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

Received & Inspected
APR 10 2006
FCC Mail Room

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

REPORT AND ORDER AND THIRD ORDER ON RECONSIDERATION

Adopted: April 5, 2006 **Released: April 6, 2006**

By the Commission:

TABLE OF CONTENTS

Paragraph Number

I. INTRODUCTION 1
II. BACKGROUND 2
A. Telephone Consumer Protection Act of 1991 2
B. TCPA Orders 3
C. Junk Fax Prevention Act of 2005 6
III. DISCUSSION 8
A. Established Business Relationship Exemption 8
1. Established Business Relationship with Recipient 9
2. Recipient's Facsimile Number 13
B. Definition of Established Business Relationship 17
1. EBR Definition 18
2. Limits on Duration of Established Business Relationship 21
C. Notice of Opt-Out Opportunity 24
1. Clear and Conspicuous 25
2. Cost-Free Opt-Out Mechanism 27
3. Timeframe for Honoring Opt-Out Requests 30
4. Identification Requirements and Opt-Out Notice 33
D. Request to Opt-Out of Future Unsolicited Advertisements 34
1. Interplay Between Established Business Relationship Exemption and Opt-Out Request 35
2. Third Parties and Fax Broadcasters 37
E. Professional or Trade Organizations 41
F. Unsolicited Advertisement 44
1. Definition 44
2. Prior Express Invitation or Permission 45
3. "Transactional" Communications 49
4. Offers for Free Goods and Services and Informational Messages 52
5. Petitions for Reconsideration on EBR exemption 55
G. Private Right of Action 56

H. Effective Date of Rules 57
I. Filings in Response to this Order 58
IV. PROCEDURAL ISSUES 59
A. Paperwork Reduction Act 59
B. Congressional Review Act 61
C. Accessible Formats 62
D. Final Regulatory Flexibility Analysis 63
V. ORDERING CLAUSES 64
Appendix A: Final Rules
Appendix B: Final Regulatory Flexibility Act Analysis
Appendix C: Comments and Petitions Filed

I. INTRODUCTION

1. In this Order, we amend the Commission's rules on unsolicited facsimile advertisements as required by the Junk Fax Prevention Act of 2005 (the Junk Fax Prevention Act).[1] Specifically, we (1) codify an established business relationship (EBR) exemption to the prohibition on sending unsolicited facsimile advertisements; (2) provide a definition of an EBR to be used in the context of unsolicited facsimile advertisements; (3) require the sender of a facsimile advertisement to provide specified notice and contact information on the facsimile that allows recipients to "opt-out" of any future facsimile transmissions from the sender; and (4) specify the circumstances under which a request to "opt-out" complies with the Act. We believe these rules balance the interests of entities that send facsimile advertisements with those of persons that wish to avoid such messages. In addition, we take this opportunity to address certain issues raised in petitions for reconsideration of the 2003 Report and Order[2] concerning the Telephone Consumer Protection Act's (TCPA)[3] facsimile advertising rules.

II. BACKGROUND

A. Telephone Consumer Protection Act of 1991

2. On December 20, 1991, Congress enacted the TCPA to address a growing number of telephone marketing calls and certain telemarketing practices thought to be an invasion of consumer privacy.[4] In relevant part, the TCPA prohibits the use of any telephone facsimile machine, computer, or other device to send an "unsolicited advertisement" to a telephone facsimile machine.[5] An unsolicited advertisement is defined as "any material advertising the commercial availability or quality of any

[1] *See* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005) (Junk Fax Prevention Act). Section 2(h) of the Junk Fax Prevention Act requires the Commission to issue regulations to implement these amendments no later than April 5, 2006.

[2] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003) (*2003 TCPA Order*).

[3] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227.

[4] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227.

[5] 47 U.S.C. § 227(b)(1)(C).

property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."[6] The TCPA also requires those sending any messages via telephone facsimile machines to identify themselves to message recipients.[7] The TCPA did not expressly exempt persons with whom the sender has an EBR or tax exempt nonprofit organizations from the prohibition on sending unsolicited facsimile advertisements, although it did create such exemptions from the definition of "telephone solicitation."[8]

B. TCPA Orders

3. In 1992, the Commission adopted rules implementing the TCPA, including restrictions on the transmission of unsolicited facsimile advertisements by facsimile machines.[9] The Commission's rules on unsolicited facsimile advertisements incorporated the language of the statute virtually verbatim.[10] The Commission stated that "the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition" on unsolicited facsimile advertisements.[11] The Commission concluded, however, that facsimile transmissions from persons or entities that have an EBR with the recipient can evidence the necessary invitation or permission of the recipient to receive the facsimile advertisement.[12] The Commission defined the term "established business relationship" to mean:

> a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.[13]

4. On July 3, 2003, the Commission revised many of its telemarketing and facsimile

---

[6] 47 U.S.C. § 227(a)(4).

[7] Specifically, the TCPA provides that the facsimile include "in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual." 47 U.S.C. § 227(d)(1)(B).

[8] *See* 47 U.S.C. § 227(a)(3).

[9] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 (1992) (*1992 TCPA Order*); *see also* 47 C.F.R. § 64.1200.

[10] *See, e.g.*, 47 C.F.R. § 64.1200(a)(3) (no person or entity may "[u]se a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."); 47 C.F.R. § 64.1200(f)(10) (the term "unsolicited advertisement means 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").

[11] *1992 TCPA Order*, 7 FCC Rcd at 8779, para. 54, n.87.

[12] *Id.*

[13] *1992 TCPA Order*, 7 FCC Rcd at 8771, para. 35.

advertising rules under the TCPA.[14] *The Commission reversed its prior conclusion that an EBR provides* companies with the necessary express permission to send facsimile advertisements to their customers.[15] Instead, the Commission concluded that the recipient's express permission must be in writing and include the recipient's signature.[16] The Commission also revised the definition of an EBR, in the context of telephone solicitations, to limit the duration of that exception to 18 months after the recipient's last purchase or transaction, or three months after the recipient's last application or inquiry.[17] Following the release of the *2003 TCPA Order*, several entities filed petitions for reconsideration, most of which were related to the Commission's facsimile advertising rules.[18]

5. On August 18, 2003, the Commission issued an *Order on Reconsideration* that delayed, until January 1, 2005, the effective date of the requirement that the sender of a facsimile advertisement first obtain the recipient's prior express permission in writing.[19] Comments filed after the release of the *2003 TCPA Order* indicated that many organizations needed additional time to secure this prior written permission.[20] On October 3, 2003, the Commission released an order staying the 18-month and three-month time limitations imposed on the duration of the EBR as applied to the sending of unsolicited facsimile advertisements pending either a decision on this issue on reconsideration or January 1, 2005.[21] On October 1, 2004 and June 27, 2005, the Commission further delayed the effective date of these requirements.[22]

C. Junk Fax Prevention Act of 2005

6. On July 9, 2005, Congress enacted the Junk Fax Prevention Act of 2005 which amends

---

[14] *See supra,* n.2.

[15] *2003 TCPA Order,* 18 FCC Rcd at 14127-28, para. 189.

[16] *Id.* at 14128-29, para. 191. *See also* 47 C.F.R. § 64.1200(a)(3)(i).

[17] *Id.* at 14079, para. 113. *See also* 47 C.F.R. § 64.1200(f)(3). Prior to the *2003 TCPA Order*, the EBR definition applied to both telephone solicitations and unsolicited facsimile advertisement transmissions and contained no expiration date.

[18] Petitioners described a variety of specific types of communications and asked whether they are covered by the TCPA's facsimile advertising prohibition. *See* Appendix C for a list of petitions filed.

[19] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order on Reconsideration, 18 FCC Rcd 16972, 16974-75, paras. 5-6 (2003) (*Order on Reconsideration*).

[20] *Id.* at 16974, para. 5.

[21] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, 18 FCC Rcd 19890 (2003) (*EBR Duration Order*).

[22] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, 19 FCC Rcd 20125 (2004) and *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, FCC 05-132 (rel. June 27, 2005) (*Stay Order*). In an Order adopted on December 9, 2005, the Commission further delayed the effective date of the written permission requirement until the conclusion of this rulemaking proceeding to implement the Junk Fax Prevention Act. *See infra,* n.31.

the facsimile advertising provisions of the TCPA.[23] In general, the Junk Fax Prevention Act: (1) codifies an EBR exemption to the prohibition on sending unsolicited facsimile advertisements;[24] (2) provides a definition of an EBR to be used in the context of unsolicited facsimile advertisements;[25] (3) requires the sender of a facsimile advertisement to provide specified notice and contact information on the facsimile that allows recipients to "opt-out" of any future facsimile transmissions from the sender;[26] and (4) specifies the circumstances under which a request to "opt-out" complies with the Act.[27] In addition, the Junk Fax Prevention Act authorizes the Commission to: (1) determine the "shortest reasonable time" that a sender must comply with a request not to receive future facsimile advertisements;[28] (2) consider exempting certain classes of small business senders from the requirement to provide a "cost-free" mechanism for a recipient to transmit an opt-out request;[29] and (3) consider whether 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 "opt-out" notice otherwise required by the Junk Fax Prevention Act.[30]

7. On December 9, 2005, the Commission released a Notice of Proposed Rulemaking proposing modifications to the Commission's rules on unsolicited facsimile advertisements to implement the amendments required by the Junk Fax Prevention Act.[31]

III. DISCUSSION

A. Established Business Relationship Exemption

8. Section 2(a) of the Junk Fax Prevention Act amends section 227(b)(1)(C) of the Act by adding an EBR exemption to the prohibition on sending unsolicited facsimile advertisements. Specifically, section 2(a) provides that it shall be unlawful for any person within the United States or any

---

[23] *See supra*, n.1.

