

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20580

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| 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 05-338 |

COMMENTS OF THE YELLOW PAGES ASSOCIATION

The following comments are submitted on behalf of the Yellow Pages Association (“YPA”).¹ YPA wants to stop the flow of unwanted, and sometimes harassing, junk faxes offering inexpensive trips to Disney World or “can’t miss” weight loss pills. YPA’s members also want to be able to use the fax machine as a legitimate tool to communicate with current and prospective clients. Congressional enactment of the Junk Fax Prevention Act of 2005 (“JFPA”) went a long way toward balancing the needs of businesses and consumers regarding the transmission of unsolicited commercial faxes.

Telephone directories – both print and Internet – are visual media. Potential advertisers generally want to see their advertisements prior to completing the transaction. Faxing has been an effective way to communicate with advertisers and allow them to see the advertisement and artwork. While many advertisers now prefer email as the communications method of choice, there are still a significant number that prefer to do business by fax. With that in mind, YPA submits the following comments on the Commission’s Notice of Proposed Rulemaking in the above-captioned proceeding.

¹ The Yellow Pages Association is a global trade association based in Berkeley Heights, New Jersey, representing the Yellow Pages industry, both print and electronic. YPA member companies include publishers (of both Yellow and White Pages) and other businesses associated with the Yellow Pages industry.

I. Recognition of an Established Business Relationship Exemption

The Junk Fax Prevention Act codifies an established business relationship (EBR) exemption to the prohibition on unsolicited commercial faxes. In order to qualify for the exemption, the sender of the fax must have obtained the fax number from the recipient or from some public source.

The Commission asks whether the fax sender should verify whether or not a recipient intended that its fax number be publicly available. In the context of a business-to-business transaction, such as those in the directory publishing business, it is unlikely that a business would intend to “hide” its fax number. If the fax number is in a directory, an advertisement or website, it should be assumed that the number is public. It would be an incredible burden to establish whether or not a business intended to put its fax number in, for example, an Internet directory. It would be difficult to find the right contact person to determine whether or not the recipient “voluntarily” agreed to make the fax number publicly available, and the likelihood that a business will claim that it did not voluntarily agree to make its fax number public is next to nil. Calling the intended recipient to determine whether it intended for its fax number to be public is annoying to the recipient and adds the type of costs and burdens that led Congress to enact the JFPA in the first place. Furthermore, the requirement for opt-out language on unsolicited faxes is intended to protect the recipient in the event a “private” fax number inadvertently becomes publicly available. It is precisely one of the reasons why such a mechanism exists.

The Commission also asks how it should determine whether or not the sender had the recipient's fax number prior to the enactment of the JFPA. YPA believes that, if the recipient has received a fax from the sender before July 9, 2005, it should be conclusively established that the

sender had the number prior to July 9, 2005. Most entities in a business-to-business relationship exchange contact information, including phone numbers, email addresses and fax numbers. It should be presumed that, if there is an EBR between the two entities, the sender has obtained the recipient's fax number by legitimate means.

II. Definition of Established Business Relationship

The Commission seeks comments on establishing a time limit for the EBR. The JFPA contains certain triggers that would allow the Commission to decide whether or not it should entertain such a limit. These conditions precedent have not been met. The JFPA requires that, before making a decision on an EBR time limit, the Commission must:

“(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a *significant* number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines; (II) determine whether a *significant* number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers; (III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and (IV) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship...”²

The Commission has not yet conducted its own analysis to determine whether or not a time limit on the EBR is necessary, and the record is devoid of any evidence that would support such a time limit. Until the Commission conducts its analysis and makes it public, it is premature to examine this issue.

² 47 U.S.C. 227 (b)(2)(G) (emphasis added).

Notwithstanding the fact that this analysis is premature, for directory publishers, an EBR limited to 18 months for transactions and three months for inquiries is too short. Directories are published on a cycle – typically annually, but it is not uncommon for a cycle to be 14 to 16 months. If a new business opens up and wishes to advertise in the directory, it could be nine months before the publisher is ready to solicit advertisements for that particular directory. A potential advertiser may have asked about rates in January, but the publisher may not be able to fax information regarding those rates until October. A three-month inquiry EBR would technically make such a fax illegal and would require the publisher to obtain an additional authorization, even though it was merely responding to an inquiry from a potential advertiser during the time period discussed by the parties. For the directory business, a 9 to 12-month inquiry period would be more reasonable.

