

Re: Please support Boxer's HOLD on S.714, Junk Fax Prevention Act of 2005 ("JFPA")

Dear Senator _____,

On April 14, the S.714, the mis-named "Junk Fax Prevention Act of 2005 ("JFPA") passed out of the commerce committee and will now go to the Senate floor for a vote. **The Senators all thought they were voting for a bill that would reduce junk faxes. They were wrong.**

None of the people who actually fight junk faxes support this bill. Therefore, there is something very wrong here. If what the Senators thought was true, then the people who fight junk faxes should be thrilled. In fact, just the opposite is the case!!

Fortunately, Senator Boxer has placed a HOLD on this bill. I'd like to tell you why she did that and ask you to **please support that HOLD.**

I am writing you today to explain why this bill, which purports to "prevent" junk faxes, will in fact do the opposite: **it will cause junk faxes to increase** and it will virtually eliminate all enforcement. That is why, in its current form, it must not pass.

I am an attorney that specializes in the handling of junk fax lawsuits. I have been doing this for _____ years and have filed over _____ cases. I am very familiar with the law in this area and I've read the text of Senator Smith's bill.

All of my clients rely on the fax machine to do business and need the protections offered by this bill in Section 2(g).

But this bill also attempts to add (in Section 2(a) through 2(f)) a brand new exemption to the law (called the Established Business Relationship ("EBR") exemption) **that my business clients do not need and cannot support.** Even though my clients need part of this bill to operate (Section 2(g)), the other part of this bill is so onerous that passing this bill as written would effectively obsolete the whole law entirely since it would wipe out any enforcement ability. **What's the point in having a law if there is no enforcement?**

The bill does do one critical thing: it clarifies in Section 2(g) that permission to fax need not be in writing. That is the part of this bill is important to pass. It is required by many businesses. For example, this is needed so that a Senator can call his favorite restaurant and ask the restaurant to fax him a menu. It is also needed so real estate agents can send their clients property information via fax. The list is endless.

But the bill also introduces a brand new exemption to the sending of junk faxes: the Established Business Relationship (EBR) exemption in Sections 2(a) - 2(f). This part is not only unnecessary, but it would seriously weaken the junk fax statute and allow a

torrent of junk faxes to be sent. This is exactly contrary to the intent of the authors. **This is the part of the bill which MUST BE DROPPED: 2(a) - 2(f).**

On the face of it, adding an "EBR exemption" sounds reasonable because businesses thought they had it for the last 14 years. But the reality is that they didn't. Mr. Kirsch, who testified at the subcommittee meeting that heard the bill, was correct in his testimony on this point. **I am very familiar with TCPA cases, and there are no cases where a court which actually examined the issue has opined that an EBR exemption has ever existed for junk faxes.** There are a few cases where the trial court made a mistake and these were all overruled on appeal. There are a few cases where courts refer to the FCC interpretation, but do not address the conflict between the FCC footnote and the statute. I've checked the CFR and there is no EBR exemption in the FCC regulations. There is an EBR exemption for voice calls, but there is not an EBR exemption for junk faxes in the FCC regulations or any FCC Order (a footnote is not an Order). There is also no EBR exemption in the junk fax statute. There is one for voice calls, but not for faxes. **Congress deliberately took the EBR out of the junk fax section of the bill before passing it in 1991.**

Yet this lack of a legal exemption never caused the sponsors a problem! They admitted in their open letter to the house which hundreds of them signed. **Adding an EBR exemption now is completely unnecessary:** none of my business clients need such an exemption since they all use fax machines responsibly. **An EBR exemption would open up two very serious loopholes:** (1) it would completely stop private enforcement of the TCPA and (2) it would open up the fax machine for more junk faxes, only this time the faxes would be legal and could not be stopped.