[24] Junk Fax Prevention Act, Sec. 2(a).

[25] Junk Fax Prevention Act, Sec. 2(b).

[26] Junk Fax Prevention Act, Sec. 2(c).

[27] Junk Fax Prevention Act, Sec. 2(d). In addition, the Junk Fax Prevention Act requires the Commission to submit an annual report to Congress regarding enforcement of the rules relating to the sending of unsolicited facsimile advertisements. Junk Fax Prevention Act, Sec. 3. The Junk Fax Prevention Act also requires the Comptroller General of the United States to conduct a study regarding complaints received by the Commission concerning unsolicited facsimile advertisements. *See* Junk Fax Prevention Act, Sec. 4.

[28] Junk Fax Prevention Act, Sec. 2(c).

[29] *Id.*

[30] Junk Fax Prevention Act, Sec. 2(e).

[31] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Notice of Proposed Rulemaking and Order, FCC 05-206 (rel. December 9, 2005) (*JFPA NPRM*). In the Order, the Commission delayed the effective date of the written permission requirement at 47 C.F.R. § 64.1200(a)(3)(i) until the conclusion of the rulemaking.

person outside the United States if the recipient is within the United States:

> (C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless –
>
> (i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;
>
> (ii) the sender obtained the number of the telephone facsimile machine through –
>
> (I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or
>
> (II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution, except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before the date of enactment of the Junk Fax Prevention Act of 2005 if the sender possessed the facsimile machine number of the recipient before such date of enactment; and
>
> (iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D), except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E).[32]

1. Established Business Relationship with Recipient

9. In the *JFPA NPRM*, the Commission proposed amending its rules in accordance with the specific requirements in section 2(a) of the Junk Fax Prevention Act regarding the express recognition of an EBR exemption.[33] The Commission also sought specific comment on whether to establish parameters defining what it means for a person to provide a facsimile number "within the context of [an] established business relationship" and what it means for a person to voluntarily agree to make a number available for public distribution.[34] In addition, the Commission proposed removing section 64.1200(a)(3)(i) of the Commission's rules, which requires the recipient to obtain a signed, written statement indicating the recipient's consent to receive facsimile advertisements from the sender.[35]

---

[32] Junk Fax Prevention Act, Sec. 2(a).

[33] *JFPA NPRM*, para. 9.

[34] *JFPA NPRM*, para. 10.

[35] *JFPA NPRM*, para. 9.

10. *As noted in the JFPA NPRM, Congress concluded that an unsolicited advertisement from* a sender with an EBR to the recipient will not be governed by the general prohibition found in section 227(b)(1)(C) of the TCPA.[36] Instead, the Junk Fax Prevention Act permits the sending of fax advertisements if there exists an EBR between the sender and recipient and certain other conditions are met regarding how the facsimile number was obtained.[37]

11. In compliance with the requirements of the Junk Fax Prevention Act, we now amend section 64.1200(a)(3) of the Commission's rules to expressly recognize an EBR exemption from the prohibition on sending unsolicited facsimile advertisements.[38] The majority of commenters agree that incorporating such an exemption is necessary to ensure that the Commission's rules are consistent with the amended federal statute.[39] Industry commenters contend that faxing continues to be a preferred method of communication by many businesses and that an EBR exemption will allow companies to communicate effectively with their customers.[40] For example, commenters note that fax advertisements are routinely sent from real estate professionals to home buyers, from telephone directory publishers to advertisers, and from food service distributors to restaurants.[41] According to these commenters, such advertisements are sent based on legitimate EBRs between the senders and recipients.[42] Although some oppose an EBR exemption for fax advertising,[43] the Commission's mandate is to implement the statute as enacted by Congress. Moreover, the opt-out requirements in the statute will permit consumers to prevent future unwanted faxes—even those from companies with which they conduct business.

12. To ensure that the EBR exemption is not exploited, we conclude that an entity that sends a facsimile advertisement on the basis of an EBR should be responsible for demonstrating the existence of the EBR.[44] The entity sending the fax is in the best position to have records kept in the usual course of

---

[36] *Id.*

[37] Junk Fax Prevention Act, Sec. 2(a).

[38] We correspondingly remove section 64.1200(a)(3)(i) from the Commission's existing rules, as facsimile senders will now be permitted to send facsimile advertisements to recipients with which they have an EBR without first securing the recipient's written permission. *See* S. REP. NO. 109-76 at 8 ("This legislation is designed to permit legitimate businesses to do business with their established customers and other persons with whom they have an established business relationship without the burden of collecting prior written permission to send these recipients commercial faxes").

[39] *See, e.g.,* ASTA Comments at 6; MFC Comments at 2; NAW Comments at 3-6; NEPA Comments at 2; PRC Comments at 2; SHRM Comments at 3; Westfax Comments at 1-2.

[40] *See, e.g.,* NAEDA Comments at 1; ABM Comments at 3.

[41] NAR Reply Comments at 2; YPA Comments at 1; IFDA Comments at 1.

[42] *Id.*

[43] *See, e.g.,* McKenna Reply Comments at 4 (transmitting unsolicited fax ads constitutes a conversion of, use of, and destruction of the recipient's property, no different from other forms of dominion or occupation); Biggerstaff Comments at 10; Hallikainen Comments at 1 (supports an opt-in approach to faxing).

[44] NNA Comments at 8 (asserting that if a recipient takes action against a sender it believes to have sent an unsolicited fax outside of the context of an EBR, the burden would be on the sender to prove the relationship); Texas OPC Reply Comments at 3 (the burden of proving the existence of an EBR should rest upon the party (continued....)

business showing an EBR, such as purchase agreements, sales slips, applications and inquiry records.[45] We emphasize that we are not requiring any specific records be kept by facsimile senders.[46] Should a question arise, however, as to the validity of an EBR, the burden will be on the sender to show that it has a valid EBR with the recipient.

2. Recipient's Facsimile Number

13. As set forth in the Junk Fax Prevention Act, an EBR alone does not entitle a sender to fax an advertisement to an individual consumer or business. The telephone facsimile number must also be provided voluntarily by the recipient.[47] Specifically, under the new rules, any person sending a fax advertisement under the EBR exemption must have obtained the facsimile number directly from the recipient within the context of the EBR, or ensure that the recipient voluntarily agreed to make the number available in a directory, advertisement, or site on the Internet which is accessible to the public. In accordance with the Junk Fax Prevention Act, an exception to this requirement will apply if the EBR was formed prior to July 9, 2005.[48]

a. Facsimile Number Obtained Directly From Recipient

14. The provision of a telephone facsimile number to a business or other entity reflects a willingness to receive faxes from that entity. Accordingly, it would be permissible for the sender to fax an advertisement to a recipient that had provided a facsimile number to the sender, for example, on an application, information request, contact information form, or membership renewal form.[49] It also would be permissible for the recipient to provide to the sender its facsimile number orally over the telephone or through a website maintained by the fax sender. In circumstances such as these, we conclude that the consumer has provided the facsimile number in the context of an established business relationship with

(Continued from previous page)
seeking to profit from the fax); McKenna Comments at 3. *But see* Everett Labs Comments at 6 (fax recipients who claim to be aggrieved should have the burden of disproving the existence of an EBR).

[45] *See* AGs Comments at 9; Lorman Ed Services Comments at 17 (normal business records should suffice); AFSA Comments at 4 (as result of an EBR, there may be any number of documents, applications, agreements, and other communications exchanged between the parties). *But see* American Bankers Assoc Comments at 4 (the costs of maintaining evidence of an EBR could be enormous). We agree with ABA that digitized documents would be acceptable if they established the existence of the EBR.

[46] *See* CBS Reply Comments at 4 (the sender should have the flexibility to demonstrate the existence of an EBR through the presentation of records that it chooses to retain rather than be subject to extensive recordkeeping requirements).

[47] *See* Junk Fax Prevention Act, Sec. 2(a); *see also supra,* para. 8. *See* EPIC Comments at 1 (Commission should recognize that a person has voluntarily agreed to make a number available for public distribution only where that person has explicitly stated that they wish to receive unsolicited commercial messages).

