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

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

OCT 17 2008

ORDER ON RECONSIDERATION

Adopted: October 8, 2008 **Released: October 14, 2008**

By the Commission:

I. INTRODUCTION

1. In this Order on Reconsideration, we address certain issues raised in petitions for reconsideration and/or clarification of the Report and Order[1] implementing the Junk Fax Prevention Act of 2005.[2] As set forth in detail below, we clarify that: (1) facsimile numbers compiled by third parties on behalf of the facsimile sender will be presumed to have been made voluntarily available for public distribution so long as they are obtained from the intended recipient's own directory, advertisement, or Internet site; (2) reasonable steps to verify that a recipient has agreed to make available a facsimile number for public distribution may include methods other than direct contact with the recipient; and (3) a description of the facsimile sender's opt-out mechanism on the first webpage to which recipients are directed in the opt-out notice satisfies the requirement that such a description appear on the first page of the website. We believe the clarifications provided herein will assist senders of facsimile advertisements in complying with the Commission's rules in a manner that minimizes regulatory compliance costs while maintaining the protections afforded consumers under the Telephone Consumer Protection Act (TCPA).[3]

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[1] *See* Direct Marketing Association Petition for Reconsideration and Clarification, filed in CG Docket Nos. 02-278, 05-338 on June 2, 2006 (DMA Petition); Leventhal Senter & Lerman PLLC Petition for Reconsideration or Clarification, filed in CG Docket Nos. 02-278, 05-338 on June 2, 2006 (LS&L Petition). *See also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) (*Junk Fax Order*).

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

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

II. BACKGROUND

A. Telephone Consumer Protection Act

2. On December 20, 1991, in an effort to address a growing number of telephone marketing calls and certain telemarketing practices thought to be an invasion of consumer privacy, Congress enacted the TCPA.[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]

3. In 1992, the Commission adopted rules implementing the TCPA, including restrictions on the transmission of unsolicited advertisements by facsimile machines.[6] The Commission's rules on unsolicited facsimile advertisements incorporated the language of the TCPA virtually verbatim.[7] On July 3, 2003, the Commission revised some of its telemarketing rules including those relating to facsimile advertising.[8] Prior to the implementation of the revised facsimile rules, however, Congress enacted the Junk Fax Prevention Act which amended provisions of the TCPA relating to unsolicited facsimile advertisements.[9] As required by the Junk Fax Prevention Act, the Commission initiated a rulemaking to conform its regulations to the requirements of the Junk Fax Prevention Act.[10]

B. Junk Fax Prevention Act of 2005

4. On July 9, 2005, the Junk Fax Prevention Act was enacted amending section 227 of the Communications Act. In general, the Junk Fax Prevention Act: (1) codified an established business relationship (EBR) exemption to the prohibition on sending unsolicited facsimile advertisements;[11] (2)

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[4] *See* TCPA, Section 2(5), *reprinted in Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Notice of Proposed Rulemaking, 7 FCC Rcd 8752 (1992).

[5] 47 U.S.C. § 227(b)(1)(C). An unsolicited advertisement is defined as "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, in writing or otherwise." *See* 47 U.S.C. § 227(a)(5).

[6] *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. In 1995 and 1997, the Commission released orders addressing petitions for reconsideration of the *1992 TCPA Order. See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd 12391 (1995) (*1995 TCPA Reconsideration Order*); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Order on Further Reconsideration, 12 FCC Rcd 4609 (1997) (*1997 TCPA Reconsideration Order*).

[7] *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 . . .").

[8] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 at 14128-29, para. 191 (2003).

[9] *See generally* Junk Fax Prevention Act.

[10] *See 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, 20 FCC Rcd 19758 (2005).