The reason this law will totally gut enforcement is because every defendant will claim he made an inquiry to my clients in the past 20 years, or visited my clients' website, or called, or sent an email. I am an ethical attorney and **I will not file a lawsuit against a Defendant if I don't have reasonable basis to believe they are liable at the time I file the lawsuit.**

But please tell me how I would be able to know whether any Defendant has an EBR with my client if this law passes? It is impossible. Under today's law, it is easy. My client knows who can fax him because if the material looks like an advertisement, the law requires that he has to know the sender. If my client doesn't know the sender, I have a basis for filing a lawsuit. But under this proposed law, just because my client doesn't know the sender doesn't mean the sender can't legally send him a fax. The sender could have visited my client's website. Such visits do not track the identity of the browser. So I could call the Defendant and ask them if they have ever created an EBR with my client. All of them will say they have.

So all private enforcement of the TCPA would come to a stop. As one attorney who has handled 1,500 TCPA cases said to me, "If this bill passes we can all go home." He's exactly right for the reasons I just pointed out.

Also, if this law passes, as Mr. Kirsch pointed out at the hearing, asking a simple question of the government such as "Are you open today?" creates an EBR between the government and Kirsch. Kirsch can then send ads (about anything) to every fax machine owned by the government. And vice-versa, anyone in the government can advertise to any fax machine owned by Mr. Kirsch. The latter isn't likely of course, but if we did the example with Wal*Mart, anyone who walks into a Wal*Mart store or calls on the phone, may legally be marketed to (and vice-versa).

Mr. Kirsch points were right on target. It is too bad that other than Senators Boxer and Smith, there were no Senators there to hear his remarks or challenge them. In fact, **Senator Smith did NOT ASK A SINGLE QUESTION at the subcommittee meeting!!** I know that because I saw the video of the subcommittee meeting.

Finally, I've seen the material put out by some of the sponsors of this bill, the so-called "Fax Ban Coalition" and NFIB, for example. Those materials are factually incorrect and misleading. These sponsors got hundreds of businesses to sign on by providing misleading arguments.

The fact is that if the material being faxed is not an advertisement, it is not regulated by the TCPA. Permission doesn't matter. Therefore, most material sent by fax, such as travel itineraries, invoices, letters, political advocacy, charitable event, political fundraisers, etc. does not qualify as an "advertisement" and thus is not even regulated at all by the TCPA. No consent is necessary at all for these faxes. It has always been this way. So the normal use of the fax machine, as a request-response mechanism is not regulated at all. It is only when businesses attempt to use the fax machine as a low-cost advertising vehicle that the protections kick in. Allowing businesses to have an "EBR exemption" to this restriction would allow them to save money on their advertising expenses by allowing them to legally shift their advertising costs to their customers without their consent. And they know if they are required to be asked for consent first, nobody would give it. That's why they want this...so they can force advertising down their customer's throat whether they like it or not. I ask you: tell me one business that requires an EBR exemption to do business?

If the sponsors of this bill are telling you the truth, that this bill will "prevent" junk faxes, then how do they explain the fact that not a single attorney that prosecutes junk faxers has signed on in support of this bill? 100% of the attorneys I know who enforce the TCPA protections are opposed to this bill for the reasons I've already outlined.

If this bill will really "prevent" junk faxes as they author claims, then why aren't any consumer groups writing you in support of this bill? I know why. Because they don't support it.

When the Commerce Committee met to markup this bill, Chairman Stevens remarked at the start of the meeting how painful junk faxes have been to him personally. He described how he returned home to find that all his paper in his machine had been used up for the printing of junk fax advertisements.

We don't need a law which makes this problem worse in the guise of making it better.

In summary, to properly re-set the situation back to what it was before the FCC rulemaking, **Section 2(g) in this bill is required. But Section 2(a) – 2(f) creates a BRAND NEW “EBR exemption” that is NOT NEEDED now and was never needed in the past and will OPEN THE DOOR TO ABUSE.**

Please support Senator Boxer’s hold on this bill until the EBR exemption in Section 2(a) – 2(f) is REMOVED from this bill.

I'd be delighted to respond to any questions you have or any other misinformation that you may receive on this bill.

Sincerely yours,