[48] *See* Junk Fax Prevention Act, Sec. 2(a).

[49] *See* Lorman Ed Services Comments at 16 (suggesting a recipient's seminar registration form, product order form or warranty card should all count as voluntarily providing the number in the course of an EBR). Similarly, a business card containing a fax number that is provided by the recipient to the sender would permit the sending of a facsimile advertisement.

the fax sender.[50] *In the event a recipient complains that its facsimile number was not provided to the* sender, the burden rests with the sender to demonstrate that the number was communicated in the context of the EBR.

b. Facsimile Number Obtained from Directory, Advertisement or Internet Site

15. The Junk Fax Prevention Act requires that, if the sender relies on an EBR and obtains the facsimile number from a directory, advertisement or site on the Internet, the sender must ensure that the recipient voluntarily agreed to make the number available for public distribution.[51] Commenters contend that it would be unduly burdensome for senders of facsimile advertisements to verify that a consumer voluntarily agreed to make the facsimile number public in every instance.[52] We agree. Therefore, we determine that a facsimile number obtained from the recipient's *own* directory, advertisement, or internet site was voluntarily made available for public distribution, unless the recipient has noted on such materials that it does not accept unsolicited advertisements at the facsimile number in question.[53] For instance, if the sender obtains the number from the recipient's own advertisement, that advertisement would serve as evidence of the recipient's agreement to make the number available for public distribution.[54] On the other hand, if the sender obtains the number from sources of information compiled by third parties—*e.g.*, membership directories, commercial databases, or internet listings—the sender must take reasonable steps to verify that the recipient consented to have the number listed, such as calling or emailing the recipient.[55] We agree that membership directories requiring a fee to use are limited in

---

[50] *See infra*, paras. 37-40 on third parties acting as agents for the sender.

[51] Junk Fax Prevention Act, Sec. 2(a). *See also* EPIC Comments at 1 (the mere presence of a fax number in a directory should not constitute the voluntary agreement for dissemination to senders).

[52] *See, e.g.*, NNA Comments at 8; NAR Comments at 3-4 (asserting that any rules must allow senders to obtain facsimile numbers from public sources to whom persons have made their fax numbers publicly available); Everett Labs Comments at 5-6.

[53] *See* AHLA Comments at 3; NIADA Comments at 2; Reed Elsevier Comments at 8. *But see* EPIC Comments at 1 (the Commission should recognize that a person has voluntarily agreed to make a number available for public distribution only where that person has explicitly stated that they wish to receive unsolicited commercial messages); Texas OPC Comments at 4 (voluntary agreement to receive fax advertisements should not be found unless the website also contains a statement expressly indicating this).

[54] Another example might be a number obtained from the recipient's own letterhead or fax cover sheet. *See* NFIB Comments at 4; Lorman Ed Services Comments at 17; Reed Elsevier Comments at 8 (for a fax number listed in a directory, which an individual reasonably can assume is public, senders can assume that such number has voluntarily been provided for public distribution). *But see* Texas OPC Reply Comments at 4 (no consent can be inferred from the mere fact that the recipient's fax number appears on a website).

[55] *See* AGs Comments at 10 (a doctor who publishes her fax number in a medical society directory should not be deemed to have made the number publicly available if there is no reasonable expectation that the directory is intended for use by third parties for marketing purposes); Lorman Ed Services Comments at 17-18; Biggerstaff Comments at 15 (explaining that list brokers mine for numbers, combining lists of numbers from multiple sources and then reselling those lists in directories); EPIC Comments at 2; NAW Comments at 4-5 (noting that some Senators and their staff raised concerns during the JFPA legislative process that a mass retailer would be permitted to purchase a bulk fax list and fax advertisements to every number on it under the EBR exemption because everyone has purchased something at a Wal-Mart, but opposing a requirement that businesses verify fax numbers from a legitimate public source). *But see* American Bankers Assoc Comments at 3 (opposing a requirement that (continued....)

distribution and, as such, the information included within the directory is made available to subscribers and purchasers, not to the general public.[56] We also reiterate that senders of facsimile advertisements must have an EBR with the recipient in order to send the advertisement to the recipient's facsimile number. The fact that the facsimile number was made available in a directory, advertisement or website does not alone entitle a person to send a facsimile advertisement to that number.

c. Established Business Relationship Formed Prior to July 9, 2005

16. Finally, as the Commission noted in the *JPFA NPRM*, the Junk Fax Prevention Act provides a third avenue for the sender to obtain the facsimile number.[57] Pursuant to the statute, the amended rules shall provide that if the EBR was in existence prior to July 9, 2005, and the sender also possessed the facsimile number before July 9, 2005, the sender may send facsimile advertisements to that recipient without demonstrating how the number was obtained or verifying it was provided voluntarily by the recipient.[58] We emphasize that, to fall within this exception, a valid EBR must have been formed between the sender and recipient before July 9, 2005. For example, a business that sold a product to a consumer in 2004 and secured that consumer's facsimile number in 2004, would be permitted to fax an advertisement to the consumer regardless of how the facsimile number was obtained. We agree with those commenters that contend it would be burdensome for senders to prove a facsimile number was in their possession prior to July 9, 2005.[59] Therefore, we adopt a presumption that if a valid EBR existed prior to July 9, 2005, the sender had the facsimile number prior to that date as well.[60] In the event the recipient alleges a violation of these provisions, the sender will need to provide proof that the EBR existed prior to July 9, 2005.[61]

(Continued from previous page)
senders verify a list of compiler's data as voluntary); ASTA Comments at 6 (there are no apparent practical steps that can be expected beyond a simple inquiry of the directory vendor).

[56] *See* Biggerstaff Comments at 16; *see also* ABM Comments at 6 (fax number in association directories that are for use only by members ought not be considered to have been provided by the facsimile machine owners for the purpose of making them publicly available. A sender should be required to ascertain whether or not the fax number was intended by the owner to be made public).

[57] Junk Fax Prevention Act, Sec. 2(a) (". . . except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before the date of enactment of the Junk Fax Prevention Act of 2005 if the sender possessed the facsimile machine number of the recipient before such date of enactment . . .").

[58] Junk Fax Prevention Act, Sec. 2(a). *See also* Commission's amended rule at 47 C.F.R. § 64.1200(a)(3)(ii)(C).

[59] *See* ABA Comments at 3; NNA Comments at 9; YPA Comments at 3; Staples Comments at 3 (it is unlikely that either a sender or recipient will be able to produce paper records, documenting the date on which a fax number was obtained or provided).

[60] This presumption could be rebutted, for example, with evidence that the recipient did not use the facsimile number before July 9, 2005. *See* AFSA Comments at 3; YPA Comments at 3; NNA Comments at 3; Staples Comments at 1 (Commission should establish a rebuttable presumption that a sender acquired a recipient's fax number prior to July 9, 2005); DMA Comments at 9 (the issue of what is voluntary will arise only where there is *already* an EBR between the sender and recipient).

[61] *See* CTTC Comments at 1 (a reasonable person could expect a solicitor will be able to access a file or record on someone to establish the existence of the EBR); NIADA Comments at 3.

B. Definition of Established Business Relationship

17. As noted in the *JFPA NPRM*, the Junk Fax Prevention Act includes a definition of an EBR to be used in the context of unsolicited facsimile advertisements.[62] The statute provides that "[t]he term 'established business relationship, . . . shall have the meaning given the term in section 64.1200 of title 47 . . . as in effect on January 1, 2003, except that such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber. . .."[63] The January 1, 2003 definition did not include any time limitations on the EBR.[64] The Junk Fax Prevention Act, however, authorizes the Commission to limit the duration of the EBR in the context of unsolicited facsimile advertisements after a 3-month period beginning from the date of enactment of the statute.[65] Therefore, the Commission sought comment in the *JFPA NPRM* on whether to limit the EBR.[66] We specifically sought comment on whether it is appropriate to limit the EBR duration for unsolicited facsimile advertisements in the same manner as telephone solicitations.[67]

1. EBR Definition

18. Based on the record,[68] and in accordance with the Junk Fax Prevention Act, we adopt as part of the Commission's rules the following definition of an EBR for purposes of sending unsolicited facsimile advertisements:

For purposes of paragraph (a)(3) of this section, the term established business

[62] *JFPA NPRM*, para. 12.

[63] Junk Fax Prevention Act, Sec. 2(b).

[64] In 2003, the Commission limited the duration of the EBR for telephone solicitations to 18 months following a purchase or transaction and three months after an application or inquiry. *See 2003 TCPA Order*, 18 FCC Rcd at 14079, para. 113.

[65] Junk Fax Prevention Act, Sec. 2(f). ("[The Commission] may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall—(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines; (II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers; (III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and (IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and (ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on the date of enactment of the Junk Fax Prevention Act of 2005").

