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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.

Everyone recognizes the need for legitimate businesses to send legitimate business communications to their customers without fear of being sued. With recent contemplated rule changes by the FCC, this ability has been placed in jeopardy and needs to be fixed.

This bill seeks to solve that problem by doing two things: (1) clarifying that permission to send unsolicited advertisements can be granted verbally and (2) adding a new exemption to the law to allow businesses that I have an Established Business Relationship (EBR) with to send me junk faxes without my consent until I tell them to stop.

The first thing is an excellent solution. The second is not.

The facts are unambiguously clear that adding an EBR exemption, while well intentioned, is completely unnecessary. It will actually hurt legitimate use of the fax machine for businesses because it will permit fax advertising practices that legitimate businesses don't use and permit abuses that will make legitimate faxes less useful the way spam e-mail makes legitimate e-mail less attractive. It creates a whole host of new problems and adds new burdens and costs. It's like "whack-a-mole"...solve one problem, create dozens more. Congress has better things to do than solve the same problem over and over and over again.

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.

A better approach is simply to clarify the terms in the TCPA to reflect the original intent and current business practice so that the normal request-response business correspondence that is typically sent via fax cannot be mis-defined as "unsolicited advertising." This solves the problem and restores the status quo without imposing new burdens or introducing any unintended consequences.

Adding a new EBR exemption won't really fix anything because it wasn't there in the first place (and nobody noticed)

Contrary to popular belief, there has never been an EBR exemption to the TCPA.

The facts, and the record, show that:

1. There never was, and never has been, an EBR exemption for junk faxes.
2. In nearly a dozen court cases, the courts have declared that there is no EBR exemption for faxes because Congress took it out of the statute before passage.
3. There never was, and never has been, an FCC regulation (i.e., a CFR) authorizing an EBR for junk faxes. It simply isn't there. It's a matter of public record. This was started by a haphazard footnote in some commentary that is not a regulation or law.
4. There is no evidence that the TCPA which never had an EBR, was not working well. This was admitted in the Fax Ban Coalition Open Letter House and in the testimony 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?

An EBR exemption has never been necessary to the smooth functioning of business because businesses use the fax machine to send material that the recipient has asked to receive. Continuing to allow oral permission will preserve that. 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 send junk that people did NOT ask for.

Although the FCC did erroneously interpret the law and say an EBR “can” (not “shall”) be deemed to be invited or permitted by the recipient in footnote 87 in the 1992 commentary, there is no such exemption mentioned in the FCC regulations (CFR) and courts have never adopted this interpretation. Furthermore, Congress never intended such an exemption; they had one and removed it in conference.

Since the enactment of the TCPA, I have not been able to locate a single court case where such an exemption has been determined to exist, including the recent decision by the Georgia Supreme Court (which did not opine on the issue but merely erroneously stated that other courts had held that there was an EBR exemption). Yet in nearly a dozen cases, the courts have explicitly stated that there is absolutely no EBR exemption for faxes. E.g., [Jemiola v. XYZ Corp.](#), 802 N.E.2d 745, 2003 TCPA Rep 1252 (Ohio C.P. 2003).¹

In addition, businesses have been acting consistent with Congress’ intent and the court’s interpretation as well. For example, there is not a single public company that I am aware of that sends junk faxes to their customer base. And there is certainly no company in the United States that needs to have an EBR exemption to send junk faxes in order to conduct business.

Therefore, adding a new EBR exemption to the TCPA as currently proposed in this bill, is not only completely unnecessary, but it is also counterproductive for the following reasons:

- It would dramatically increase the amount of junk faxes I get by an unpredictable amount. NOBODY I know wants to get more junk faxes.
- It would increase my costs since I would bear the cost having to opt out of each and every junk fax and keep records and receipts of each request. In short, Congress would be imposing a huge, unwanted cost burden on all recipients of this advertising. All the recipients would be forced to incur costs for something that they never wanted in the first place.
- It would also increase the burden on every sender would then be responsible for setting up a toll free opt out number and keeping track of all opt out requests. The record keeping burden of the advertiser would actually increase under this proposal as the sender would now have to track both opt in and opt out requests.
- It would increase the legal liability of the sender since the database of opt out numbers would be close to 100 times larger than having to maintain an opt in database. Any typo, omission, or mistake in the opt out database required by this law could generate a lawsuit. So lawsuits against businesses are 100 times more likely under the opt out rules required by this legislation. That’s not a guess; it’s a mathematical certainty.
- It opens up the door for legalized abuse via the “unintentional EBR” that I describe below creating an unpredictable torrent of junk faxes that would then be legal but completely unexpected and unwanted

¹ The slip reporter service TCPALaw.com lists many similar cases.

