposes of JFPA is to prevent use of bulk lists by "blast faxers" (third parties that can be hired to send fax advertisements) while allowing legitimate business communications to go through. The FCC must find a way to differentiate between unwanted junk faxes and legitimate business faxes between firms.
- In Section 2(a) of the JFPA, Congress gave three requirements for unsolicited fax advertisements to be lawful under the Telephone Consumer Protection Act (TCPA).
 - (1) There must be an Established Business Relationship (EBR) between the sender and the recipient.
 - (2) The sender must have obtained the fax number from a voluntary communication of the recipient or from a directory or Internet site where the recipient voluntarily agreed to make its fax number available for public distribution.
 - (3) The sender must include an opt-out notice on the unsolicited fax advertisement.

Established Business Relationship

- The FCC should limit the EBR to only those businesses with whom the recipient has directly dealt with. It should not apply to affiliated entities and should not apply to intermediaries (such as blast faxers). An EBR fax should only apply to products and services substantially related to those of the EBR.
- The FCC should also identify some situations where a communication does not create an EBR, such as the purchase of numbers through a bulk list, attempting to obtain information under the TCPA, or initiating a lawsuit. Also, the FCC should state that the EBR cannot be initiated unilaterally from the advertiser and it must exist before the fax is sent.
- The burden of proof for an EBR should be on the sender. There does not seem to be a practical way for a recipient to show that an EBR does not exist. However, the FCC should allow senders to rely on general records to prove an EBR and not require any particular form of recordkeeping. Since the senders have the burden to prove an EBR, it will be in their interest to

set up a system that is sufficient to prove an EBR exists but is not overly burdensome.

Time Limit on the EBR

- While the JFPA gives the FCC the option of limiting the duration of the EBR, it should not do so at the present time, as the Commission does not have enough information to know if a time limit is needed. The FCC should implement its rules and observe complaints filed in response to junk faxes and see if claims related to the duration of an EBR are significant. If so, the FCC can always impose a time limit at that time.
- Not implementing a durational limit at this time is in keeping with the JFPA which requires the FCC to analyze the complaints that involve an EBR. Since the EBR exemption has not been implemented yet, not adopting a time limit will give the FCC sufficient time to analyze the complaints.

Verifying a Pre-Existing EBR

- The FCC should not set strict guidelines on how to verify that an EBR existed before July 9, 2005 as it is unnecessary. If the FCC places the burden of proof on the sender to show that an EBR existed, then it is up to the sender to develop a system that would satisfy an enforcement action or a court of law that a pre-existing EBR existed.

Voluntary Communication of a Fax Number

- Because there are many ways for a recipient to voluntarily provide a fax number in the context of an EBR, the FCC's rules should be flexible. The FCC should create a safe harbor for communications of fax numbers that would be presumed to be voluntary, such as business cards, letterhead, e-mail footers, advertisements, brochures, and Websites.
- The safe harbor listed above could be rebutted by a statement from the recipient (at the same time and place that the number is released) that the number is not available for public distribution. For example, a small business could post its fax number on a Web page and state on the Web page that the number is not for public distribution.
- The FCC should approach directories in one of two ways. Directories that contain fax numbers could be presumed to make the numbers available for public distribution if the directory contains a statement specifically stating that it intended to provide public access to such fax numbers. Alternatively, numbers in directories could be presumed to be for public distribution unless the directory notes that the numbers contained therein are not for public distribution.
- If a third party requires the recipient to submit a fax number then the communication is not voluntary. For example, registrants are required to submit their fax number to a domain name registrar when registering a

domain name. Since this is required and not voluntary, this resource cannot be used as a voluntary communication of a fax number

Opt-Out Requirement

- The FCC should make clear that the opt-out requirement is in addition to an EBR and a voluntary communication of the fax number and does not replace those two requirements.
- Advocacy recommends that FCC recognize that an opt-out request terminates the exemption provided in the JFPA and does not re-establish the EBR until the recipient gives consent. This applies even when there is a continuing relationship.
- A small business should only be required to honor opt-out requests that are provided through the means the small business designates.