[66] *JFPA NPRM*, para. 16.

[67] *JFPA NPRM*, para. 17. *See also* 47 C.F.R. § 64.1200(f)(3) (limiting the duration of the EBR for telephone solicitations to 18 months following a purchase or transaction and three months after an application or inquiry).

[68] NEPA Comments at 4; NNA Comments at 10, Lorman Ed Services Comments at 8-9; CBA Comments at 6.

> relationship means 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.[69]

19. This definition extends the EBR exemption to faxes sent to both business and residential subscribers. Once established, the EBR will permit an entity to send facsimile advertisements to a business or residential subscriber until the subscriber "terminates" it by making a request not to receive future faxes.[70] This definition also clearly contemplates that the EBR could be formed by any of the following: an inquiry, application, purchase or transaction by the business or residential subscriber.[71] Consistent with the legislative history of the TCPA, an inquiry by a consumer could form the basis of the EBR.[72] However, the definition makes clear that the inquiry or application must be about products or services offered by the entity. Thus, we conclude that an inquiry about store location or the identity of the fax sender, for instance, would not alone form an EBR for purposes of sending facsimile advertisements.[73] Merely visiting a website, without taking additional steps to request information or provide contact information, also does not create an EBR.[74]

20. In addition, we conclude that the EBR exemption applies only to the entity with which the business or residential subscriber has had a "voluntary two-way communication." It would not extend to affiliates of that entity, including a fax broadcaster which is retained to send facsimile ads on behalf of that entity.[75] While the fax broadcaster may transmit an advertisement on behalf of an entity that has an EBR with the recipient, it is not permitted to use that same EBR to send a fax advertisement on behalf of another client.[76] We find that, unlike the national do-not-call registry, which allows

---

[69] *See* amended rule at 47 C.F.R. § 64.1200(f)(5).

[70] We note that the act of terminating the EBR exemption will only terminate the relationship for purposes of receiving communications constituting "unsolicited advertisements." A fax regarding collection of a debt that does not contain an advertisement will not be subject to the facsimile advertising rules. *See* ACA Comments at 9-11. *See also* ABM Comments at 13 (opt-out should terminate EBR). *But see* SIA Comments at 2-3 (an opt-out request should not terminate the EBR as a recipient may choose to opt out from certain types of advertisements but remain on the list for other advertisements).

[71] *See* AGs Comments at 9 (should limit the EBR to these specific actions by the consumer).

[72] *See* H.R. REP. NO. 102-317 at 14-15 (1991) (noting that if an investor had written to a mutual fund or responded to an ad requesting additional information, the fund's manager could make follow-up calls).

[73] *See* Sutton Comments at 1 (the Commission should clarify that efforts to discover the identity of junk faxers do not create an EBR exemption for future unwanted faxes).

[74] *See* Biggerstaff Comments at 34.

[75] *See* AGs Comments at 11. *See also* Texas OPC Comments at 5 (the EBR exception should only apply when the seller is the party claiming the EBR. The EBR should not be transferable).

[76] *See* AGs Comments at 11; Biggerstaff Comments at 24; Fax Ban Coalition Reply Comments at 9 (no legal basis to distinguish between a fax physically transmitted by an employee of the sender and the same fax that is physically transmitted by a transmitting service used by the sender).

consumers to avoid most unwanted telemarketing calls by registering a telephone number once every five years, the Junk Fax Prevention Act requires a consumer to opt-out of unwanted fax advertisements from each entity with which the consumer has an EBR. We believe that to permit companies to transfer their EBRs to affiliates would place an enormous burden on consumers to prevent faxes from companies with which they have no direct business relationship.

2. Limits on Duration of Established Business Relationship

21. Industry commenters overwhelming oppose limiting the duration of the EBR.[77] They argue that any time limits on the EBR would interfere with routine business transactions, would unduly burden senders, and would not provide a corresponding benefit to recipients, particularly in light of the Junk Fax Prevention Act's opt-out notice requirements.[78] Specifically, these commenters maintain that keeping records of an EBR that is limited in duration would involve significant costs to businesses that send faxes to their customers.[79] In addition, many of these commenters maintain that Congress required the Commission to first review complaints filed under the new rules before taking action to limit the duration of the EBR.[80] These commenters disagree as to what limits might be appropriate should the Commission determine to limit the EBR.[81] They argue that business-to-business relationships do not fall into predictable cycles, and that an 18-month limit might make sense for one business, but would be inadequate for another.[82]

22. Other commenters urge the Commission to limit the EBR, arguing that the shifting of costs to a recipient that must deal with unsolicited facsimile advertisements weighs in favor of imposing

[77] *See, e.g.*, YPA Comments at 4; CTTC Comments at 1; ABA Comments at 4; Westfax Comments at 4; NFIB Comments at 2; Lorman Ed Services Comments at 13 (arguing that limits on the EBR would severely reduce the number of consumers to whom sending educational seminar notification and reminders could be sent); ACB Comments at 2 (maintaining that every bank or mortgage broker that sends faxes with advertising content will have to keep detailed and continuously updated records of their customers' last inquiries and transactions); NADA Comments at 1-2 (indicating that unlike telemarketing calls, most faxes are sent between businesses); NAR Comments at 1-2. *But see* AGs Comments at 11.

[78] Lorman Ed Services Comments at 10; NNA Comments at 10 (would require burdensome recordkeeping and involve substantial costs); NADA Comments at 2.

[79] *See, e.g.*, AFSA Comments at 3; NAW Comments at 6-11, NFIB Comments at 3-4; NNA Comments at 10-11.

[80] *See* IFDA Comments at 3; Huntington Natl Bank Comments at 2; ABM Comments at 8; YPA Comments at 4; SBA Advocacy Comments at 7; NEPA Comments at 5; NAWD Comments at 7; ACA Comments at 9.

[81] YPA Comments at 4 (18 months for transactions and three months for inquiries is too short); NEPA Comments at 6 (Commission should not limit the EBR more narrowly for fax communications than for telephone solicitations); Lorman Ed Services Comments at 15 (a five-year limit would be appropriate); ATA Comments at 3 (to the extent the Commission imposes limits, it should enact the same limits that it imposed for telephone solicitations); SIA Comments at 2 (18/3-month limits would provide uniformity in telemarketing and fax regulation).

[82] *See, e.g.*, NNA Comments at 11-12; CTTC Comments at 2; Lorman Ed Services Comments at 15; ARTBA Comments at 2.

limits on the EBR.[83] *They support varying time limits.*[84]

23. As required by the Junk Fax Prevention Act, we intend to closely monitor implementation of the new EBR exemption and opt-out policies adopted herein.[85] Within one year of the effective date of this Order, the Commission will evaluate 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.[86]

C. Notice of Opt-Out Opportunity

24. Section 2(c) of the Junk Fax Prevention Act adds language to the TCPA that requires senders to include a notice on the first page of the unsolicited advertisement that instructs the recipient how to request that they not receive future unsolicited facsimile advertisements from the sender.[87] In accordance with the Junk Fax Prevention Act, we amend our rules to require that all unsolicited facsimile advertisements contain a notice on the first page of the advertisement stating that the recipient is entitled to request that the sender not send any future unsolicited advertisements.[88] This notice must include a domestic contact telephone number and a facsimile machine number for the recipient to transmit such a request to the sender and, as discussed below, at least one cost-free mechanism for transmitting an opt-out request.[89] We emphasize that including an opt-out notice on a facsimile advertisement alone is not

[83] AGs Comments at 12; Texas OPC Reply Comments at 3; PRC Comments at 3; EPIC Comments at 4.

[84] AGs Comments at 12 (limits should be shorter than 18/3); Strang Comments at 4 (supports one month for inquiries and six months for purchases); PRC Comments at 3 (does not believe 18/3-month limits strike a good balance, as unwanted faxes are more intrusive than unwanted telephone calls because faxes come all through the night); Worsham Comments at 1 (12 months from purchase; one month from inquiry); SHRM Comments at 8 (supports a limit on the EBR of 30 months for professional and trade associations); HPC Comments at 3 (18/3-month limits are appropriate).

[85] *See* Junk Fax Prevention Act, Sec. 2(f); *see also supra*, n.65.

[86] *See* Junk Fax Prevention Act, Sec. 2(f). We note, however, that because the Commission's facsimile advertising rules recognize an EBR exception, it is reasonable to expect that many such recipients of facsimile advertisements from senders with whom they have an EBR would not file complaints with the Commission.

[87] Junk Fax Prevention Act, Sec. 2(c) ("[The Commission] shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement; (ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful[.]"). *See also* S. REP. NO. 109-76 at 8 ("The Committee . . . added the requirement that every unsolicited facsimile advertisement contain an opt-out notice that gives the recipient the ability to stop future unwanted fax solicitations...").