- I've surveyed many people chosen at random and every single one of them would opt-out of virtually all unsolicited advertising, whether it is from businesses they know or do not know.

The bottom line is this: adding a new EBR exemption to the TCPA would create needless amounts of work for both sender and recipient, impose new costs on the recipients without their consent, and accomplish NOTHING of any economic value.

Huge burden on everyone, no value. What's the point of that?

Companies that have been sued were easily able to change their behavior. A change in the law was not required

It is clear that a small number of businesses and trade organizations have believed they had the right to send junk faxes to their customers or members.

Of the 16,000 public companies, I'm aware of only two companies that briefly sent junk faxes believing there was an EBR exemption: Walmart, Staples. So did a few trade associations such as NFIB and others that may have believed it, certainly didn't use that as a basis for sending junk faxes.... because they know that stealing paper and toner from their customers is not good business. Junk faxes really tick people off... why does a business want to be associated with a practice that ticks off so many people?

For example, NFIB has never been sued for sending legislative updates to their members by fax. That's stated on the membership application and that is why their members joined! But when they 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 (their stated mission) to their members. They just can't send ads by fax. That's simply good business practice and it's also something that's very easy to do.

None of these companies went out of business.

Instead, they mounted a campaign to have an EBR exemption added. That was a very successful campaign as they got hundreds of companies to support it. Yet that campaign was accomplished without violating the TCPA at all. So their statement that the lack of an EBR "interferes with NFIB's ability to communicate with our members" is pure poppycock. The TCPA doesn't regulate any of their fax communications with their members on legislative topics. None of these are "unsolicited ads." Sending 5 pages ads for insurance is certainly not part of NFIB's mission and not why members joined.

Adding an EBR will produce unintended consequences

There are a whole host of unintended consequences caused by adding an EBR that the sponsors did not think through.

For example, the EBR is two-way. The same EBR that gives NFIB the right to fax their members without their consent also gives their members the right to fax NFIB any advertising materials (from any company) back!!!

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. Now I can send junk faxes to every ReMax fax machine in the country, and do so until each individual ReMax office tells me to stop. That is what this EBR exemption in the bill will permit.

Here is another scenario. A carwash decides to blast faxes to the 100,000 fax machines in a major metro area. They buy a list of the fax numbers and blast away. When someone complains, the carwash then demands the consumer "prove" that they and no one in their family have never used any of the car wash's locations or done business with any of the car wash's affiliated entities. Of course, that is an illegitimate use of the EBR exemption, but that is exactly how one junk faxing carwash has responded to a TCPA complaint.

A bar association in one state promotes itself to advertisers that "You can't send junk faxes, but we can send them to our members for you, so pay us and we will send your junk fax ads to all the attorneys in this state." At least one bar association has already done this.

A computer store gets the directory of the local chamber of commerce, and blasts ads to all the chamber member's fax machines. When one business complains, it digs and digs to find where the complaining person once entered the store, or just called the store to make an inquiry, and claim that was an EBR that made the fax permitted. One computer store did exactly that in South Carolina.

These are all abuses that legitimate businesses would not engage in. But they are happening all the time and this bill – as written – would legalize them.

When I mentioned that to the sponsors they admitted that they had not considered that the same law that would supposedly benefit them could also subject them, in return, to abuse!

See more examples of the "unintentional EBR" in the section below.

A better approach: clarify the original intent

I spoke with Mr. Bladine who is testifying here today. In the 30 years he's been in business, his firm has never been sued for the business communications he's sent via fax. Nor is he aware of anyone in his local community that has been sued for sending junk

faxes. They all use faxes responsibly and **the existing law has worked for them as written and interpreted by the courts.**

Because the law has been working to everyone's satisfaction until the recent rule changes, it is clear that the best way to fix any potential problems caused by the rule changes without introducing new ones is to clarify the existing law as it has been interpreted by the courts over the last 14 years since the TCPA was enacted.

The best way to restore the status quo is by doing two simple things:

- Clarify that permission does not need to be in writing
- Optionally modify the definition of "unsolicited advertisement" so that all requested business communication are clearly permitted regardless of what medium is used to send them.

Normal request-response business communication then works as expected without fear of litigation. All such communication, such as asking your favorite restaurant to fax a menu or asking your real estate agent to send you house information, a purchase contract, or counter-offer, etc., would be exempt. These are normal business communications where the recipient has requested the material being transmitted and the material is sent in response to that request and should not be considered "unsolicited advertisements" that should be regulated by the TCPA. Legislative updates and small business information sent by NFIB to its members would be exempt because that is what their members have requested.

Even if no records of the request whatsoever are kept by the sender, the very nature of the material being sent and the number of telephone calls made to fax machines by the sender are evidence that would provide an affirmative defense available to any business that might be sued by an unscrupulous recipient. For example, a restaurant that faxes an occasional menu to people who call in requesting it is a legitimate purpose. It is far different than a restaurant who blindly sends out their menu to every fax number in the local Chamber of Commerce directory.

Non-profit membership organizations such as National Federation of Independent Businesses (NFIB) or the local Chamber of Commerce can still communicate by fax with their members under this proposal.

And if these organizations wanted carte blanche to send other things like insurance ads or discount pizza coupons, they can simply include a statement in their membership forms that by joining and providing your fax number, that you are allowing broadcast communications related to the organization to be sent to you via fax.

Or even better, they could have a check box as to whether the member wants to receive official communications by fax, email, etc. This is simply good business practice and any legitimate business already does this already.

The argument that the reason there were no lawsuits is because nobody knew there wasn't an EBR is flawed

One argument is that no lawsuits were brought because consumers also thought there was an EBR exemption to the TCPA.

Let's be realistic however. If someone receives a junk fax, they aren't going to look up the FCC's current definition of EBR and find footnote 87 in an FCC Report issued in 1992 (which, by the way, is nearly impossible to find on the FCC website even if you know where to look), and then make a determination as to whether there was an EBR or not in light of the statute saying that there isn't. That scenario is just not going to happen.

What actually happens is that most would ask an attorney or type in "junk fax" in Google and find my site (www.junkfax.org) and find out that the fax that they got was illegal because it contained advertising and was sent without express consent. The FAQ on my site makes this clear and also points out that there is no EBR exemption for junk faxes.

Any decent attorney could read the statute, research the case law, go to TCPALaw.com or read the FAQ at junkfax.org or talk to any attorney experienced with the TCPA and conclude there was never an EBR. There of course will be a few attorneys who never figure this out, just like there are lots of organizations that never figured it out.

The proof of the matter is that when companies did venture beyond the statutory language of the TCPA (such as Staples and Wal*Mart and NFA), they did get sued, and then they changed their business practices to avoid it. They didn't need a change in the law.

Further protections

If Congress wishes to further protect the fax communications of non-profit business to communicate with their membership, then it is reasonable to authorize the FCC to add a special carve out for non-profit membership organizations communicating to their membership based on subjects that are consistent with the mission of the organization, e.g., the Chamber of Commerce could fax a notice about a small business seminar the Chamber is putting on, but could not fax discount coupons to the local cash wash to members without their consent.

Indeed, the bill as written give the FCC the authority to exempt those organizations from having to include the notice and opt-out provisions on their faxes. We propose **expanding that authorization**, and allow the FCC to consider a blanket exemption for faxes sent by such organizations to their members for organizational materials.

Another important change to protect recipients would be to require that professional "fax broadcasting" companies **always** identify themselves on all the faxes they send. Currently, this is only required they have a high level of involvement in the sending of the fax. This would expose the identity of a small handful of illegal fax broadcasters who are responsible for a large portion of the junk faxes sent today.

Summary

Because the recipient bears the brunt of the costs on a fax transmission, fax machines have always to be a request/response mechanism for business communications, not a low-cost mass advertising medium for businesses. We need to keep it that way.

The proposed clarifications to the definitions would maintain the status quo; ensuring that legitimate communications are protected without opening the door to abuse. That benefits everyone: consumers, big business, and small business, whether they are recipients or senders.

If these clarifications are not acceptable, a widely accepted alternative is for Congress to remove the written permission requirements and order the GAO study. That way, any additional changes can be reviewed with the benefit of the GAO study results for guidance.

The following sections provide more detail to some of the concepts presented above.

At the very end of this document is a summary of my recommendations.

Adding a new EBR exemption to the TCPA would be unprecedented

When the original TCPA was debated in 1989, unsolicited faxes were recognized as the equivalent of “getting junk mail with the postage due” - except that you have no chance to decline the charges. *Telemarketing Practices: Hearings on H.R. 628, 2131, and 2184 Before the Subcomm. On Telecommunications and Finance of the House Comm. On Energy and Commerce*, 101st Conf., 1st Sess. (1989) Sup. Docs. No. Y4.En2/3:101-43 (U.S. Gov’t Printing Office). Unsolicited faxes are no different than using another man’s printing press and ink to print your advertising, at the other man’s expense and without his permission. This conduct has never been legal – even before the TCPA was enacted, common law cases recognized this as trespass to chattels and some brave souls actually brought junk faxers to court and won. See *Fax Weighed, 22 Cents Won in 'Junk Mail' Suit*, L.A. TIMES, July 4, 1991, p. 4.

And ironically, the same business that would love to send junk mail and not have to pay postage and printing costs, but rather have the recipient pay those costs. But they would oppose having their customers do it back to them! In short, it’d be great if I could do it to others, but I’d sure hate it if someone did it to me.

Let me ask you another question. How about we pass a law that would permit these same business to send me all this stuff that I now get in the mail to my fax machine?

Businesses would love that because it would reduce their advertising costs. Virtually every single one of these pieces could be sent via fax at a much lower cost than mailing it because faxing shifts virtually all of the costs of the advertising on to the recipient.

Should we do that? Should we legalize it so advertisers can send you ads you never asked for at your expense until you tell them to stop?

I don’t think you should. But that’s exactly what you’re being asked to do here!

It would be like telling Mr. Bladine that anyone who calls his newspaper is entitled to a full page ad in his paper for free, until he explicitly asks them to stop.

Some people dismiss junk faxes as a de minimus part of owning a fax machine. But ask yourself who is more harmful to society – a man who steals one dollar from a million people, or a man who steals a million dollars from one person? In both cases a million dollars is stolen. But the former miscreant is more harmful because he can fly under the radar and the million dollars is never recovered because it isn’t worth it to any single victim. That’s true with junk faxes. According to experts and published reports, there are over 2 billion junk faxes sent each year and that number is growing. That practice steals hundreds of millions of dollars from American’s pockets – a few cents at a time.

In 1991, Congress considered and explicitly rejected allowing a business to send faxes to someone with whom it had an “established business relationship.” The FCC admits that it

was in error in 1995 to pencil back in what Congress took out, and now has taken steps to correct that error.

Before rushing to do this however, we must remember – you are creating a legal right for one person to use another person’s property and to take the other person’s paper and ink for their own use, all without consent. No one would argue that a merchant has the right to come into my house or office (at any time of the day or night), drop off an advertisement, and take three to forty cents off of my night stand in order to offset his advertising costs. Yet that is the precisely what you will do if you create any exemptions to the junk fax prohibitions in the TCPA.

So even if we disagree in the details or scope of any exemptions to be added to the TCPA, we all have to agree that because we are shifting the costs for billions of unsolicited faxes onto recipients, we must craft such exemptions carefully and conservatively.

Several portions of this bill are not controversial. The annual report and GAO study are certainly in that category. Relaxing the FCC’s proposed new rule requiring express consent for junk faxes to be in writing is also not controversial. The sticking point is whether or not to create an exemption in the statute for anyone you have an “established business relationship” with to send you junk faxes until you tell them to stop.

There is only one major point of contention on this bill: whether or not to add new language to the TCPA to allow any business that you have a relationship with to send advertising to your fax machine without your consent until you tell them to stop.

I’d like to explain why this is a bad idea and suggest a more appropriate alternative that accomplishes all the stated objectives of the author and sponsors of this bill and does so without any unintended consequences.

The “unintentional EBR”

I’d like to give you two examples. Suppose Joe’s Office Supply decides to take it’s in-house customer list, and for those customers who have provided Joe a fax number and bought something in the last year Joe wants to send them an advertising flyer by fax. Now suppose Bill’s Office Supply wants to send advertising faxes, so he buys the list of local fax numbers from the Chamber of Commerce and sends out fax ads.

In this example, I have received both faxes, and in the past, I have bought something from both Bill and Joe. But I gave Joe my fax numbers, and intentionally withheld it from Bill since I suspected he might misuse it. What Joe did, was what I think most people thank of when they talk about sending fax ads within an “established business relationship” exemption. That is an example of a “legitimate” established business relationship fax. But Bill’s example is not. No one thinks that indiscriminate junk faxing should be permitted or rewarded. Yet in the above example, using the language of the

bill as it stands today, the indiscriminate junk fax I received from Bill, at a fax number I did not give to Bill, will be exempted from the statute. How do we create an “established business relationship” exemption for “legitimate” fax uses, but not create a loophole for exploiting by illegitimate uses?

This problem is exacerbated by how broadly the term “established business relationship” is defined. Merely making an inquiry of a business, such as calling and asking the price of an item or if they carry a particular brand will create an “established business relationship” as that term is defined. Using that definition, who does not have an “established business relationship” with large retailers like Wal*Mart or Staples? And before you think that “legitimate” businesses such as these would not do junk faxing in violation of the TCPA, both of them have in recent years.

In the last session of Congress, this problem was addressed with compromise language that stated the “established business relationship” exemption only was available as a defense if the faxes were sent “based on” an existing “established business relationship.” In the example above, this would permit Joe’s faxes, but prohibit Bill’s faxes. This way, faxes sent when a business was legitimately trying to send faxes to people it knew were its bona fide customers would qualify for the exemption, but faxes “blasted” out indiscriminately would not be permitted, even if they “accidentally” were received by someone who had done business with the sender.

I share the same goals as the author and sponsors of this bill: we all want to allow legitimate faxes and stop the junk faxes

I also share the same approach to address some unintended consequences of recent FCC rule changes. We certainly do not want to turn back the clock on a wholesale basis.

Many of the rule changes were clearly needed due to continued evasions of illegitimate telemarketers and fax advertisers. Reasonable businesses who send legitimate faxes do not want to create loopholes that will be exploited by other businesses that are not so legitimate. Those businesses who want to make legitimate use of fax as a communications medium are certainly in favor of protecting that medium from abuse. If they don’t their legitimate use of faxes gets tarred and feathered with the illegitimate uses.

The current bill attempts to do two things:

- that express consent may be given in any manner
- that an EBR should be interpreted as providing express consent

The first change is not controversial. While many people still believe that in some circumstances requiring written permission is an appropriate safeguard, there is also a consensus that there are many situations where verbal permission is acceptable. However, we know the use of alleged “verbal” permission has been abused by miscreants in the past, so future abuses in this are need to be closely watched.

But I disagree with the second change because **there never has been an EBR for fax advertisements**, not legally and not in reality. I have reviewed literally hundreds of TCPA cases, particularly those reported by the TCPA slip service TCPALaw.com, and I have not located a single court decision where the court agreed with the FCC's original interpretation.

Adding an EBR would change the status quo, not restore it

Therefore, restoring what was never there in the first place, is not restoring the status quo. It is changing the status quo!!! In this particular case, it creates a large number of very bad unintended consequences that I've documented in my written materials.

Legitimate fax advertising is sending what someone requested to be sent to them, and sending it to them at the phone number they have provided to you. It does not include "mining" for fax numbers or sending a fax to any indiscriminate fax number you can buy or find. It does not include sending 5 pages of ads for life insurance to someone who merely asked for a quote on car insurance and nothing else. It does not mean giving carte blanche to any business you have made an inquiry to, for them to send you junk mail that you have to pay to receive.

Changing the definitions of the terms solves the problem without unintended consequences

The right way to restore balance and permit legitimate fax advertisements without burdening legitimate senders, is simple: just replace Section 2a of this bill so that instead of creating a new Established Business Relationship (EBR) exemption we simply narrow the meaning of "unsolicited advertisement" so that all legitimate faxed communications are exempted from regulation.

Currently, "express permission or invitation" for faxes means that it must be expressly agreed that a) the material will be advertising and b) that it will be sent by fax, because for permission to be "express" all the elements of what is to be "permitted" must be expressed. The problem is you ask an insurance agent for a quote on life insurance, and give him your business card with fax, phone, e-mail, and mailing address, and don't agree to a faxed response, he will (in theory) violate the TCPA as it is now written. If we changed "unsolicited advertisement" to remove "express permission or invitation" and instead to exclude material that is both "expressly REQUESTED, in writing or otherwise" and sent to a phone number voluntarily provided to the sender by the recipient, that agent could fax, e-mail, or call your cell phone with the requested quote on life insurance. He could not however send you a quote for auto insurance, or send you multiple quotes (you only asked for one) for life insurance, or send them to different phone numbers.

Therefore, we should slightly restrict the scope of the term “unsolicited advertising” by re-defining it as follows:

The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services, but does not include material which is: (a) expressly requested, in writing or otherwise, by the recipient; and (b) transmitted to a telephone number voluntarily provided to the sender by the recipient.

