

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

Dear Senator X,

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.

The JFPA was authored by Senator Smith in reaction to some recent rulemaking attempts by the FCC which if implemented would have caused a severe hardship on many businesses that use fax machines. The stated intent of the JFPA was correct: simply to "restore the status quo", i.e., restore the regulations regarding the sending of junk faxes to what they were before the FCC proposed rule changes. The sponsors said, in an open letter to the House of Representatives, that the original rules had been working fine and they just wanted to restore them.

I agree with that! But the problem is that, contrary to what the sponsors have said, the **JFPA goes well beyond restoring the status quo.** It creates, as the *San Jose Mercury News* editorial ("If flawed bill wins OK, better stock up on paper," April 14, 2005) correctly pointed out, "a loophole big enough to drive a semi full of fax paper through."

The JFPA **creates a brand new exemption called the Established Business Relationship ("EBR")** that can easily be exploited by unethical businesses to legally send me junk faxes. Congress wisely and deliberately removed the EBR exemption from the original bill in 1991. That is a matter of public record. In short, the JFPA goes too far.

Businesses have never had an EBR exemption to the junk fax provisions of the TCPA. There is an EBR for telemarketing calls, but not for junk faxes. There is no statute authorizing an EBR for junk faxes. There is no FCC rule authorizing an EBR for the sending of junk faxes. You can verify that yourself. Even the sponsors admit that there is no CFR saying there is an EBR for junk faxes (there only one for voice calls). There are no court cases that examined the issue and determined that there ever was an EBR for

junk faxes. The sponsors can't name one single court case of the thousands of junk fax cases where a court said there was an EBR for junk faxes.

The closest they can come is pointing to a few cases with sloppy wording (like *Carnett's v. Hammond*) which makes it "sound" like the court said that there was an EBR, but any decent lawyer who read that case would tell you that the court just said other courts had determined that the FCC had said that. The court in the *Hammond* case did not examine the issue at all as to whether a footnote in an FCC order was in conflict with the statute.

The courts enforce the laws in this country, not the FCC. Every court to look at this issue has determine the FCC was wrong. Courts are required to look at both the statute and consider any FCC regulations when interpreting the statute. If they are in conflict, the courts must follow the statute because Congress makes the rules. But here, there wasn't even close to a conflict because the FCC never formalized their statement in a footnote into the regulations. So the FCC "regulation" that the sponsors refer to wasn't a regulation at all. It was not part of the Order or the CFR. Therefore, courts are under no obligation whatsoever to consider what is in the footnote of a Report since it was not part of the Order or the CFR. So we really weren't close to a conflict situation.

There were a few cases where the trial court thought there was an EBR but in every single one of those cases, ever single one, the appeals court told the trial court they were wrong. Additional evidence that the intent of Congress was not to allow an EBR exemption is that Congress took out the exemption in conference in 1991.

The bottom line is this: **There is no EBR for junk faxes and there never has been an EBR for junk faxes.** Period. End of story. **It is simply a matter of public record.**

With no EBR exemption, nobody seemed to mind and everyone admitted it worked well. In fact, a few companies such as Wal*Mart and Staples who thought they had an EBR, did send adverting via fax to their customers. The customers told them this was illegal and both companies stopped doing it. They didn't go out of business.

No company in the world needs and EBR exemption to do business. Mr. Kirsch pointed that out at the subcommittee meeting and nobody disputed that. But perhaps that's because everyone left the room about 10 minutes after the testimony to attend another meeting and **Senator Smith did not ask a single question.** Still, we know of no such examples of a company that would be disadvantaged.

An EBR exemption is simply a gift to businesses so that they can send their advertising more cheaply because *the consumer is forced to foot the bill*. Should Congress pass a law to allow businesses to advertise at the consumer's expense? That would be as ridiculous as passing a law that says that any company you've done business with can send you junk US mail and you are forced to pay the printing costs (and postage) for all the catalogs they send you that you didn't want. It is illegal and unfair cost shifting onto the consumer without their consent. You should not allow this. That is why Senator Boxer put her hold on this bill. Pure and simple. This bill goes to far.

The sponsors may say, fine we never had an EBR exemption, but why not add it now?

The answer is simple. The TCPA is a finely crafted piece of legislation that achieved a delicate balance between wanted and unwanted material. It's been working fine. Even the sponsors acknowledge that. Junk faxes are bad, but the problem is much better than e-mail spam. Adding a new exemption that was not there before destroys that balance and opens the door to legalized junk faxing.

For example, at the subcommittee meeting, after the 3 witnesses testified, Senator Boxer asked Mr. Kirsch what his company did. Mr. Kirsch said his company makes Internet products. Senator Boxer then explained to the subcommittee (well, it was actually just Senator Smith since he was the only other Senator in the room to hear the witnesses testify) that Mr. Kirsch now has an Established Business Relationship (EBR) with the federal government and would, if the JFPA passes, be legally entitled to send any advertising from any company to every single fax machine owned by the US government located in the United States.

That was not the status quo! That has never been allowed under current law! But it would be legal if the JFPA passes. Senator Smith did not dispute that fact at the subcommittee meeting. In fact, he appeared to be surprised and shaken by it. He did not mention it at all to the full committee when he presented the bill to committee for approval.

Shouldn't all the facts be on the table so that Senators can understand both the downsides and the upsides? Senator Boxer put a hold on this bill so that she can have time to explain the downsides. I think she deserves that chance and I hope that you will give her that chance. Not just for my sake, but for the sake of everyone, including the sponsors.

If Senator Smith drops the "EBR exemption" from this bill, he will achieve the stated objective of the sponsors: to restore the status quo to what it was before the FCC got involved. I would support this bill if he did that and Senator Boxer would release her hold as well.

We need to pass the JFPA for the sake of business. The "permission in writing or otherwise" language is crucial to add to the statute due to the FCC rulemaking. But business never had an EBR exemption.

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.

Thank you.

6/18/2018

Sincerely yours,