[88] Amended rule at 47 C.F.R. § 64.1200(a)(3)(iii) and (iv).

[89] *See* NAA Comments at 13 (supports the requirement to include both a telephone number and facsimile number). *See also* S. REP. NO. 109-76 at 12 ("Section 2(c) would also require that the telephone and fax numbers, and the cost-free mechanism, provided to a recipient must permit an individual or business to make an opt-out request at any time").

sufficient to permit the transmission of the fax; an EBR with the recipient must also exist.

1. Clear and Conspicuous

25. In the *JFPA NPRM*, we sought comment on whether it was necessary to set forth in our rules the circumstances under which the opt-out notice will be considered "clear and conspicuous."[90] Some commenters argue that as long as the notice is on the first page and is apparent to a reasonable consumer, the Commission should not further define what will be considered "clear and conspicuous."[91] Others urge the Commission to provide specific guidance to ensure consumers are aware of their opt-out rights and sending parties have standards by which they can comply with the law.[92] We are persuaded that rules specifying the font type, size and wording of the notice might interfere with fax senders' ability to design notices that serve their customers.[93] However, we make some additional determinations about the opt-out notice so that facsimile recipients have the information necessary to avoid future unwanted faxes.

26. Consistent with the definition in our truth-in-billing rules, "clear and conspicuous" for purposes of the opt-out notice means a notice that would be apparent to a reasonable consumer.[94] We also conclude that the notice must be separate from the advertising copy or other disclosures and placed at either the top or bottom of the fax.[95] Many facsimile advertisements today contain text covering the entire sheet of paper, making it difficult to see an opt-out notice that is placed amongst the advertising material. Thus, the notice must be distinguishable from the advertising material through, for example, use of bolding, italics, different font, or the like. We clarify that, in accordance with the Junk Fax Prevention Act, if there are several pages to the fax, the first page of the advertisement must contain the opt-out notice.[96]

---

[90] *JFPA NPRM*, para. 20.

[91] YPA Comments at 6; *see also* American Bankers Assoc Comments at 4; NFIB Comments at 4-5; SBA Advocacy Comments at 7; Westfax Comments at 11; NAR Comments at 8; MFC Comments at 13 (suggesting the Commission use standards similar to the CAN-SPAM rules – "clearly legible, use sufficiently large type, and be placed so as to be readily apparent to a customer").

[92] Strang Comments at 5; Texas OPC Comments at 7; NIADA Comments at 5 (should do so in such a way that entities retain the flexibility to determine how to meet the clear and conspicuous standard); AGs Comments at 12; EPIC Comments at 5.

[93] *But see* Strang Comments at 2 (should specify the exact wording, location on the page, and font type and size to be used).

[94] *See* amended rule 47 C.F.R. § 64.1200(f)(2). *See also* truth-in-billing requirements at 47 C.F.R. § 64.2401(e).

[95] *See* S. REP. NO. 109-76 at 12 ("...[S]ection 2(c) would require that the opt-out notice complies with the current provisions of Section 227(d)...which require that any unsolicited fax being sent contain in the margins at the top or bottom of each page the date and time it is sent, the identification of the sender of the message, and the telephone number of the sending machine"). *See also* Texas OPC Comments at 7. *But see* NNA Comments at 12 (suggesting that placing opt-out notices at the extreme top or bottom may cause the notice to be cut off during transmission).

[96] Junk Fax Prevention Act, Sec. 2(c). If a cover page accompanies the advertisement, we encourage senders to include the notice on the cover page as well. *See* Bank of America Comments at 3 (should interpret statutory phrase "first page of unsolicited advertisement" as the fax cover sheet or first page of fax message); Huntington (continued....)

2. Cost-Free Opt-Out Mechanism

27. The Junk Fax Prevention Act requires that the notice identify "a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement[.]"[97] In accordance with the statute, we amend the rules to require senders to identify a cost-free mechanism in their notices.[98] Industry members oppose a rule requiring the provision of a toll-free number, arguing that a toll-free number would be costly and answering the calls or setting up an automated system to do so would be overly burdensome, particularly for small businesses.[99] Of these commenters, some suggest that senders be permitted to provide a website address through which consumers can opt-out of future faxes.[100] Some consumer advocates contend that senders should be required to provide the toll-free telephone number, as many consumers do not have access to the Internet.[101]

28. In an effort to balance the needs of consumers who wish to opt-out of faxes with the interests of business, we find that a website address, email address, toll-free telephone number, or toll-free facsimile machine number will constitute "cost-free mechanisms" for purposes of our rules.[102] We also conclude that a local telephone number may be considered a cost-free mechanism so long as the advertisements are sent to local consumers for whom a call to that number would not result in long distance or other separate charges.[103] Senders of facsimile advertisements need make available only one of these mechanisms to comply with this requirement. A website or email address will allow businesses, particularly small businesses, to avoid excessive costs associated with maintaining a toll-free telephone number.[104] If a sender uses a website for receiving opt-out requests, it must describe the opt-out

(Continued from previous page)
Natl Bank Comments at 4-5 (cover page, where used, should be considered the first page of the facsimile); CBS Corp Comments at 7 (if cover sheet used, notice should appear on cover sheet).

[97] Junk Fax Prevention Act, Sec. 2(c).

[98] *See* AGs Comments at 20 (to require a recipient to incur charges simply to request that no more fax ads be sent would shift additional costs onto the shoulders of recipients contrary to the purposes of the JFPA).

[99] *See, e.g.*, NNA Comments at 4; NFIB Comments at 5.

[100] *See* ASAE Comments at 6; DMA Comments at 10; ABA Comments at 2; ASAE Comments at 6.

[101] AGs Comments at 21; EPIC Comments at 6.

[102] *See* Comerica Comments at 1. *See also* Texas OPC Reply Comments at 10 (recipient must pay for a postcard and postage or paper, envelope and postage, which is not cost-free).

[103] NFIB Comments at 5. *See also* S. REP. NO. 109-76 at 10 (noting that the cost-free mechanism might include either a toll-free or a local telephone number).

[104] Given that we are not mandating that senders offer a toll-free telephone number for consumers to make opt-out requests, we find no reason to exempt small business from the cost-free mechanism requirement. As discussed above, businesses can use a website address or email address for receiving such requests. The record contains little empirical evidence that the costs associated with setting up a website or email address would be unduly burdensome to a small business given their revenues. *See* Junk Fax Prevention Act, Sec. 2(c) ("[The Commission may...subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders [from the requirement to provide a cost-free mechanism for a recipient to transmit an opt-out request], but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated (continued....)

mechanism and procedures clearly and conspicuously on the first page of the website.

29. As noted above, apart from the cost-free mechanism required by the statute, the opt-out notice must contain a domestic contact telephone number and facsimile machine number.[105] If the cost-free mechanism offered by the sender is either a domestic toll-free telephone number or toll-free facsimile machine number, the sender will be in compliance with both sets of requirements.[106] We agree with the Attorneys General commenters that the facsimile number should be a number that is separate and distinct from the telephone number to ensure consumers are less likely to find a busy line and can make opt-out requests without delay.[107] It is the responsibility of the sender to ensure that the number(s) are available to accept opt-out requests. In accordance with the statute, the new rules will require the sender to accept opt-out requests 24 hours, 7 days a week at the number(s), website or email address identified in the opt-out notice.[108]

3. Timeframe for Honoring Opt-Out Requests

30. The Junk Fax Prevention Act requires that the opt-out notice on the facsimile advertisement states that "failure to comply, within the shortest reasonable time, as determined by the Commission, with such a[n opt out] request . . . is unlawful."[109] In the *JFPA NPRM*, we sought comment on the "shortest reasonable time" within which a facsimile sender should comply with an opt-out request.[110] Of the comments filed, many were from businesses and trade organizations that support a period of 30 days within which senders must comply with opt-out requests.[111] Other commenters support a shorter period of time for honoring do-not-fax requests, such as 10 or 15 days, noting the costs associated with continuing to receive unwanted faxes after an opt-out request is made.[112] CTTC

(Continued from previous page)
by such small businesses"). We also note that a third party could be retained to maintain any of these opt-out mechanisms, although the sender remains liable for ensuring that opt-out requests are honored timely. *See also* ABM Comments at 12; SBA Advocacy Comments at 9.

[105] Junk Fax Prevention Act, Sec. 2(c).

[106] Huntington Natl Bank Comments at 8.

[107] AGs Comment at 19.

[108] CTTC Comments at 2. *See also* amended rule at 47 C.F.R. § 64.1200(a)(3)(iii)(E).

[109] Junk Fax Prevention Act, Sec. 2(c).

[110] *JFPA NPRM*, para. 20.

[111] American Bankers Assoc Comments at 5; NEPA Comments at 6; NNA Comments at 13; NFIB Comments at 6; NAR Comments at 8 (members might not have the resources to instantaneously incorporate consumer requests into do-not-fax lists); Westfax Comments at 12; SHRM Comments (supports 45 days); ABM Comments at 10; MFC Comments at 14 (supports 31 days, so that senders can remove numbers on a monthly basis).

