

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of )
Rules and Regulations Implementing the )
Telephone Consumer Protection Act of 1991 ) CG Docket No. 02-278
Starkle Ventures, LLC's Petition for Rulemaking )
to Rescind Established Business Relationship Rule ) CG Docket No. 05-338
for Facsimile Advertisements )

ORDER

Adopted: March 14, 2007

Released: March 15, 2007

By the Chief, Consumer & Governmental Affairs Bureau:

I. INTRODUCTION

1. In this Order, we decline to commence a rulemaking proceeding to rescind the established business relationship (EBR) exception for facsimile advertisements. The Commission has previously addressed the question of whether facsimile advertisements can be sent to persons with whom the sender has an EBR. As recognized in the Junk Fax Prevention Act of 2005, an unsolicited advertisement from a sender with an EBR to the recipient will not be governed by the general prohibition found in section 227(b)(1)(C) of the Telephone Consumer Protection Act (TCPA). Accordingly, we deny the petition for rulemaking filed by Starkle Ventures, LLC (Starkle).

II. BACKGROUND

2. In 1992, the Commission adopted rules implementing the TCPA, including restrictions on the transmission of unsolicited facsimile advertisements. The Commission's rules on facsimile advertisements incorporated the language of the statute virtually verbatim. The Commission stated that,

1 Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005) (Junk Fax Prevention Act). See Junk Fax Prevention Act, Sec. 2(a).

2 Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227. Section 227(b)(1)(C) provides that it shall be unlawful for any person within the United States or any person outside the United States if the recipient is within the United States . . . to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement . . .

3 Petition for Rulemaking, Starkle Ventures, LLC, filed in WCB Docket 05-91, September 1, 2005 (Petition).

4 See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 (1992) (1992 TCPA Order); see also 47 C.F.R. § 64.1200.

5 See, e.g., 47 C.F.R. § 64.1200(a)(3) (no person or entity may "[u]se a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."); 47 C.F.R. § 64.1200(f)(13) (the term "unsolicited advertisement means any material advertising the commercial availability or quality of any

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“the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition” on unsolicited facsimile advertisements.<sup>6</sup> The Commission concluded, however, that facsimile transmissions from persons or entities that have an EBR with the recipient can evidence the necessary invitation or permission of the recipient to receive the facsimile advertisement.<sup>7</sup> The Commission defined the term “established business relationship” to mean:

a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.<sup>8</sup>

3. On July 3, 2003, the Commission revised many of its telemarketing and facsimile advertising rules under the TCPA.<sup>9</sup> Based on the record, the Commission reversed its prior conclusion that an EBR provides companies with the necessary express permission to send facsimile advertisements to their customers.<sup>10</sup> Instead, the Commission concluded that the recipient’s express permission must be in writing and include the recipient’s signature.<sup>11</sup>

4. On August 18, 2003, the Commission issued an *Order on Reconsideration* that delayed, until January 1, 2005, the effective date of the requirement that the sender of a facsimile advertisement first obtain the recipient’s prior express permission in writing.<sup>12</sup> Comments filed after the release of the *2003 TCPA Order* indicated that many organizations needed additional time to secure this prior written permission.<sup>13</sup> On October 1, 2004 and June 27, 2005, the Commission further delayed the effective date of this requirement.<sup>14</sup>

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property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission”).

<sup>6</sup> *1992 TCPA Order*, 7 FCC Rcd 8752 at 8779, para. 54, n.87.

<sup>7</sup> *Id.*

<sup>8</sup> *1992 TCPA Order*, 7 FCC Rcd at 8771, para. 35.

<sup>9</sup> *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003) (*2003 TCPA Order*).

<sup>10</sup> *Id.* at 14127-28, para. 189.

<sup>11</sup> *Id.* at 14128-29, para. 191. *See also* 47 C.F.R. § 64.1200(a)(3)(i).

<sup>12</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order on Reconsideration, 18 FCC Rcd 16972, 16974-75, paras. 5-6 (2003) (*Order on Reconsideration*).

<sup>13</sup> *Id.* at 16974, para. 5. On October 3, 2003, the Commission released an order staying the 18-month and three-month time limitations imposed on the duration of the EBR as applied to the sending of unsolicited facsimile advertisements pending either a decision on this issue on reconsideration or January 1, 2005. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, 18 FCC Rcd 19890 (2003).