For transactions, an 18-month period is also too short. Occasionally, an advertiser chooses not to advertise in a directory for one year. When that happens, the directory sales persons will almost certainly contact the business in order to sell them an advertisement in the next directory. Again, due to the cyclical nature of the directory business, it may be more than 18 months from the last transaction until the customer is contacted again. For cyclical businesses, such as directory publishers, a 24-month transaction period would be more reasonable.

The rules for faxing should be different from the do-not-call rules. First of all, faxing is almost always business-to-business, whereas telephone solicitation is mostly business-to-consumer.³ Businesses have fax machines primarily to facilitate business transactions. Consumers have telephones primarily to communicate with other consumers and businesses. Businesses have a lesser expectation of privacy than consumers, as businesses hold themselves

³ YPA takes no position on an EBR time limitation for business-to-consumer faxes.

out as open to the public. And businesses do not have to concern themselves with the nuisance of fax machines ringing at unusual or inconvenient times.

III. Notice of Opt-Out Opportunity

The Commission asks whether it should dictate the format of the opt-out notice. Congress determined that the opt-out notice should be on the first page of the fax and that it should and be “clear and conspicuous.” Congress also details the information that must be contained in the opt-out notice.⁴ Congress gave very clear guidance on the opt-out notice. Unless there is substantial evidence of problems associated with opt-out notices, the Commission does not need to micro-manage the words and look of opt-out notices. The Commission should be flexible in allowing companies to design notices that work with their own fax cover sheets.

IV. Request to Opt-Out of Future Unsolicited Advertisements

The Commission asks whether a sender should be required to honor a request made by a different method than the cost-free method provided by the sender, even if such methods are not consistent with those described by the sender in the facsimile communication’s “opt-out” notice. YPA strongly urges the Commission not to require honoring other opt-out methods.

The record-keeping and training necessary to ensure that all do-not-fax requests coming into the company via any method are properly logged in and accounted for is a nightmare scenario. A business cannot be expected to keep track of each do-not-fax request that arrives at its doorstep through some means other than the cost-free method the company has already established. Unscrupulous people could send a generic do-not-fax request letter to a large

⁴ 47 U.S.C. 227(b)(2)(D).

company's headquarters in the hope that it would get lost, in order to sue the company the next time a fax is sent.

As noted above, most fax recipients are businesses, most of which are able to take advantage of the cost-free opt-out method provided by the sender. Most businesses have Internet or email access or can obtain access through free or low-cost means, such as public libraries. All, or virtually all, businesses have the ability to make a toll-free phone call. The Commission should not institute a rule intended to ensure that every last person can avail himself or herself of a sender's cost-free opt-out method with little or no effort. To allow the recipient to choose another opt-out method would be to open the door to abuse and litigation. It would truly be a case of the tail wagging the dog. Such a requirement is unnecessary it could cause harm that greatly outweighs any little good it does.

V. Unsolicited Advertisement

The Commission seeks comment on what forms of permission, besides written, should be allowed. YPA strongly urges the Commission to be flexible in the forms of permission allowed. One of the reasons that Congress enacted the JFPA was that written permission for faxing was deemed too burdensome. To obtain written permission to fax something to a potential new customer would be both a difficult and burdensome exercise. Oral permission should be sufficient. In the course of normal business, a potential advertiser may ask the directory publisher to fax over some information. To require the publisher to submit that request in writing defies common sense and seems solely designed to discourage commercial transactions.⁵

⁵ YPA asserts that transaction-based faxes are not unsolicited commercial faxes. A quote for a specific advertiser, a renewal of an advertisement, or a mock-up of an advertisement for a specific advertiser should be considered a transactional fax, and therefore wholly outside the do-not-fax requirements of 47 U.S.C. Sec. 227.

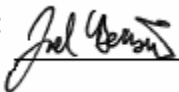
If the Commission determines that the sender will be required to bear the burden of proving whether or not permission has been granted, the Commission should be flexible as to the evidence necessary to prove the recipient granted permission for the fax. For example, if the sender has contemporaneous notes of the conversation with the potential customer, and those notes contain the fax number – or, if the sender has a business card or letterhead with the fax number – such evidence should demonstrate oral permission. Similarly, if the sender has faxed information to the recipient in the past, it should be presumed that permission was granted unless there is evidence that the recipient complied with the opt-out provisions.

VI. Conclusion

In enacting the Junk Fax Prevention Act of 2005, Congress recognized that the Commission’s proposed fax rules from 2003 were too burdensome. Faxing is a legitimate business tool. The Commission’s rules must also recognize that. For the most part, faxes are used in business-to-business transactions. If the parties determine that fax is an efficient way to conduct business, the Commission should not second-guess that decision by imposing burdensome rules on fax use.

Respectfully submitted,

Yellow Pages Association

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