[112] Biggerstaff Comments at 19; AGs Comments at 16-17; Empire Comments at 2 (the time period should be ten business days); Strang Reply Comments at 3 (a do-not-fax request should be honored within seven days of receipt, but in no case should exceed 14 days); Sutton Comments at 7 (should be honored within 24 hours); EPIC Comments at 5 (senders should be able to honor within five days); Texas OPC Reply Comments at 6 (reasonable time would be 3-10 business days).

maintains that legitimate businesses that receive such requests will honor them immediately.[113]

31. In accordance with the Junk Fax Prevention Act, we conclude that senders must comply with an opt-out request within the shortest reasonable time of such request. Taking into consideration both large databases of facsimile numbers and the limitations on certain small businesses to remove numbers for individuals that opt-out, we conclude that a reasonable time to honor such requests must not exceed 30 days from the date such a request is made.[114] The record demonstrates that 30 days will provide a reasonable opportunity for persons, including small businesses, to process requests and remove the facsimile numbers from their lists or databases.[115] Consistent with our rules for company-specific do-not-call requests, facsimile senders with the capability to honor do-not-fax requests in less than 30 days must do so.[116] We believe that any period greater than 30 days will likely impose additional costs and burdens on consumers and businesses that have taken steps to avoid facsimile messages by making opt-out requests. We also conclude that the sender must remove the facsimile number from its fax lists within the 30-day period, regardless of whether it believes the number may be used by more than one individual.[117] We believe it is reasonable to presume that persons making opt-out requests on behalf of a business' facsimile machine are authorized to do so. Senders must honor such opt-out requests made by the business, even if doing so restricts faxes sent to all employees of that business. This determination is consistent with our findings in the do-not-call context in which a do-not-call request applies to all persons at the residence associated with that telephone number.[118]

32. We decline to limit the time period during which an opt-out request remains in effect as suggested by NFIB.[119] We recognize that, like telephone numbers, facsimile numbers change hands over time. However, as noted above, the national do-not-call registry requires consumers to re-register just once every five years to avoid most telemarketing calls. In the absence of a similar do-not-fax list, a consumer would need to make numerous—perhaps hundreds—of opt-out requests every five years to

---

[113] CTTC Comments at 2. According to the Attorneys General commenters, the Federal Trade Commission is taking steps to shorten from 10 to 3 days its timeframe within which senders of commercial email messages must comply with opt-out requests from recipients under the CAN-SPAM Act. *See* AGs Comments at 16-17.

[114] *See* ASAE Comments at 5 (30 days is the shortest reasonable time as many associations are lightly staffed and depend upon the generosity of volunteers); NIADA Comments at 6; DMA Comments at 9 (supports 30 days).

[115] American Bankers Assoc Comments at 5; NEPA Comments at 6; NNA Comments at 13; NFIB Comments at 6; NAR Comments at 8 (members might not have the resources to instantaneously incorporate consumer requests into do-not-fax lists); Westfax Comments at 12; ABM Comments at 10; MFC Comments at 14 (31 days, which is the timeframe within which telemarketers must scrub their lists using the national do-not-call registry).

[116] *See* 47 C.F.R. § 64.1200(d)(3); *see also 2003 TCPA Order*, 18 FCC Rcd at 14069, para. 94.

[117] *See* American Bankers Assoc Comments at 5 (explaining that a business may need to investigate whether the opt-out request is for a fax number used by only one individual or if others use the number and whether the opt out is valid for all users).

[118] *See Consumer.net v. AT&T*, 15 FCC Rcd 281, 297 (1999). *See* DMA Comments at 6 (a fax sender should be permitted to rely on consent provided by any member of a business recipient's personnel with apparent authority to act on its behalf; senders should honor an opt-out request by an employee of a business with apparent authority to submit a request).

[119] NFIB Comments at 6. *See also* CBA Comments at 15.

avoid receiving unwanted faxes.[120] Instead, we conclude that a consumer who wishes to receive faxes at a new number or resume receiving faxes after previously opting out should notify the sender of such changes by giving prior express permission to the sender.[121] We also encourage facsimile senders to update their facsimile number databases, when consumers subsequently transact business, file applications or make inquiries.

4. Identification Requirements and Opt-Out Notice

33. As noted in the *JFPA NPRM*, the Commission's existing rules 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.[122] The TCPA also requires facsimile messages to include the date and time they are sent.[123] We sought comment on the interplay between this identification requirement and the opt-out notice requirement under the Junk Fax Prevention Act.[124] A few commenters identified additional burdens associated with complying separately with both requirements.[125] We conclude that senders that provide their telephone number and facsimile number as part of the opt-out notice will satisfy the Commission's identification rule so long as they also identify themselves by name on the facsimile advertisement.

D. Request to Opt-Out of Future Unsolicited Advertisements

34. The Junk Fax Prevention Act requires that a request not to send future unsolicited facsimile advertisements meet certain requirements.[126] In accordance with the statutory provisions, we

---

[120] *See supra,* para. 20.

[121] *See* AGs Comments at 23 (a do-not-fax request must be honored until the recipient gives express consent to receive solicitations).

[122] *JFPA NPRM*, para. 17. *See also* 47 C.F.R. § 68.318(d). We note that the "sender" of the facsimile advertisement is the person on whose behalf the advertisement is sent. Under the Commission's rules, the fax broadcaster must also identify itself if it demonstrates a high degree of involvement in the sender's facsimile messages, such as supplying the numbers to which a message is sent. *See* 47 C.F.R. § 68.318(d). Verizon urges the Commission to amend its current Caller Identification (Caller ID) rules to require that fax broadcasters transmit the same caller ID information that is currently required of telemarketers. Verizon alleges that there is a growing trend by fax broadcasters to engage in "caller ID spoofing," whereby they manipulate their caller ID data to disguise the true telephone number from which the calls have been placed. *See* Verizon Comments at 1. Although outside the scope of the NPRM, we will monitor caller ID spoofing to determine whether action is warranted to address the practice in the future.

[123] *See* 47 U.S.C. § 227(d)(1)(B).

[124] *JFPA NPRM*, para. 17.

[125] *See, e.g.,* Westfax Comments at 12.

[126] Junk Fax Prevention Act, Sec. 2(d) ("[The Commission] shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates; (ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and (iii) the person making the request has not, subsequent to (continued....)

adopt rules requiring that an opt-out request identify the telephone number or numbers of the facsimile machines or machines to which the request relates. In addition, the request must be made using the telephone number, facsimile number, website address or email address provided by the sender in its opt-out notice. Most commenters argue that permitting opt-out requests to be made through other avenues not identified in the notice will impair an entity's ability to account for all requests and process them in a timely manner.[127] As discussed above, the sender is required to include a telephone number and facsimile number on the advertisement, and if neither numbers are cost-free (*i.e.,* they are not 800 toll-free numbers or local numbers for local recipients), then the sender must have a website or email address to permit recipients to opt-out of future facsimile messages. Requiring recipients to use one of the methods identified on the facsimile should reasonably permit any consumer to avoid future facsimile messages from the sender. Under the new rules, the sender will be prohibited from sending facsimile advertisements to a person that has submitted a request that complies with these requirements.[128]

1. Interplay Between Established Business Relationship Exemption and Opt-Out Request

35. We agree with the majority of commenters that an opt-out request should be honored irrespective of whether the recipient continues to do business with the sender.[129] Therefore, our rules will reflect that a do-not-fax request will terminate the EBR exemption from the prohibition on sending facsimile advertisements.[130] This determination is consistent with the Commission's rules on telephone solicitations, whereby a telephone subscriber's seller-specific do-not-call request terminates any EBR exemption with that company even if the subscriber continues to do business with the seller.[131]

36. As set forth in the statute, a sender may resume sending facsimile advertisements to a consumer that has opted-out of such communications if that consumer subsequently provides his express invitation or permission to the sender.[132] Of the comments received on this issue, most agree that when a consumer has made an opt-out request of the sender, it should be up to the sender to demonstrate that the

(Continued from previous page)
such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine").

[127] American Bankers Assoc Comments at 5; Westfax Comments at 9; Huntington Natl Bank Comments at 8; NIADA Comments at 8; YPA Comments at 6; NFIB Comments at 5; ARTBA Comments at 3. *But see* Biggerstaff Comments at 22 (maintaining that it would be inconsistent to prescribe only fixed and limited methods by which a fax advertiser must accept a do-not-fax request when there are no such restrictions in the telemarketing context). We encourage senders that are on actual notice of a recipient's opt-out request to honor the request even if not sent by the methods identified in the sender's opt-out notice.

