

**TESTIMONY OF STEVEN T. KIRSCH
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**BEFORE THE SUBCOMMITTEE ON
TRADE, TOURISM, AND ECONOMIC DEVELOPMENT
OF THE SENATE COMMITTEE ON COMMERCE, SCIENCE, AND
TRANSPORTATION
ON
S. 714, THE JUNK FAX PREVENTION ACT OF 2005**

APRIL 13, 2005

Thank you Mr. Chairman for allowing me to speak with the committee on my perspective on this very important piece of legislation.

I'm here representing people who hate junk faxes. There are over 200 million of us.

There is only one real point of contention here: whether or not to add an EBR exemption to the junk fax statute.

My purpose in coming here to today is to present compelling evidence that, contrary to what you've heard from others, adding an EBR exemption for junk faxes is something that should not and must not be done. Not for my sake. But for everyone's sake.

For example... I get a ton of unwanted junk mail in my mailbox every day from companies I've done business with in the past.

Suppose you write a law that **forced** me to pay both postage and printing costs for this advertising until such time as I notified each business to stop? That way, all of these businesses could send me stuff that I don't want at virtually no cost to them and force me to pay for it until such time as I got mad enough to write them each a letter to stop. How many of you would vote for such a bill?

I hope no one would. But that's exactly what you're being asked to do here today.

Never before, in the history of this country has it been legal to use another man's printing press and ink to print your advertising, at the other man's expense and without his permission. But that is exactly what this bill proposes to do.

The sponsors have proposed putting the EBR exemption "back into the TCPA" in order to "restore the status quo" and avoid "a harsh impact on business communication without providing any tangible benefit to consumers [FBC open letter to House]"

That is plain nonsense. It is utterly false. The facts unambiguously show that exact opposite is true: an EBR exemption is completely unnecessary and if you do put an EBR exemption in, you will impose a harsh impact without any benefit.

The facts, and the record, show that:

1. There never was, and never has been, an EBR exemption for junk faxes. The EBR was deliberately removed from the TCPA before passage in 1991.
2. There are no court cases that I'm aware of that have determined there ever was a legal EBR exemption.
3. It is an undisputed fact that there never was, and never has been, an FCC regulation authorizing an EBR for junk faxes. It simply ain't there folks. It's a matter of public record.
4. There is no evidence that the TCPA which never had an EBR, was not working well. This was admitted by Fax Ban Coalition [Open Letter House] and in the testimony of the NAR given today. For example, NAR has over 1 million members, they admit that they fax their members all the time, their members fax other members, their members fax their clients. Yet there are no known cases of the NAR or a real estate agent ever having been sued for sending any legitimate business-related faxes.

So your primary witness, the country's largest trade organization which extensively uses faxes, is telling you it hasn't been a problem. So if it hasn't been a problem, why do we need to fix it?

In fact, we know an EBR exemption has never been necessary to the smooth functioning of business because it was never there for 14 years and nobody ever complained. In fact, hardly anybody ever noticed!

Furthermore, there is not a single company in the world that requires an EBR exemption to do legitimate business. Can you name one? The only use of an EBR exemption is to allow advertisers to send junk that people did not ask for.

For example, NFIB has never been sued for sending legislative updates to their members by fax. That's why their members joined! But when NFIB faxed a 5 page unsolicited ad to sell insurance to their members, they were sued and had to pay \$575. The court said in no uncertain terms that there was no EBR for faxes. NFIB broke the law because they broke their covenant with their members who wanted legislative updates – not advertising. They can still fax their legislative updates to their members; that has never been regulated under the TCPA. They just can't send ads by fax without asking first. That's simply good business practice and it's also something that's very easy to do.

Here's another scenario. I can call a ReMax realty office and ask for information on listings or their services. That creates an EBR between me and ReMax. If this bill passes, I would legally be able to send junk faxes to every ReMax fax machine in the country advertising my spam products ... or anything else for that matter, and do so until

each individual ReMax office tells me to stop. That is what the EBR exemption in this bill will permit.

In addition, if you institute an EBR, you are going to cause everyone a lot of work for no benefit whatsoever and you are going to open the floodgates of unintended, adverse consequences.

I've surveyed many people and every single one of them would opt-out of virtually all unsolicited advertising sent by fax, **whether it is from businesses they know or do not know**. Why force almost everyone to jump through a hoop to get rid of something they never wanted in the first place? Why force businesses to have to create 800 numbers and databases of all those opt-outs that they do not have to do today? What's the point of that?

Summary

In conclusion, everyone agrees...the TCPA has generally been an extremely fine piece of legislation because it succeeded in striking a reasonable balance between allowing wanted content while restricting unwanted content.

We all recognize the need to relax the "in writing" permission requirement that the FCC attempted to add to the regulations. But there is no need for a new EBR exemption.

Any changes that you do should be done very carefully and only if they are absolutely necessary.

No company in the world needs an EBR exemption to send legitimate faxes to do business.

However, it is reasonable, **but it is not required**, to add a special carve-out for membership organizations to send faxes to their members and I have suggested suitable language in my written comments.

Thank you and I would be delighted to take any questions you have.