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

provided a definition of an EBR to be used in the context of unsolicited facsimile advertisements;[12] (3) required 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;[13] and (4) specified the circumstances under which a request to "opt-out" complies with the Act.[14]

5. On April 6, 2006, as required by the Junk Fax Prevention Act,[15] the Commission released an Order amending its rules on unsolicited facsimile advertisements. In so doing, the Commission adopted the requirements of that statute virtually verbatim.[16]

6. As relevant here, the Junk Fax Prevention Act allows a sender that has an EBR with the recipient to send an unsolicited facsimile advertisement if the sender obtained the number of the facsimile machine through: (1) the voluntary communication of such number, within the context of the EBR, from the recipient of the facsimile advertisement, or (2) a directory, advertisement, or site on the Internet to which the recipient *voluntarily agreed* to make available its facsimile number for public distribution.[17] For this second category of facsimile numbers, the Commission found that it would be unduly burdensome for senders of facsimile advertisements to verify that the recipient voluntarily agreed to make the facsimile number public in every instance.[18] As a result, the Commission concluded 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.[19] The Commission noted, however, that if a sender obtains the facsimile number from sources of information compiled by third parties – such as membership directories and commercial databases, the sender "must take reasonable steps to verify that the recipient consented to have the number listed, such as calling or emailing the recipient."[20]

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

[13] *Id.*, Sec. 2(c).

[14] Junk Fax Prevention Act, Sec. 2(d). In addition, the Junk Fax Prevention Act authorized the Commission to: (1) determine the "shortest reasonable time" that a sender must comply with a request not to receive future facsimile advertisements; (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; 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.

[15] *See generally Junk Fax Order.*

[16] *See Junk Fax Order*, App. A – Final Rules. *See also* 47 C.F.R. § 64.1200 (as revised by the *Junk Fax Order*).

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

[18] *See Junk Fax Order*, 21 FCC Rcd at 3795, para. 15.

[19] *Id.*

[20] *Id.*, 21 FCC Rcd at 3795-96, para. 15. The Commission's rules define the "sender" as the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement. *See* 47 C.F.R. § 64.1200(f)(8).

7. The Junk Fax Prevention Act also requires that all unsolicited facsimile advertisements include an opt-out notice that instructs recipients on how to notify senders that they do not wish to receive future facsimile advertisements.[21] Among other requirements, the opt-out notice must identify a "cost-free" mechanism by which recipients can transmit their opt-out requests.[22] The Commission concluded that, if a sender designates a website as its cost free opt-out mechanism, a description of the opt-out mechanism and procedures must be included "clearly and conspicuously *on the first page of the website*."[23] The Commission also clarified that, in accordance with the Junk Fax Prevention Act, if there are several pages to the facsimile, the first page of the advertisement must contain the opt-out notice.[24] In so doing, the Commission declined to find that the "first page" notice requirement was satisfied by including the notice on a cover page. Rather, the Commission required that the opt-out notice appear on the first page of the advertisement itself.[25]

8. Finally, the Commission declined to limit the time period during which a request to opt-out from receiving unsolicited facsimile advertisements remains in effect.[26] The Commission concluded that requiring consumers to repeat their opt-out requests to potentially hundreds of senders of unsolicited facsimile advertisements would be overly burdensome to recipients.[27] Therefore, once an opt-out request has been received, the sender is prohibited from transmitting facsimile advertisements to that number until the sender obtains the prior express permission of the recipient to resume sending facsimile advertisements.[28]

C. Petitions For Reconsideration

9. On June 2, 2006, two petitions for reconsideration and clarification were filed in response to the *Junk Fax Order*.[29] Specifically, the Direct Marketing Association (DMA) seeks clarification that the *Junk Fax Order* does not prohibit the use of third-party agents to perform services that an organization would otherwise be permitted to conduct internally.[30] In particular, DMA contends that many facsimile senders hire third parties to gather facsimile numbers from the intended recipients'

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

[22] *Id.*

[23] *Junk Fax Order*, 21 FCC Rcd at 3803, para. 28 (emphasis added).

[24] *Id.*, 21 FCC Rcd at 3801, para. 26.

[25] *Id.*, 21 FCC Rcd at 3801, para. 26 and n.96.

[26] *Id.*, 21 FCC Rcd at 3804-05, para. 32.