<sup>14</sup> *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, 19 FCC Rcd 20125 (2004) and *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, 20 FCC Rcd 11424 (2005). In an Order adopted on December 9, 2005, the Commission further delayed the effective date of the written permission requirement until the conclusion of the rulemaking proceeding to implement the Junk Fax Prevention Act. *See Rules and Regulations*

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5. On July 9, 2005, Congress enacted the Junk Fax Prevention Act amending section 227 of the Communications Act. In general, the Junk Fax Prevention Act: (1) codified an established business relationship (EBR) exemption to the prohibition on sending unsolicited facsimile advertisements;<sup>15</sup> (2) provided a definition of an EBR to be used in the context of unsolicited facsimile advertisements;<sup>16</sup> (3) required the sender of a facsimile advertisement to provide specified notice and contact information on the facsimile that allows recipients to “opt-out” of any future facsimile transmissions from the sender;<sup>17</sup> and (4) specified the circumstances under which a request to “opt-out” complies with the Act.<sup>18</sup> Section 2(h) of the Junk Fax Prevention Act provides that “not later than 270 days after the date of enactment of this Act, the Federal Communications Commission shall issue regulations to implement the amendments made by this section.”<sup>19</sup>

6. Prior to the Commission’s proceeding to implement the Junk Fax Prevention Act, Starkle filed a petition on September 1, 2005, asking the Commission to initiate a rulemaking to rescind the EBR rule for facsimile advertisements, in effect since 1992.<sup>20</sup> Specifically, Starkle seeks “rescission of the Commission’s exemption applicable to pre-amendment facsimile advertisements,” asking that the exemption be rescinded retroactive to the time of its creation in 1992.<sup>21</sup> According to Starkle, numerous individuals and entities sent telephone facsimile advertisements to Starkle, which it believes constitute a violation of the “pre-amendment” TCPA.<sup>22</sup> Starkle therefore seeks rescission of the EBR exemption to eliminate it as a potential barrier to recovery for facsimile advertisements sent prior to July 9, 2005.<sup>23</sup> Starkle argues that the Commission’s EBR exemption is invalid and should be rescinded because it conflicts with the TCPA and exceeds the rulemaking authority granted the Commission.<sup>24</sup>

7. On December 9, 2005, the Commission released a Notice of Proposed Rulemaking proposing modifications to the Commission’s rules on unsolicited facsimile advertisements to implement the amendments required by the Junk Fax Prevention Act.<sup>25</sup> On April 6, 2006, the Commission released

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*Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Notice of Proposed Rulemaking and Order, 20 FCC Rcd 19758 (2005) (*JFPA NPRM*).

<sup>15</sup> Junk Fax Prevention Act, Sec. 2(a).

<sup>16</sup> Junk Fax Prevention Act, Sec. 2(b).

<sup>17</sup> Junk Fax Prevention Act, Sec. 2(c).

<sup>18</sup> Junk Fax Prevention Act, Sec. 2(d). In addition, the Junk Fax Prevention Act authorized the Commission to: (1) determine the “shortest reasonable time” that a sender must comply with a request not to receive future facsimile advertisements; (2) consider exempting certain classes of small business senders from the requirement to provide a “cost-free” mechanism for a recipient to transmit an opt-out request; and (3) consider whether to allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association’s tax-exempt purpose that do not contain the “opt-out” notice otherwise required by the Junk Fax Prevention Act.

<sup>19</sup> See Junk Fax Prevention Act, Sec. 2(h).

<sup>20</sup> See *supra* note 3.

<sup>21</sup> *Petition* at 3.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 3-6.

<sup>25</sup> *JFPA NPRM*, 20 FCC Rcd 19758 (2005).

an Order amending its rules on unsolicited facsimile advertisements.<sup>26</sup> In so doing, the Commission adopted the requirements of that statute virtually verbatim.<sup>27</sup>