Interesting corner cases: non-profit membership organizations

An interesting case is the NFIB case. Members join NFIB and expect to get legislative updates by fax – in fact, that is stated on the membership form. But should NFIB be legally permitted to send advertisements for life insurance to their members? Some members may be interested in the offer, but that is not why they joined the NFIB. Should this be allowed? How about if the offer was for car insurance? Or pizza coupons? I think not.

There are four approaches to solving this dilemma:

- Have Congress try to micro-manage the carve outs for each type of situation and each case and direct the FCC to devise the perfect solution that will make everyone happy
- Provide a base-level carve out in certain well-understood common situations
- Let each entity determine what carve outs it needs and then determines the best way to obtain consent from the recipients prior to sending junk faxes
- Create a giant exemption that is so broad almost anything can be faxed to anyone so no one ever gets sued – but as a result make the fax advertising medium unusable like spam.

I don't recommend the first or the last approach at all. I don't think anyone does.

The second approach is reasonable. For example, for non-profit membership organizations, it is somewhat reasonable that by joining you are subjecting yourself to receive ads via fax that are related to furthering the mission of the organization until you ask them to stop. The majority of businesses who sent faxes based on a perceived EBR exemption were membership organizations, and the changes in the bill we have suggested would protect legitimate communications of those organizations with their members, without opening up a huge EBR loophole for abuse by others.

However, I think the best approach is to allow the TCPA to function as designed. Let each organization determine what the carve outs should be and how the member's permission should be obtained, e.g., on a membership agreement. This is simply good business practice since it sets expectations properly. It is something the organization is probably doing now anyway.

Fax broadcasters should be required to identify themselves

There is one simple improvement to the law that affects only companies that send faxes for others (such as Vision Lab, Protus IP Solutions, etc.):

Direct the FCC to require that these professional “fax broadcasting” companies who send faxes for hire, to ALWAYS identify themselves on the fax REGARDLESS of whether they have a high level of involvement or not in the sending of the fax.

Currently, they are only required to do this if they have a “high level of involvement” in the transmission. Of course, all the illegal broadcasters I know of claim in court they do not have a high level of involvement. This makes suing the illegal junk fax broadcaster difficult since it is virtually impossible to tell where the fax was sent from.

Conclusion

Junk faxes are a major problem for businesses and consumers. Everyone hates junk faxes.

I’d urge this committee not to overreact to the problem by creating a new EBR exemption which has never been needed and would generate a host of new, unanticipated problems.

Carefully tailored specific exemption for membership organizations and requested materials are a much safer solution. In opening the door to bring the baby back into the house that the FCC threw out with the bathwater, we must be careful not to also let back in the wolves and the snakes.

I’d encourage each and every one of you to poll your constituents and ask them how many businesses that they would like to receive unsolicited advertisements from via fax. I’ve done it and the answer is the same for consumers, big business, and small business: none want advertisements from businesses they do business with unless they expressly ask for it. That is consistent with the FCC findings and precisely why the FCC attempted to strengthen the junk fax protections.

Fax machines were designed to be request/response business tools, not a tool for businesses to shift the advertising costs onto consumers without their consent. We need to keep it that way.

There are solutions that will keep the junk faxes at bay while more explicitly permitting legitimate business communication. These are summarized in the Recommendations section.

I hope that you will seriously consider these recommendations. It’s the right thing to do as it benefits both senders and recipients without the danger of imposing new burdens and new legal liabilities.

Recommendations

I have six recommendations for improving the TCPA:

1. Clarify that permission to fax can be granted “in writing or otherwise.”
2. Require that professional “fax broadcasting” companies **always** identify themselves on all the faxes they send (regardless of their “level of involvement”)
3. Re-define the term “unsolicited advertising” as follows:

The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services, but does not include material which is: (a) expressly requested, in writing or otherwise, by the recipient; and (b) transmitted to a telephone number voluntarily provided to the sender by the recipient.

4. Allow the FCC to do a rulemaking to consider the details of an exemption to: “allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members which are exclusively in furtherance of the association’s tax-exempt purpose.” Such an exemption would clearly allow the Chamber of Commerce to send a fax to members promoting a business roundtable seminar, but can’t send one simply promoting the local carwash and pizza coupons. They also can only send to the fax number(s) provided to the organization by the member and they have to stop if requested to stop.
5. Do not add a general EBR exemption to the TCPA. That would be a major mistake.
6. The GAO study and FCC reports proposed in the current bill are fine.