[27] *Id.*

[28] *Id.*, 21 FCC Rcd at 3805, para. 32.

[29] *See* DMA Petition; LS&L Petition. No comments were filed in opposition to these petitions. Three comments were filed in support of LS&L's Petition. *See* National Association of Broadcasters Comments in Support of Petition For Reconsideration dated July 13, 2006; Comments of American Society of Association Executives dated July 12, 2006; Joint Comments of the Named State Broadcasters Associations dated July 13, 2006.

[30] DMA Petition at 2-4.

own directories, websites or advertisements.[31] In these instances the DMA suggests that, although literally "compiled by third parties," this information is collected on behalf of the sender, and in relation to those with whom the sender has an EBR.[32] DMA contends that, in this situation, additional verification that the recipient has voluntarily made available its facsimile number should not be required simply because a third party – rather than an internal employee of the sender – has compiled the information. In addition, DMA urges the Commission to make clear that when a sender does elect to use facsimile numbers collected independently from a third party source such as a membership directory, that "reasonable steps" to verify the number was provided voluntarily may include measures that do not involve direct contact with the intended recipient.[33] For example, DMA argues that the manner in which numbers are compiled, furnished, or displayed and other similar 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 without the necessity of contacting the recipient directly.[34] Finally, DMA requests that the Commission reconsider the decision not to limit the time period for which an opt-out request remains in effect.[35]

10. Leventhal Senter and Lerman PLLC (LS&L), on behalf of certain unnamed broadcast clients, seeks reconsideration or clarification of two issues relating to the opt-out notice.[36] First, LS&L requests that the Commission clarify that the requirement that a clear and conspicuous description of the opt-out mechanism appear on the website's first page is met when "a dedicated opt-out page [is] specified by URL in the opt-out notice" that appears in the facsimile advertisement.[37] In addition, LS&L suggests that a link could be included on the website's homepage to direct recipients to the appropriate internal webpage.[38] LS&L contends that web homepages for most businesses do not easily lend themselves to including lengthy descriptions of the opt-out mechanism.[39] Therefore, LS&L argues that interpreting the "first page" requirement to require the entire opt-out mechanism to appear on the sender's homepage would be costly to implement.[40] Second, LS&L requests that a properly formatted opt-out notice included on a facsimile cover page complies with the requirement that such opt-out notice

[31] *Id.* at 1-3.

[32] *Id.* at 3.

[33] *Id.* at 4.

[34] *Id.* at 4.

[35] *Id.* at 5-9. For example, DMA notes that the Commission has limited the duration of a do-not-call request to five years in the case of unwanted telephone solicitations. *Id.* at 6.

[36] *See generally* LS&L Petition. Three comments were filed in support of LS&L's Petition. *See* National Association of Broadcasters Comments in Support of Petition For Reconsideration dated July 13, 2006; Comments of American Society of Association Executives dated July 12, 2006; Joint Comments of the Named State Broadcasters Associations dated July 13, 2006.

[37] LS&L Petition at 2-4.

[38] *Id.* at 2.

[39] *Id.* at 2-3.

[40] *Id.* at 3.

appear on the "first page of the advertisement."[41] LS&L contends that businesses often send facsimile advertisements that are pre-produced or are designed in a manner that cannot easily be edited or revised to include the opt-out language in a clear and conspicuous manner on the advertisement.[42]

III. DISCUSSION

A. Established Business Relationship

1. Facsimile Numbers Obtained from the Recipient's Own Directory, Advertisement or Internet Site

11. Consistent with the Commission's conclusion in the *Junk Fax Order*, we reiterate that facsimile numbers compiled on behalf of the facsimile sender will be presumed to have been voluntarily made available for public distribution so long as they are obtained from the intended recipient's own directory, advertisement or Internet site.[43] In so doing, we agree with DMA that the Commission did not limit this presumption to only those situations in which the sender compiles this information through "in-house" employees. Rather, it is the source from which the facsimile number is obtained, and not the identity of the compiler, that provides evidence of whether the recipient intended to make that number available for public distribution.[44] Therefore, no additional verification that the recipient has voluntarily made available his or her facsimile number is required if the number is obtained from the recipient's own directory, advertisement or Internet site. However, we caution that a sender that uses a third party to compile facsimile numbers will be liable for the errors of its third-party agent or contractor. 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 the recipient's own directory, advertisement or website does not alone entitle a sender to transmit a facsimile advertisement to that number.[45]