### III. DISCUSSION

8. We decline to commence a rulemaking proceeding to rescind the EBR exception for facsimile advertisements. Congress clearly granted the Commission authority to adopt rules implementing the TCPA.<sup>28</sup> Under this authority, the Commission has, on numerous occasions, addressed the question of an exception for facsimile advertisements sent to persons with whom the sender has an EBR. In 1992, the Commission initiated a notice of proposed rulemaking, proposing implementing regulations and defining the contours of exemptions to the prohibitions of the statute.<sup>29</sup> In the *1992 TCPA Order*, the Commission concluded that facsimile transmissions from persons or entities that have an EBR with the recipient can evidence the necessary invitation or permission of the recipient to receive the facsimile advertisement.<sup>30</sup> The Commission reaffirmed this finding in a 1995 order, stating “the existence of an established business relationship establishes consent to receive telephone facsimile advertisement transmissions.”<sup>31</sup> In 2002, the Commission initiated a further rulemaking proceeding to review the TCPA rules in an effort to enhance consumer privacy protections while avoiding imposing unnecessary burdens on the telemarketing industry, consumers, and regulators.<sup>32</sup> As relevant here, the Commission specifically sought comment on the effectiveness of the facsimile advertising rules and on the Commission’s determination that a prior business relationship between a fax sender and recipient establishes the requisite consent to receive facsimile advertisement transmissions.<sup>33</sup> Although the Commission determined in 2003 to reverse its prior conclusion that an EBR provides companies with the necessary express permission to send facsimile advertisements to their customers, the accompanying rules did not become effective.<sup>34</sup>

9. Congress subsequently enacted the Junk Fax Prevention Act amending the TCPA’s facsimile advertising provisions.<sup>35</sup> The Junk Fax Prevention Act codified an EBR exemption to the prohibition on sending unsolicited facsimile advertisements.<sup>36</sup> Specifically, 2(a) provides that, “it shall be unlawful for any person . . . to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—the unsolicited advertisement is

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<sup>26</sup> See also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) (*Junk Fax Order*).

<sup>27</sup> See *Junk Fax Order*, App. A – Final Rules. See also 47 C.F.R. § 64.1200 (as revised by the *Junk Fax Order*).

<sup>28</sup> See 47 U.S.C. § 227(b)(2).

<sup>29</sup> See *In the Matter of the Telephone Consumer Protection Act of 1991*, CC Docket No 92-90, Notice of Proposed Rulemaking, 7 FCC Rcd 2736 (1992).

<sup>30</sup> *1992 TCPA Order*, 7 FCC Rcd at 8779-80, para. 54, n.87.

<sup>31</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12408, para. 37 (1995).

<sup>32</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 17 FCC Rcd 17459, CG Docket No. 02-278 and CC Docket No. 92-90 (2002) (*2002 NPRM*).

<sup>33</sup> *2002 NPRM*, 17 FCC Rcd at 17482-84, paras. 37-40.

<sup>34</sup> See *supra*, paras. 3 and 4.

<sup>35</sup> See *supra*, note 1.

<sup>36</sup> Junk Fax Prevention Act, Sec. 2(a).

from a sender with an established business relationship with the recipient...<sup>37</sup> As recently as April 2006, the Commission released an Order revising its rules on the transmission of facsimile advertisements in accordance with the Junk Fax Prevention Act.<sup>38</sup>

10. Starkle has not presented grounds for the Commission to revisit its facsimile advertising rules. Starkle argues that the Commission's rules, in place since 1992, serve as a "barrier to recovery for [unlawful] facsimile advertisements."<sup>39</sup> We assume Starkle refers to the TCPA's private right of action, which permits consumers to file suit in state court for violations of the TCPA rules, "if otherwise permitted by the laws or rules of court of a State."<sup>40</sup> The Commission noted that this language suggests that Congress contemplated that such legal action was a matter for consumers to pursue in appropriate state courts, subject to those courts' rules.<sup>41</sup> Starkle is free to pursue such action in state courts.

11. We therefore conclude that, given the recent direction from Congress in the Junk Fax Prevention Act and the Commission's numerous rulemaking proceedings to implement the TCPA since 1992, a rulemaking proceeding to address the EBR exemption is neither necessary nor appropriate. Accordingly, we deny the Petition for Rulemaking.

#### IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C § 154(i), and Section 1.401(e) of the Commission's rules, 47 C.F.R. § 1.401(e), the Petition for Rulemaking filed September 1, 2005, by Starkle Ventures, LLC, IS DENIED.

13. This action is taken under delegated authority pursuant to Sections 0.141 and 0.361 of the Commission's Rules, 47 C.F.R. §§ 0.141 and 0.361.

Federal Communications Commission

Catherine W. Seidel  
Chief, Consumer & Governmental Affairs Bureau

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<sup>37</sup> *Id.*

<sup>38</sup> *See supra*, note 26.

<sup>39</sup> *Petition* at 3.

<sup>40</sup> 47 U.S.C. § 227(b)(3).

<sup>41</sup> *See 2003 TCPA Order*, 18 FCC Rcd at 14136, para. 206.