

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

| | | |
|---|---|----------------------|
| Junk Fax Prevention Act of 2005 |) | CG Docket No. 05-338 |
| |) | |
| Rules and Regulations Implementing the |) | |
| Telephone Consumer Protection Act of 1991 |) | CG Docket No. 02-278 |

PETITION FOR RECONSIDERATION AND CLARIFICATION

The Direct Marketing Association ("DMA") hereby petitions the Federal Communications Commission ("FCC" or "the Commission"), pursuant to 47 C.F.R. § 1.429 to reconsider certain decisions it reached in the *JFPA Report and Order*.¹ First, we ask that the Commission clarify or, alternatively, that it reconsider its decision with respect to the use of fax numbers compiled by third parties. To the extent that the *JFPA Report and Order* might be interpreted to prohibit a sender from outsourcing activities such as gathering fax numbers directly from intended recipients' own directories, advertisements, or Internet websites, the Commission should clarify or reconsider that conclusion to ensure that organizations are permitted to use contractors or other agents to perform these functions. Many entities that use facsimiles to advertise goods or services rely on vendors to assist with various aspects of their marketing efforts. The Commission's rules must remain flexible enough to enable facsimile senders to contract for services they could perform internally. The Junk Fax Prevention Act of 2005 ("JFPA") was not intended to alter existing business practices; on the contrary, it was enacted largely to preserve them. The FCC should also make clear that reasonable steps

¹ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, CG Docket No. 02-278 ("*JFPA Report and Order*").

to verify that a person voluntarily supplied a fax number need not always entail direct contact with intended recipients.

Second, we urge the Commission to reconsider imposing an unlimited retention period for do-not-fax ("DNF") requests, and instead adopt a five-year retention period for fax opt-outs, as it did for both company-specific do-not-call ("DNC") requests and registration for the national Do-Not-Call Registry. The *JFPA Report and Order* suggests that the lack of a centralized fax opt-out database like the DNC Registry warrants a longer retention period for company-specific fax opt-outs. Under the JFPA, however, one may *only* send an unsolicited fax advertisement based on an established business relationship ("EBR"). Furthermore, calls based on an EBR are exempt from the DNC Registry. Hence, the JFPA affords equal or greater protection as compared to telephone solicitations, and there is no basis for imposing a longer retention period for fax opt-outs.

I. Fax Number Compilations

Certain statements in the *JFPA Report and Order* might be interpreted to prohibit the use of agents to perform routine services that an organization would otherwise be permitted to conduct internally. DMA urges the Commission to ensure, as it has in other contexts, that commercial and nonprofit entities can continue to rely on agents to perform services on their behalf, and that agents are fully empowered to act for their principals.

The *JFPA Report and Order* addressed two different sources of facsimile numbers that senders may use to transmit faxes based on an established business relationship ("EBR") as permitted by the JFPA. Pursuant to section 2(a) of the JFPA, one category is numbers that a sender obtains based on "voluntary communication" of the number from the recipient; the second category is numbers that a sender obtains through

"a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution."² For the second category, the *JFPA Report and Order* established a bright line rule 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 that number.³ Yet for "sources of information compiled by third parties," the Commission declared that a sender "must take reasonable steps to verify that the recipient consent to have the number listed, such as calling or emailing the recipient."⁴

The examples of "information compiled by third parties" that the Commission cited – membership directories, commercial databases, or internet listings – suggest that the Commission did not intend to mandate further verification for *all* facsimile numbers gathered by third parties. Nonetheless, DMA asks that the Commission clarify or reconsider the issue. Any entity, ranging from a commercial seller, to a nonprofit association, to a private charity, may wish to hire a list compiler to gather or update customer or donor contact data from those customers or donors. This information, although literally "compiled by third parties," is collected on behalf of the sender, and in relation to those with whom the sender has an EBR. Such compilations are thus fundamentally different from independently compiled directories like those the Commission identified in the *JFPA Report and Order*. Senders should not be required to

² Section 2(a) of the JFPA creates an exception to the requirement if the EBR was formed before July 9, 2005.

³ *JFPA Report and Order* ¶15 (emphasis original).

⁴ *Id.*

verify that numbers gathered on their behalf were furnished voluntarily; doing so would duplicate the work and, in effect, require the sender to re-collect the data internally.

