

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C. 20554

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

To: The Commission

**PETITION FOR RECONSIDERATION OR CLARIFICATION**

Leventhal Senter & Lerman PLLC (“LS&L”), on behalf of certain broadcast clients, hereby submits this Petition for Reconsideration or Clarification regarding the Report and Order and Third Order on Reconsideration (the “Report and Order”) issued by the Federal Communications Commission (the “FCC” or the “Commission”) on April 6, 2006 in the above-captioned matters which amended the Commission’s rules on unsolicited advertisements sent by facsimile as required by the Junk Fax Prevention Act of 2005. LS&L respectfully seeks reconsideration or clarification of two requirements set forth in the Report and Order. Specifically, LS&L requests that: (i) the Commission determine that a clear and conspicuous description of a sender’s opt-out mechanism on the webpage to which recipients of unsolicited faxed advertisements are directed, complies with the requirement that such a description appear on a website’s first page; and (ii) that a properly formatted opt-out notice included on a fax cover

page complies with the requirement that such an opt-out notice appear on the “first page of the advertisement.” The requested clarifications would further the intent and enhance the effectiveness of the Commission’s new rules regarding unsolicited advertisements sent by fax while also recognizing certain real-world burdens and impracticalities that would be imposed in the absence of such clarifications.

### **Description of Opt-Out Procedure and Mechanism on Web Sites.**

The Commission’s rules require that all faxed advertisements include an opt-out notice by which recipients can inform senders that they do not wish to receive future unsolicited faxed advertisements.<sup>1</sup> This opt-out notice must include a cost-free mechanism by which recipients can transmit their opt-out request.<sup>2</sup> If a sender designates a website as its cost-free opt-out mechanism, a description of the mechanism and procedures must be included “clearly and conspicuously *on the first page of the website.*”<sup>3</sup> LS&L requests that the Commission find that this requirement is met when the requisite description is included on a dedicated opt-out page specified by URL in the opt-out notice (*e.g.*, [www.business.com/faxopt-out](http://www.business.com/faxopt-out)). A link could also be included on the website’s homepage to direct recipients to the appropriate internal webpage.

The first page of a website is typically the site’s homepage, containing navigational, editorial, informational links and links to other legal content (*e.g.*, the site’s Privacy Policy and Terms of Use Agreement). The homepages of websites for most businesses and associations do not easily lend themselves to including a relatively lengthy, clear and conspicuous, description of

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<sup>1</sup> 47 C.F.R. § 64.1200(a)(3)(iii) and (iv).

<sup>2</sup> *Id.* at § 64.1200(a)(3)(iii)(C)(2).

<sup>3</sup> *Report and Order*, at ¶ 28 (emphasis added).

the opt-out mechanism.<sup>4</sup> Such a notice would likely compromise the design, function, and nature of many such homepages. Thus, the opt-out mechanism would significantly distract site visitors from the purpose of the homepage. Indeed, for many businesses and associations, it is unlikely that a significant portion of a website's visitors are accessing the site in order to take advantage of the unsolicited fax advertisement opt-out mechanism. A majority of visitors to a website's homepage are likely looking for information or seeking to engage in a transaction with the website's owner. Only recipients of unsolicited faxed advertisements would be directed to go to the website for the purpose of utilizing the opt-out mechanism. Without diminishing the effectiveness of the opt-out notice, those recipients could be referred directly to a webpage dedicated to the website's opt-out mechanism.

However, including such a clear and conspicuous description on the web page that includes the opt-out mechanism does not pose the same challenges and can be included without displacing or compromising important editorial material. Instead, a fax sender's opt-out notice could include the specific URL of the web page on its site that accepts opt-outs. Thus, those recipients who wish to take advantage of the opt-out option may do so using the information contained in the opt-out notice.

The requirement that such a description be placed on a website's first page is particularly burdensome on small businesses. Use of such a website is likely one of the least expensive and most cost-effective opt-out mechanisms available to small businesses, however requiring such a lengthy description of the mechanism on a website's homepage is a significant deterrent to use a website as a sender's cost-free, opt-out mechanism. Thus, small businesses must choose

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<sup>4</sup> Such a description, detailing the website's opt-out mechanism and procedures by which it is to be completed is likely to consume a significant of space on each website's homepage as it must be "clear and conspicuous," *i.e.*, it must be apparent to a reasonable website visitor. *Report and Order* at ¶ 28.

between significantly compromising the effectiveness of the homepage of their websites or selecting a more expensive, less cost-effective, method of accepting opt-out notices. Moreover, while allowing the use of a website may be a cost-effective opt-out mechanism for small businesses,<sup>5</sup> requiring them to redesign an existing homepage, which may be content rich with a considerable use of graphical elements, to include a description of the opt-out mechanism and procedure will be significantly more costly than to design a clear-and-conspicuous dedicated webpage for accepting opt-out notices. The requirement may also have a long-term economic impact to the extent such a redesign compromises the commercial effectiveness of a small-business's homepage.