[128] *See infra,* discussion on prior express invitation or permission, paras. 45-48. *See also* amended rule at 47 C.F.R. § 64.1200(a)(3)(vi).

[129] NAWD Comments at 11-12; NNA Comments at 15; Westfax Comments at 8; AGs Comments at 25; Biggerstaff Comments at 22; CTTC Comments at 1 (the act of opting out will not only stop unsolicited advertisements, it will effectively terminate the EBR for purposes of the TCPA); NIADA Comments at 7.

[130] *See* amended rule at 47 C.F.R. § 64.1200(a)(3)(vi).

[131] *See* 47 C.F.R. § 64.1200(f)(3)(i) and amended as 47 C.F.R. § 64.1200(f)(4)(i).

[132] Junk Fax Prevention Act, Sec. 2(d).

consumer subsequently gave his express permission to receive faxes.[133] As discussed in more detail below, our rules will permit such permission to be granted in writing or orally.[134] Senders that claim their facsimile advertisements are delivered based on the recipient's prior express permission must be prepared to provide clear and convincing evidence of the existence of such permission.

2. Third Parties and Fax Broadcasters

37. The record reveals that fax broadcasters,[135] which transmit other entities' advertisements to telephone facsimile machines for a fee, are responsible for a significant portion of the facsimile messages sent today.[136] The Commission sought comment in the *JFPA NPRM* on whether to specify that if the entity transmitting the facsimile advertisement is a third party agent or fax broadcaster, that any do-not-fax request sent to that agent will extend to the underlying business on whose behalf the fax is transmitted.[137] The majority of commenters maintain that a third party should not be responsible under the law for accepting and communicating opt-out requests to senders.[138] Some commenters argue that to hold third parties responsible for processing opt-out requests will unduly restrict any third party's ability to send faxes to consumers on behalf of other entities.[139]

38. We conclude that the sender—the business on whose behalf the fax is transmitted—is responsible for complying with the opt-out notice requirements and for honoring opt-out requests. Regardless of whether the sender includes its own contact information in the opt-out notice or the contact information of a third party retained to accept opt-out requests, the sender is liable for any violations of the rules. This determination is consistent with the Commission's telemarketing rules.[140] Third parties, including fax broadcasters, need only accept and forward do-not-fax requests to the extent the underlying business contracts out such responsibilities to them.

---

[133] *See JFPA NPRM*, para. 25. *See also* AGs Comments at 22; B. Sachau Comments; NIADA Comments at 8; NAWD Comments at 13 (given the private right of action, it would be imprudent to rely on the recipient to prove that his opt-out had been superseded).

[134] *See* amended rule at 47 C.F.R. §64.1200(a)(3)(v)(C).

[135] The term facsimile broadcaster means a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee. *See* 47 C.F.R. § 64.1200(f)(4) and amended as (f)(6).

[136] *See* Biggerstaff Comments at 1-2; Texas OPC Comments at 15-17; Verizon Comments at 4.

[137] *JFPA NPRM*, para. 25.

[138] *See* American Bankers Assoc Comments at 5 (the question attempts to deputize broadcast fax companies as surrogates for a type of national do-not-fax list); NAWD Comments at 12; ABM Comments at 14; NFIB Comments at 7 (applying a do-not-fax request to third party senders could result in NFIB members not receiving vital information to which their membership entitles them); ASTA Comments at 11. *But see* AGs Comments at 25.

[139] American Bankers Assoc Comments at 5; NFIB Comments at 7. *But see* Strang Comments at 7 (a do-not-fax request to a fax broadcaster must apply to all customers of that broadcaster unless the consumer specifically asks for faxes from particular advertisers).

[140] *See* 47 C.F.R. § 64.1200(d)(3) ("...If [do-not-call] requests are recorded or maintained by a party other than the person or entity on whose behalf the telemarketing call is made, the person or entity on whose behalf the telemarketing call is made will be liable for any failures to honor the do-not-call request").

39. *We take this opportunity to emphasize that under the Commission's interpretation of the* facsimile advertising rules, the sender is the person or entity on whose behalf the advertisement is sent.[141] In most instances, this will be the entity whose product or service is advertised or promoted in the message. As discussed above, the sender is liable for violations of the facsimile advertising rules, including failure to honor opt-out requests. Accordingly, we adopt a definition of sender for purposes of the facsimile advertising rules.[142]

40. Under the current rules, a fax broadcaster also will be liable for an unsolicited fax if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile advertisements, and we will continue to apply this standard under our revised rules.[143] If the fax broadcaster supplies the fax numbers used to transmit the advertisement, for example, the fax broadcaster will be liable for any unsolicited advertisements faxed to consumers and businesses without their prior express invitation or permission.[144] We find that a fax broadcaster that provides a source of fax numbers, makes representations about the legality of faxing to those numbers or advises a client about how to comply with the fax advertising rules, also demonstrates a high degree of involvement in the transmission of those facsimile advertisements. In addition, we conclude that a highly involved fax broadcaster will be liable for an unsolicited fax that does not contain the required notice and contact information.[145] In such circumstances, the sender and fax broadcaster may be held jointly and severally liable for violations of the opt-out notice requirements. Based on our own enforcement experience, and the fact that highly involved fax broadcasters will have firsthand knowledge of the inclusion of the opt-out notice, we determine that such a fax broadcaster must, at a minimum, ensure that the faxes it transmits on behalf of each sender contain the necessary information to allow a consumer to opt out of a particular sender's faxes in the future. Otherwise, the consumer may have no means of stopping unwanted faxes transmitted by the fax broadcaster on behalf of various advertisers.

E. Professional or Trade Organizations

41. The Junk Fax Prevention Act authorizes the Commission to consider exempting nonprofit organizations from the opt-out notice requirements discussed above.[146] Specifically, the statute

[141] NAR Comments at 12 (asking the Commission to clarify the definition of "sender"); ABM Comments at 10 (a definition of "sender" would help distinguish between the business on whose behalf the fax is sent and a vendor who does nothing more than transmit a fax).

[142] *See* amended rule at 47 C.F.R. §64.1200(f)(8).

[143] *See* 47 C.F.R. § 64.1200(a)(3)(ii) and amended rule 47 C.F.R. § 64.1200(a)(3)(vii). *See also* 47 C.F.R. § 68.318(d) ("If a facsimile broadcaster demonstrates a high degree of involvement in the sender's facsimile messages, such as supplying the number to which a message is sent, that broadcaster's name, under which it is registered to conduct business with the State Corporation Commission (or comparable regulatory authority), must be identified on the facsimile, along with the sender's name.") *See also* AGs Comments at 29.

[144] 47 C.F.R. § 64.1200(a)(3)(ii).

[145] *See* amended rule at 47 C.F.R. § 64.1200(a)(3)(vii).

[146] Junk Fax Prevention Act, Sec. 2(e) ("[The Commission] may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, 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), except that the Commission may take action under this subparagraph only—(i) by regulation issued after public comment; and (ii) if the (continued....)

provides that the Commission may, after receiving public comment, 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 opt-out notice.[147] The statute requires that the Commission first determine that such notice is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements.[148] We sought comment on whether to allow such organizations to send faxes that do not contain the opt-out notice.[149] We asked how members would obtain the necessary information to stop unwanted faxes if the associations do not provide such information, and we asked what benefits there are to nonprofit organizations if they are exempt from the opt-out notice requirement.[150]

42. Most commenters that are themselves trade associations or professional organizations argue that they exist to serve their members, and that members of an association know how to contact those associations should they no longer wish to receive fax messages.[151] They contend that most trade associations have a membership or customer service department that can assist the member with an opt-out request.[152] Other commenters oppose an exemption for nonprofits, arguing that such organizations should have no difficulty including an opt-out notice on their facsimile advertisements.[153] We are not persuaded that consumers will have the necessary tools to easily opt-out of unwanted faxes from trade associations if the faxes received do not contain information on how to opt out. Moreover, we believe the benefits to consumers of having opt-out information readily available outweigh any burden in

(Continued from previous page) ——————————
Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements[.]").

[147] *Id.*

[148] Junk Fax Prevention Act, Sec. 2(e).

[149] *JFPA NRPM*, para. 27.

[150] *Id.*

[151] *See* IFDA Comments at 4; ABM Comments at 15-16; ASAE Comments a 7-9; DMA Comments at 1-3; State Broadcasters Comments at 6; ABA Comments at 2 (ABA members include a clear notice on the face of each facsimile about how to access ABA's website and then be directed to a separate webpage that allows members to opt-out of receiving future facsimile ads); ASAE Comments at 2 (urging the Commission to find that simply joining a nonprofit association constitutes prior express invitation or permission, making the Junk Fax Prevention Act provisions inapplicable).

[152] American Bankers Assoc Comments at 6; SBA Advocacy Comments at 9; NNA Comments at 16, NFIB Comments at 7; NADA Comments at 4 (an exemption would assist our compliance efforts and eliminate inadvertent violations of federal law when communicating with our members); SHRM Comments at 6.