Contact Information

- The FCC should require all senders of unsolicited fax advertisements that are claiming an EBR relationship to include their contact information on the cover page as stated in Section 2(c) of the JFPA. If this information is not present or is deliberately falsified, then the sender may not make the claim of an EBR with the recipient.
- FCC should require proper Caller ID on all fax advertisements. Several commenters stated that some unscrupulous faxers use Caller ID spoofing and blocking as a way of hiding their identity when sending unsolicited fax advertisements. Caller ID spoofing or blocking should negate any EBR claim and make the sender liable for penalties under the TCPA.

Clear and Conspicuous Notice

- The FCC should adopt the same definition for "clear and conspicuous notice" that the FCC uses in its rules on mobile services commercial messages. This requires that the notice be clearly legible, use sufficiently large type, and be placed so as to be readily apparent to the recipient.
- The FCC should not specify font and point size as well as location on the page. Every small business has their own particular method of writing their name and contact information. As long as the information is present, legible, and readily apparent, the goal of the JFPA has been met.

Cost-Free Mechanism

- The FCC should exempt small businesses from the cost-free mechanism. Instead, the FCC should only require the contact information (name, address, and local telephone number). Small businesses still must provide an opt-out mechanism, notice of that mechanism, and maintain an opt-out list as required by Section 2(c).
- If the FCC does not exempt small businesses from the cost-free mechanism, then the FCC should allow e-mail or a Web-based method to qualify as cost-

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free methods. The Internet is a viable alternative to toll-free numbers as consumers can gain access through their local library even if they do not have access at their home or business.

- The FCC should clarify that a local telephone number is a cost-free mechanism if the fax is sent locally. Many small businesses fax primarily to recipients that are close by and a local telephone number would satisfy the cost-free requirement.
- Advocacy is concerned that if the FCC does not grant the small business exemption and requires toll-free numbers as the sole cost-free mechanism, that it is tantamount to requiring every small business in the nation that uses a fax machine to get a toll-free number.

Trade Associations

- The FCC should grant the non-profit exemption allowed by Congress in Section 2(e) of the JFPA, but the Commission should stress that the unsolicited faxes must be in furtherance of the association's tax-exempt purpose and the recipients must be members of the organization or association.
- The FCC should clarify that membership in the same association or organization does not create an EBR between members based upon shared membership.

Response Period

- The FCC should keep the period to respond to an opt-out request at 30 days. If complaints warrant a shorter period, the FCC can restrict it in a later rulemaking.
- If the FCC shortens the opt-out period, the agency should allow small businesses 30 days to respond to an opt-out request since they are less likely to be automated.

Technological Solution

- The FCC should encourage companies that build fax machines to take into account the junk fax problem. Because junk faxes are a wide-spread problem, there is a real need in the market for machines that can cull out junk faxes. A technological solution could complement the FCC's implementation of the JFPA.
- There are currently fax machines on the market that are capable of displaying Caller ID of a received fax. The machines can store "junk fax" numbers and either refuse to receive faxes from that number or not print the fax.
- In addition to the Caller ID, fax machine could store faxes instead of automatically printing them. Recipients could then either delete or print as

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they prefer. This technological solution will require fax machines to have a sizeable amount of memory, but there are fax machines currently on the market under \$200 that are capable of storing up to 500 pages of received faxes. In addition, it would be helpful if the fax machines could show a preview of the fax before printing.

- Fax programs on a computer are already capable of providing the ability to preview a fax before printing it.

Please contact me at (202) 205-6533 or eric.menge@sba.gov if you have any questions regarding this filing or Advocacy's position on implementing the Junk Fax Prevention Act.

Sincerely,

/s/ _____

Eric E. Menge
Assistant Chief Counsel for

Telecommunications