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[41] *Id.* at 4-7 ("[s]uch an interpretation would be consistent with the statutory first page requirement while ensuring that the notice is clear and conspicuous, as this would be the first page a recipient will see.").

[42] *Id.* at 5.

[43] As noted above, the Junk Fax Prevention Act allows a sender that has an EBR with the recipient to send an unsolicited facsimile advertisement if the sender obtained the number of the facsimile machine through a directory, advertisement, or site on the Internet to which the recipient *voluntarily agreed* to make available its facsimile number for public distribution. *See Junk Fax Prevention Act*, Sec. 2(a). The Commission's rules provide that if a sender obtains the facsimile number from the recipient's own directory, advertisement or Internet site, it will be presumed that the number was voluntarily made available for public distribution. The recipient may rebut this presumption by noting on such materials that it does not accept unsolicited advertisements at the facsimile number in question. *See Junk Fax Order*, 21 FCC Rcd at 3795, para. 15; 47 C.F.R. § 64.1200(a)(3)(ii).

[44] *See, e.g., Junk Fax Order*, 21 FCC Rcd at 3795-96, para. 15 (noting that membership directories requiring a fee to use are limited in distribution and, as such, the information included within the directory is made available to subscribers and purchasers, not the general public).

[45] *See id.*, 21 FCC Rcd at 3796, para. 15 (noting that the sender must also have an EBR with the recipient in order to transmit a facsimile advertisement).

2. Reasonable Steps to Verify That the Recipient has Voluntarily Made Available a Facsimile Number

12. We clarify that "reasonable steps" under the Commission's rules to verify that a recipient has agreed to make available a facsimile number for public distribution may include methods other than calling or emailing the recipient directly.[46] The Commission cited these verification methods in the *Junk Fax Order* as examples that satisfy this requirement.[47] The Commission did not, however, limit parties in this context only to means of direct contact with the recipient.

13. We agree with DMA that it is possible that the circumstances attending the collection of a facsimile number can provide sufficient evidence that the number has been provided voluntarily for public distribution without the necessity of contacting the recipient.[48] For example, the recipient may expressly agree at the point of collection to allow for public disclosure of the facsimile number. We caution, however, that should a complaint arise on this issue, the facsimile sender has the burden to demonstrate that the circumstances surrounding the acquisition of the facsimile number reasonably indicate that the recipient agreed to make the facsimile number available for public distribution.[49]

B. Notice of Opt-Out Opportunity

1. Location of the Opt-Out Mechanism on the Website's First Page

14. We clarify that a facsimile sender satisfies the requirement to provide clear and conspicuous notice of a cost-free mechanism for transmitting opt-out requests when the opt-out notice directs the recipient to a dedicated webpage that allows the recipient to opt-out of future facsimile advertisements. The Commission's rules require that all facsimile advertisements include an opt-out notice by which recipients can inform senders that they do not wish to receive future unsolicited advertisements.[50] The notice must include a domestic telephone number and facsimile number for the recipient to transmit an opt-out request.[51] If neither the required telephone number nor facsimile number is a toll free number, a separate cost-free mechanism must be provided for the recipient to transmit the opt-out request.[52] In the *Junk Fax Order*, the Commission noted that, if the sender designates a website as its cost-free opt-out mechanism, a description of the mechanism must be included clearly and

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[46] 47 C.F.R. § 64.1200(a)(3)(ii).

[47] *See Junk Fax Order*, 21 FCC Rcd at 3795, para. 15.

[48] DMA Petition at 4-5.