[153] Biggerstaff Comments at 25; Hallikainen Comments at 1; Strang Comments at 8; Westfax Comments at 12-13 (the opt-out notice is easy to put into the content of any facsimile and should be included on all advertisements); Lorman Ed Services Comments at 1 (such an exemption would confuse and burden association members); Lorman Ed Services Reply Comments at 8 (consumers need to know they have the right to opt out; a notice does that); PRC Comments at 4 (to eliminate an opt-out choice entirely when a fax is sent by a nonprofit or trade association would deprive the recipient of any control).

including such notices.[154] Facsimile advertisements impose direct costs on consumers for paper, toner, and time spent sorting and discarding unwanted faxes. Should consumers not have access to opt-out contact information, they may be forced to incur unacceptable costs associated with faxes sent from nonprofit organizations. In addition, the record reveals that trade associations already have mechanisms in place through which members communicate with the organization.[155] Therefore, inclusion of an opt-out notice on their fax messages should not be burdensome.

43. While neither the TCPA nor its amendments carve out an exemption for nonprofits from the facsimile advertising rules, we agree with those petitioners that argue that messages that are not commercial in nature—which many nonprofits send—do not constitute "unsolicited advertisements" and are therefore not covered by the facsimile advertising prohibition.[156] We clarify that messages that do not promote a commercial product or service, including all messages involving political or religious discourse, such as a request for a donation to a political campaign, political action committee or charitable organization, are not unsolicited advertisements under the TCPA.[157] We emphasize that, under the Junk Fax Prevention Act, even unsolicited advertisements transmitted by tax-exempt nonprofit organizations may be sent to persons with whom the senders have an established business relationship, subject to the other statutory requirements.

F. Unsolicited Advertisement

1. Definition

44. The facsimile advertising rules apply to a fax communication that constitutes an "unsolicited advertisement" as defined in the TCPA.[158] The Junk Fax Prevention Act amends the term "unsolicited advertisement" by adding "in writing or otherwise" before the period at the end of that section.[159] We proposed amending the Commission's rules to reflect the change in the statutory

---

[154] We note that the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.

[155] DMA Reply Comments at 3; ABM Comments at 16.

[156] *See, e.g.,* ASAE Petition for Reconsideration, filed July 25, 2003; Consumer Electronics Association Petition for Reconsideration at 2-6, filed August 21, 2003; Independent Sector Comment at 2, filed August 25, 2003; Maryland Nonprofit Petition for Reconsideration at 2, filed August 25, 2003. We also emphasize that we are not carving out an exemption for tax-exempt nonprofits. Rather, consistent with the language of the TCPA, we do not intend for the clarifications in this Order to result in the regulation of noncommercial speech as commercial facsimile messages under the TCPA regulatory scheme.

[157] *See* American Dietetic Association Petition at 8, filed August 25, 2003; National Association of Business PACs Petition at 7-8, filed August 25, 2003. Under the Federal Election Commission's rules, when a person pays a political committee for a commercially available product or service, such as a dinner sponsored by a political campaign, the full purchase price of the item or service is considered a contribution to the campaign. *See* FEC Comments at 2-3, filed October 14, 2003. Therefore, the fact that a political message contains an offer to attend a fundraising dinner or to purchase some other product or service in connection with a political campaign or committee fundraiser does not turn the message into an advertisement for purposes of the TCPA's facsimile advertising rules.

[158] *See* 47 U.S.C. § 227(a)(4).

[159] Junk Fax Prevention Act, Sec. 2(g).

language.[160] No commenter opposed the modification. Accordingly, we amend our rules at 64.1200(f)(10) so that the definition reads as follows:

> The term unsolicited advertisement means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without the person's prior express invitation or permission, in writing or otherwise.[161]

2. Prior Express Invitation or Permission

45. Several commenters ask the Commission to explicitly recognize that "prior express invitation or permission" to send a facsimile advertisement may be obtained by means other than a signed written statement.[162] CBA urges the Commission not to specify the various other means, for fear that the Commission might overlook certain legitimate methods and forms of permission.[163] We clarify that, as an initial matter, a sender that has an EBR with a consumer may send a facsimile advertisement to that consumer without obtaining separate permission from him.[164] In the absence of an EBR, the sender must obtain the prior express invitation or permission from the consumer before sending the facsimile advertisement.[165] Prior express invitation or permission may be given by oral or written means, including electronic methods.[166] We expect that written permission will take many forms, including email, facsimile, and internet form. Whether given orally or in writing, prior express invitation or permission must be express, must be given prior to the sending of any facsimile advertisements, and must include the facsimile number to which such advertisements may be sent.[167] It cannot be in the form of a "negative option."[168] However, a company that requests a fax number on an application form could include a clear statement indicating that, by providing such fax number, the individual or business agrees to receive facsimile advertisements from that company or organization.[169]

---

[160] *JFPA NRPM*, para. 29.

[161] *See* amended rule at 47 C.F.R. § 64.1200(f)(13).

[162] *See* NEPA Comments at 9; NAR Comments at 16; Huntington Natl Bank Comments at 7.

[163] CBA Comments at 14-15; *see also* YPA Comments at 7.

[164] As discussed above, a sender that has received an opt-out request from a consumer must not continue to send facsimile advertisements regardless of whether there exists a business relationship between them.

[165] *See* 47 U.S.C. § 227(b)(1)(C) and (a)(4).

[166] As discussed above, we are removing the Commission's rule at section 64.1200(a)(3)(i) which requires the recipient to obtain a signed, written statement indicating the recipient's consent to receive facsimile advertisements from the sender. *See supra*, para. 11, n.38.

[167] AGs Comments at 28.

[168] A facsimile advertisement containing a telephone number and an instruction to call if the recipient no longer wishes to receive such faxes, would constitute a "negative option" as the sender presumes consent unless advised otherwise.

[169] Trade and membership organizations could do so on their membership renewal statements.

46. *We are concerned that permission not provided in writing may result in some senders* erroneously claiming they had the recipient's permission to send facsimile advertisements. Commenters that discussed this issue agree that a sender should have the obligation to demonstrate that it complied with the rules, including that it had the recipient's prior express invitation or permission.[170] Senders who choose to obtain permission orally are expected to take reasonable steps to ensure that such permission can be verified. In the event a complaint is filed, the burden of proof rests on the sender to demonstrate that permission was given.[171] We strongly suggest that senders take steps to promptly document that they received such permission.[172] Express permission need only be secured once from the consumer in order to send facsimile advertisements to that recipient until the consumer revokes such permission by sending an opt-out request to the sender.

47. The record on the facsimile advertising rules has long reflected the fact that consumers incur costs for receiving fax communications.[173] Recipients assume the cost of the paper used, the cost associated with the use of the facsimile machine, and the costs associated with the time spent receiving a facsimile advertisement during which the machine cannot be used by its owner to send or receive other facsimile transmissions.[174] We therefore conclude that, in the absence of an EBR, facsimile requests for permission to transmit faxed advertisements would not be permissible, as they would impose costs on consumers who had not yet consented to receive such communications.[175]

48. Senders who claim they obtained a consumer's prior express invitation or permission to send them facsimile advertisements prior to the effective date of these rules will not be in compliance unless they can demonstrate that such authorization met all the requirements as adopted herein. In addition, entities that send facsimile advertisements to consumers from whom they obtained permission, must include on the advertisements their opt-out notice and contact information to allow consumers to stop unwanted faxes in the future.

3. "Transactional" Communications

49. We agree with those petitioners who argue that messages whose purpose is to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender are not advertisements for purposes of the TCPA's facsimile advertising rules.[176] For

---

[170] Westfax Comments at 10; McKenna Comments at 2; YPA comments at 2 (maintaining that the Commission should be flexible as to the evidence necessary to prove the recipient granted permission to receive the fax).

[171] *See* Sauchau Comments; AGs Comments at 26.

[172] An example of such documentation could be the recording of the oral authorization. Other methods might include established business practices or contact forms used by the sender's personnel.

[173] *See 2003 TCPA Order*, 18 FCC Rcd at 14127-28, para. 189; *see also* AGs Comments at 4-5, 20; McKenna Reply Comments at 4; Biggerstaff Comments at 4-5.

[174] Biggerstaff Comments at 4-5; AGs Comments at 1 (describing the costs and time spent dealing with junk faxes).

[175] This finding is also consistent with our telemarketing and CAN-SPAM rules for wireless devices, which do not permit the calling or text messaging to obtain prior express permission.

[176] *See, e.g.*, Wells Fargo Petition for Reconsideration, filed August 25, 2003; Reed Elsevier Petition for Reconsideration, filed August 25, 2003; Proximity Marketing Request for Clarification, filed August 25, 2003; Financial Services Coalition Petition for Reconsideration at 6-7, filed August 25, 2003.