**Inclusion of Opt-Out Notice on Fax Cover Page.**

The Commission's new rules also require that an opt-out notice be included on the first page of the advertisement.<sup>6</sup> Although several commenters requested that the FCC's rules be interpreted to designate the cover sheet as the first page of the advertisement,<sup>7</sup> the Commission declined to do so.<sup>8</sup> Not allowing the notice to be placed solely on the cover page ignores business practicalities and in some instances may create a fundamental implementation problem. LS&L therefore respectfully requests the Commission to reconsider its interpretation that the first page of the advertisement is not the cover page if one is used. Such an interpretation would

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<sup>5</sup> *See Id.*, at 76 (noting that the Office of Advocacy of the U.S. Small Business Administration recommended that web-based systems be permitted as a cost-free opt-out mechanism).

<sup>6</sup> 47 C.F.R. § 64.1200(a)(3)(iii)(A).

<sup>7</sup> *See* Bank of America Comments at 3, Reply Comments of CBS Corporation at 7, and The Huntington National Bank Comments at 4-5.

<sup>8</sup> "If a cover page accompanies the advertisement, we encourage senders to include the notice on the cover page *as well.*" *Report and Order*, at n. 96 (emphasis added).

be consistent with the statutory first page requirement<sup>9</sup> while ensuring that the notice is clear and conspicuous, as this would be the first page a recipient will see.

Businesses, associations, non-profit organizations, and individuals often send advertisements by fax that are pre-produced or are designed in a manner that cannot be easily edited or revised due to copyright, trademark or other legal or artistic reasons. Such material would not allow for the addition of any content, including additional opt-out notice language in a clear and conspicuous manner.<sup>10</sup> As a result, failure to recognize that a cover page can be the first page of an advertisement inherently prohibits sending some material in compliance with the Commission's rules, and would be more burdensome than necessary.

Significantly, a fax cover sheet contains critically important information about the fax and is an integral part of the advertisement. It identifies the name and contact information of the sender and the recipient, and in many instances establishes the purpose of the fax (*i.e.*, whether it is an "advertisement" subject to the Commission's rules). Moreover, the opt-out notice, like the contact and other information contained on the cover page, relates to the relationship between the sender and recipient and is therefore more appropriately placed on the cover page rather than in the substantive portion of the fax.

Further, numerous states impose opt-out notice obligations on faxed advertisements, some of which include varying and sometimes conflicting requirements. For instance,

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<sup>9</sup> 47 U.S.C. § 227(b)(2)(D)(i).

<sup>10</sup> The opt-out notice must include a statement that the recipient is entitled to request that the sender not send any future unsolicited advertisements and contain a domestic contact telephone number, a facsimile machine number and at least one cost-free mechanism for transmitting an opt-out request. 47 C.F.R. § 64.1200(a)(3)(iii). This notice must be clear and conspicuous, must be placed separate from the advertising copy or other disclosures and at either the top or bottom of the fax and must also be distinguishable from the advertising material through some use of bolding, italics, different font, etc. *Report and Order*, at ¶ 26.

Colorado<sup>11</sup> requires the notice to be in the margin at the top or bottom of each transmitted page or on the first page of the transmission. New Jersey<sup>12</sup> requires the notice to be on the first page of the unsolicited advertisement, while New Mexico<sup>13</sup> and Rhode Island<sup>14</sup> require the notice to be in the “first text of the body of the message.” Such requirements make implementation and compliance with relevant laws and regulations even more difficult and burdensome. Federal recognition and guidance that the cover sheet can be considered the first page of the advertisement will help establish a universal standard that is less burdensome and less confusing to implement for small and large businesses and other entities to implement.

Permitting the opt-out notice to be included on a fax cover page will greatly increase the effectiveness of the Commission’s rules. Without federal guidance, employees will find it even more difficult to educate their employees as to where and when an opt-out notice must be placed on any given fax given the difficulties presented when sending some pre-produced materials and when complying with a myriad of state requirements. Interpreting the “first page” requirement to permit the opt-out notice to be placed on a cover sheet allows a business to design one standard cover page with the opt-out mechanism clearly and conspicuously included for use by all of its employees. Such a standardized cover page permits a uniform implementation of a business’ fax opt-out mechanism and eliminates the possibility that an employee will forget to include the required notice or will fail to include it in a clear and concise manner.

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<sup>11</sup> Colo. Rev. Stat. §§ 6-1-702 (1)(b).

<sup>12</sup> N.J. Stat. Ann. § 56:8-158 (2)(b).

<sup>13</sup> N.M. Stat. § 57-12-23(B)(2).

<sup>14</sup> R.I. Gen Laws § 6-47-1(2).

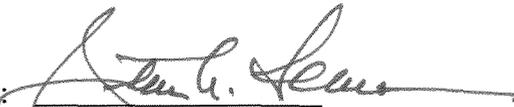
Use of a cover page also makes it easier to comply with the Commission's other requirements that the opt-out notice be separate from the advertising copy and other disclosures and at either the top or bottom of the fax.<sup>15</sup> Following implementation of the new rules, fax recipients will become accustomed to opt-out notices from various senders appearing in a uniform location on a fax's cover page – thus making it easier for them to take exercise their right to opt-out of unwanted faxed advertisements.

**Conclusion.**

LS&L respectfully requests that the Commission reconsider or clarify its rules regarding advertisements sent by fax as noted.

Respectfully submitted,

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Members

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<sup>15</sup> *Report and Order*, at ¶ 26.