[49] In the context of facsimile advertisements, the Commission has defined the "sender" as the person or entity whose services are advertised or promoted in the advertisement. *See Junk Fax Order*, 21 FCC Rcd at 3807-08, paras. 38-39. *See also* 47 C.F.R. § 64.1200(f)(8). The Commission has concluded that a fax broadcaster also will be liable for violations of the facsimile rules if it demonstrates "a high degree or involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile advertisements." *See Junk Fax Order*, 21 FCC Rcd at 3808, para. 40. *See also* 47 C.F.R. § 64.1200(a)(3)(vii).

[50] 47 C.F.R. § 64.1200(a)(3)(iii).

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

[52] 47 C.F.R. § 64.1200(a)(3)(iii)(D)(2).

conspicuously on the first page of the website.[53] We clarify that a description of the facsimile sender's opt-out mechanism on the first webpage to which recipients are directed in the opt-out notice satisfies the requirement that such a description appear on the "first page" of the website. In addition, a clear and conspicuous link should be provided on the website's homepage to direct recipients to the appropriate internal opt-out webpage.[54] We agree with LS&L, however, that the Commission did not intend to mandate that the entire opt-out mechanism must appear on the homepage of every sender of unsolicited facsimile advertisements.[55] Rather, the intent of this requirement is to provide a reasonable means for recipients to locate the facsimile sender's opt-out mechanism and make requests to avoid future unwanted facsimiles. We believe this interpretation of the "first" webpage requirement adequately ensures that recipients can locate the opt-out mechanism while providing flexibility to facsimile senders in designing their websites in the most cost-effective manner to comply with this requirement.[56]

2. Facsimile Cover Page

15. We decline to reconsider the Commission's decision that the first page of the facsimile advertisement must contain the opt-out notice.[57] In so doing, we note that the Junk Fax Prevention Act requires that "the notice is clear and conspicuous and *on the first page of the unsolicited advertisement*."[58] Specifically, we decline to find that placement of the opt-out notice on a cover sheet that accompanies the facsimile advertisement satisfies this requirement.[59] The Commission specifically addressed this issue in the *Junk Fax Order*, and petitioners provide no new information or evidence that leads us to now reconsider this conclusion.[60]

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[53] *Junk Fax Order*, 21 FCC Rcd at 3802-03, para. 28.

[54] *See* LS&L Petition at 2.

[55] *See id.* at 3. *See also* ASAE Comments at 2; NAB Comments at 3.

[56] Interested parties in this proceeding contend that reconfiguring web homepages to include the opt-out mechanism is more cost prohibitive for most small businesses than simply designing a separate opt-out page. These parties also note that the traditional content of the homepage may be significantly disrupted by the inclusion of the entire opt-out mechanism. *See, e.g.*, LS&L Petition at 2-4; ASAE Comments at 2-3; NAB Comments at 3.

[57] *See* LS&L Petition at 4-7. *See also Junk Fax Order*, 21 FCC Rcd at 3801, para. 26.

[58] *See* 47 U.S.C. § 227(b)(2)(D)(i) (emphasis added).

[59] *See* LS&L Petition at 4-7.

[60] *See Junk Fax Order*, 21 FCC Rcd at 3801, para. 26. In many cases, the facsimile "sender" will not be the same party that actually transmits the facsimile to the recipient. In these situations, there will be no way for the sender to ensure that an opt-out notice that complies with the requirements of the Junk Fax Prevention Act is included in the cover page or even whether a cover page is sent. In addition, a cover page may easily become separated from the advertisement upon receipt. Therefore, the Commission has concluded that the interest of facsimile recipients and senders is best protected by a requirement that the notice be placed on the first page of the advertisement itself.