In the same vein, DMA urges the Commission to make clear that when a sender does elect to use fax numbers collected independently by a third party, "reasonable steps to verify" that the number was provided voluntarily may include measures that do not involve additional direct contact with intended facsimile recipients. We emphasize again that only facsimiles based on an EBR are at issue. Organizations that recklessly contact numbers that have not been voluntarily provided for public distribution will lose customers, members, donors, or others whose relationship they value. Senders have a business relationship to protect, and can be expected not to abuse it.

The Commission's only examples of reasonable verification measures – calling or emailing recipients – would impose unwarranted burdens and expense on senders in circumstances when other factors provide sufficient indicia that a recipient voluntarily made a fax number available for public distribution. For example, the manner in which numbers are compiled, furnished, or displayed, the requests or disclosures made at the point of collection, or other factors may be ample to demonstrate that a recipient agreed to make a facsimile number appearing in an advertisement, directory, or internet site available for public distribution. The circumstances attending the collection of a facsimile number will vary; what constitutes reasonable verification that an intended recipient voluntarily agreed to furnish a fax number will vary, too. Direct contact with recipients is unnecessary in every instance; mandating a verification call or email in every case would impose substantial, often redundant costs. It also threatens the viability of a promotional effort. For example, a sender's effort to obtain direct verification may

"preview" a forthcoming marketing message and dilute its impact. Moreover, repeated inquires to an intended recipient about whether a sender can use a particular fax number may itself diminish receptivity to the facsimile itself.

To the extent that the Commission intended to require verification of literally *all* facsimile number compilations by third parties, or to mandate direct contact with recipients to do so, DMA strongly urges the Commission to reconsider. Alternatively, we ask that the Commission clarify that senders may contract for services they could perform internally, such as gathering fax numbers directly from intended recipients' own directories, advertisements, or Internet websites, and that reasonable steps to verify that a facsimile number was provided voluntarily may include measures that do not involve additional direct contact with intended recipients.

II. Retention Period for Do-Not-Fax Requests

The Commission should also reconsider its decision not to limit the time period for which a do-not-fax opt-out ("DNF") request remains effective. The decision to require businesses to honor DNF requests *indefinitely* is at odds with not only the current five-year standard applicable to general telephone solicitations, but also the longer, ten-year retention standard previously applied to general telemarketing for nearly a decade. The Commission should, consistent with the approach to general telephone solicitations, adopt a five-year retention period for DNF requests. There is no basis for requiring marketers to maintain DNF requests in perpetuity.

When the Commission adopted its original TCPA regulations in 1992, it initially declined to apply a limit to the duration of a company-specific do-not-call request.⁵ In

⁵ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, 7 FCC Rcd. 8752, ¶ 31 ("1992 TCPA Order").

1995, noting concerns raised by DMA and others, the Commission recognized that there is substantial number turnover, and that placing a time limit on such DNC requests would benefit both consumers and business. Therefore, the Commission modified the requirement that company-specific do-not-call lists be maintained indefinitely and adopted a ten-year retention period.⁶ The Commission explained that its "rules should reflect the fact that residential telephone numbers are recycled."⁷ At that time, the Commission rejected requests to apply a five-year retention period, noting that the agency believed "that a five-year period...would not adequately account for the privacy needs of residential telephone subscribers."⁸

In 2003, the Commission revisited the issue in connection with amendments to its TCPA rules and shortened the retention period to 5 years. The Commission concluded that a "five-year period reasonably balances any administrative burden imposed on consumers in requesting not to be called with the interests of telemarketers in contacting consumers."⁹ The Commission also stated its belief that the option to sign up for the national DNC Registry would "mitigate the burden on those consumers who may believe more frequent company specific requests are overly burdensome."¹⁰

The *JFPA Report and Order* acknowledged that "like telephone numbers, facsimile numbers change hands over time," yet the Commission changed course and determined not to impose any time limit on the duration of a DNF request.¹¹ The

⁶ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Memorandum Opinion and Order*, 10 FCC Rcd. 12391, ¶¶ 14-15 (1995) ("*1995 TCPA Order*").

⁷ *Id.* at ¶15.

⁸ *Id.*

⁹ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, FCC 03-153, ¶ 92 ("*2003 TCPA Order*").

¹⁰ *Id.*

¹¹ *JFPA Report and Order* ¶ 32.

Commission stated that in the absence of a registry for facsimile numbers like the national DNC Registry, consumers might need to make numerous DNF requests every five years, rather than simply subscribe to a single registry "once every five years to avoid most telemarketing calls."¹²

There is simply no justification for imposing a more stringent standard to DNF requests. While there is no centralized registry for fax opt-outs, only a marketer that already has an established business relationship ("EBR") with the intended recipient may send an unsolicited fax advertisement to that recipient.¹³ Congress previously recognized the special relationship between a business and its customers when it enacted the Telephone Consumer Protection Act of 1991, excluding calls based on an established business relationship from the definition of "telephone solicitation."¹⁴ This Commission and the Federal Trade Commission have both concluded that the balance of interests in such situations weighs in favor of allowing marketers to contact their customers.¹⁵ Hence, both sets of federal rules exempt calls to someone with whom the seller has an EBR from the DNC Registry requirements.¹⁶

Certainly the JFPA embodies the same principle by allowing senders to transmit unsolicited advertisements by facsimile to recipients with whom the sender has an EBR. Yet, because one may *only* send an unsolicited fax advertisement based on an EBR, as compared to telephone solicitations, far fewer marketers are permitted to contact someone with a fax advertisement in the first instance. Thus, to the extent that the DNC Registry has a "mitigating" effect on individuals' opt-out burden for telephone

¹² *Id.*

¹³ Junk Fax Prevention Act of 2005, Sec. 2(a), Pub. L. No. 109-21, 119 Stat. 359 (2005).

¹⁴ 47 U.S.C. § 227(a)(3).

¹⁵ 2003 *TCPA Order* ¶ 42; Telemarketing Sales Rule, Final Rule, 68 Fed. Reg. 4580, 4633-34 (2003).

¹⁶ 47 C.F.R. § 64.1200(f)(9); 16 C.F.R. § 310.4(b)(1)(iii)(B)(ii).

solicitations, the JFPA's statutory limit on sending unsolicited fax advertisements only when there is an EBR achieves the same result by significantly restricting those who may send such facsimiles.

Moreover, the rapid pace of number turnover is not limited to phone lines used for voice communications; the Commission has acknowledged that fax numbers also change hands, as well as the fact that a shorter retention period will enhance the accuracy of a database of opt-out requests. In fact, some people use the same line for both facsimiles and voice communications. The harm to marketers and consumers that results from an indefinite retention period is also the same. Marketers are equally deprived of a potential contact when a fax number is placed on a DNF list as they are when a number is placed on general DNC list. Customers who wish to get faxes but who are assigned a fax number on an organization's DNF list are similarly harmed because they will not get the fax.

The Commission should, consistent with the standards applicable to company-specific DNC requests and the registration period applicable to the national DNC Registry, apply a moderate retention period of five years for DNF requests. Submitting a DNF request once every five years does not impose undue burden on recipients in light of high number turnover and the comparatively limited fax advertisements permitted under the JFPA. As DMA noted in our comments on DNC retention, during a five-year period, a marketer's products or services may significantly change, and a consumer may change his or her mind about being on that company's opt-out list or lists. Yet mandating that businesses avoid contacting someone at a number who is *not* the person who requested to

be placed on the DNF list imposes high cost and lost opportunities, and ultimately, places an unreasonable burden on organizations that rely on facsimiles for advertising.

CONCLUSION

For the foregoing reasons, DMA respectfully asks that the Commission clarify or, alternatively, that it reconsider its decision with respect to the use of fax numbers compiled by third parties to ensure that senders are permitted to rely on agents to perform functions on their behalf, and that reasonable steps to verify that a person voluntarily supplied a fax number need not always entail direct contact with intended recipients. We also request that the Commission reconsider imposing an unlimited retention period for do-not-fax requests and adopt a five-year retention period, as it did for registrations for the national DNC Registry and company-specific DNC requests.

Respectfully submitted,

Jerry Cerasale
Senior Vice President, Government Affairs
The Direct Marketing Association, Inc.
1111 19th Street, N.W., Suite 1100
Washington, DC 20036
(202) 955-5030

Ian D. Volner
Heather L. McDowell
Venable LLP
575 7th Street, N.W.
Washington, DC 20004-1601
(202) 344-4800
Counsel for The DMA

June 2, 2006