3. Duration of Opt-Out Requests

16. We decline to reconsider the Commission's decision not to limit the duration for which a request to opt-out from receiving unsolicited facsimile advertisements remains in effect.[61] Here too the Commission directly addressed this issue in the *Junk Fax Order*, and petitioners provide no new evidence or arguments on reconsideration that lead us to reconsider this finding.[62] The Commission has considered arguments that facsimile numbers may change hands over time and that those who make the opt-out request could, at some point, no longer be the same parties associated with those telephone numbers.[63] The Commission has concluded, however, that these concerns are outweighed by the potential burdens imposed on those recipients that would otherwise be forced to repeat their opt-out requests to potentially hundreds of facsimile senders.[64]

17. We disagree with DMA's contention that opt-out requests from facsimile recipients should be limited in duration in the same manner as do-not-call requests.[65] We note that, unlike the Commission's rules on telephone solicitations, once an EBR has been established for purposes of allowing the transmission of facsimile advertisements, it remains in effect indefinitely until the recipient affirmatively opts-out from receiving future advertisements.[66] In contrast, the Commission's rules limit the duration of an EBR exemption in the case of telephone solicitations to no longer than 18 months after a purchase or transaction or three months following an application or inquiry.[67] Thus, the EBR will expire automatically in the case of telephone solicitations without any further action by the consumer. In addition, recipients of facsimile advertisements 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

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[61] *See* DMA Petition at 4-8.

[62] *See Junk Fax Order*, 21 FCC Rcd at 3804-05, para. 32.

[63] *Id.*

[64] *Id.*

[65] DMA Petition at 5-8.

[66] *See* 47 C.F.R. § 64.1200(f)(5). The EBR definition set forth by the Junk Fax Prevention Act for facsimile advertisements is unlimited in duration. *See* Junk Fax Prevention Act, Sec. 2(f). The Junk Fax Prevention Act permits the Commission to consider limiting the duration of the facsimile EBR exemption on the prohibition on sending facsimile advertisements after taking into consideration certain specified factors set forth in the Act. *See* 47 U.S.C. § 227(b)(2)(G). Consistent with these statutory guidelines, the Commission has indicated that it intends to evaluate complaint data to determine whether the EBR exemption has resulted in a significant number of complaints, and whether such complaints involve facsimile advertisements sent based on an EBR of a duration that is inconsistent with the reasonable expectations of consumers. *See Junk Fax Order*, 21 FCC Rcd at 3800, para. 23. *See also* Junk Fax Prevention Act, Sec. 2(f).

[67] *See* 47 C.F.R. § 64.1200(f)(4).

transmissions. We believe that protecting recipients from the direct costs imposed by unwanted facsimile transmissions is best achieved by declining to limit the duration of an opt-out request.[68]

IV. PROCEDURAL ISSUES

A. Regulatory Flexibility Analysis

18. We note that no Final Regulatory Flexibility Analysis is necessary for this Order on Reconsideration as we are not making any changes to the Commission's rules.

B. Paperwork Reduction Act

19. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

C. Congressional Review Act

20. The Commission will send a copy of this Order on Reconsideration in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

D. Materials in Accessible Formats

21. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice) or (202) 418-0432 (TTY). This Order on Reconsideration can also be downloaded in Word and Portable Document Format (PDF) at http://www.fcc.gov/cgb/policy.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1-4, 227, and 303(r) of the Communications Act of 1934, as amended; 47 U.S.C. §§ 151-154, 227, and 303(r); Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429; and section 64.1200 of the Commission's Rules, 47 C.F.R. § 64.1200, this Order on Reconsideration in CG Docket Nos. 02-278 and 05-338 IS ADOPTED.

23. IT IS FURTHER ORDERED, that petitions for reconsideration and/or clarification filed by the Direct Marketing Association and Leventhal Senter and Lerman PLLC in CG Docket Nos. 02-278 and 05-338 are DENIED in part and GRANTED in part as set forth herein.

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[68] As noted in the *Junk Fax Order*, a consumer who wishes to receive facsimiles at a new number or resume receiving facsimiles after previously opting out may give the sender prior express permission. *See Junk Fax Order*, 21 FCC Rcd at 3805, para. 32.

24. IT IS FURTHER ORDERED, that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Order on Reconsideration, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary