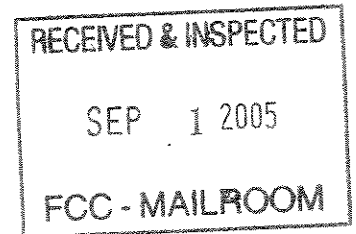

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Possible Revision or Elimination of Rules	)	DA 05-1524
	)	

COMMENTS OF STARKLE VENTURES, LLC

Starkle Ventures, LLC ("Starkle"), an Arizona limited liability company, hereby submits its comments in response to the Possible Revision or Elimination of Rules (the "PRER"). *See* 70 F.R. 33416. Starkle requests that, in connection with its review of 47 C.F.R. § 64.1200, the Federal Communications Commission (the "Commission") eliminate the established business relationship rule for facsimile advertisements.

Rule to be Eliminated

In 1991 the Telephone Consumer Protection Act ("TCPA") was enacted by Congress which, among other things, prohibited the sending of a facsimile advertisement without "prior express invitation or permission" from the person to whom the facsimile advertisement was sent. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (*see* §§ 227(a)(4) and (b)(1)(C)).

In 1992 the Commission created the established business relationship liability exemption for facsimile advertisements: "We note, however, that facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 F.C.C.R. 8752, 8779 at ¶54 n.87 (1992). The Commission reaffirmed the exemption in a 1995

order, stating "the existence of an established business relationship establishes consent to receive telephone facsimile advertisement transmissions." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Memorandum Opinion and Order, 10 F.C.C.R. 12391, 12408 at ¶37 (1995). In 2003, the Commission rescinded the exemption, _but_ only from the effective date of the order forward; the Commission reaffirmed the applicability of the exemption to any facsimile advertisements sent prior to such effective date—"We emphasize that, prior to the effectuation of rules contained herein, companies that transmitted facsimile advertisements to customers with whom they had established business relationships were in compliance with the Commission's existing rules." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 F.C.C.R. 14014, 14127 ¶189 and n.699 (2003). The Commission then effectively negated its prospective rescission of the exemption by repeatedly extending the effective date of that portion of the order, which is presently not scheduled to take effect until January 9, 2006. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order on Reconsideration, 18 F.C.C.R. 16972 ¶ 1 (2003) (extending effective date to January 1, 2005); *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, 19 F.C.C.R. 20125 ¶ 1 (2004) (extending effective date to June 30, 2005); *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, FCC 05-132 (2005) (extending effective date to January 9, 2006).

On July 9, 2005 the TCPA was amended by Congress to include an established business relationship liability exemption for facsimile advertisements. Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359.

As part of the PRER, the Commission will be reviewing 47 C.F.R. § 64.1200, which makes reference to the Commission's exemption applicable to pre-amendment facsimile advertisements. Starkle seeks elimination of the Commission's exemption in the review process. The exemption should be eliminated retroactive to the date it was created in 1992.

Statement of Interest

Prior to July 9, 2005, numerous individuals and entities sent telephone facsimile advertisements to Starkle without obtaining its prior express invitation or permission. Starkle believes these facsimile advertisements constituted a violation of the pre-amendment TCPA. However, some of these individuals and entities have asserted they are not liable based on the Commission's exemption. Starkle believes the Commission's exemption is invalid. Starkle seeks rescission of the Commission's exemption to eliminate it as a potential barrier to recovery for facsimile advertisements sent prior to July 9, 2005.

Argument

THE COMMISSION'S EXEMPTION IS INVALID AND SHOULD BE ELIMINATED BECAUSE IT DIRECTLY CONFLICTS WITH THE TCPA AND ITS LEGISLATIVE HISTORY AND EXCEEDS THE RULEMAKING AUTHORITY GRANTED THE COMMISSION.

The issue is whether the Commission's exemption is valid as to pre-amendment facsimile advertisements.

The TCPA grants the Commission the authority to "prescribe regulations to *implement* the requirements" of subsection (b) of the TCPA, which includes the facsimile advertisement prohibition. 47 U.S.C. §§ 227(b)(2) (conferring rule making authority to "implement" subsection

(b)(emphasis added)), 227(b)(1)(C) (prohibition on sending "unsolicited advertisement"), and 227(a)(4) (defining "unsolicited advertisement" as one "transmitted to any person without that person's prior express invitation or permission"). However, as the Commission has previously acknowledged, "the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 F.C.C.R. 8752, 8779 at ¶54 n.87 (1992). In other words, the word "implement" does not give the Commission authority to rewrite the facsimile advertisement prohibition at its pleasure, regardless of what Congress intended. "But the role of the agencies remains basically to execute legislative policy; they are no more authorized than are the courts to rewrite acts of Congress." *Talley v. Mathews*, 550 F.2d 911, 919 (4th Cir. 1977).

The unauthorized rewriting of the pre-amendment TCPA is exactly what the Commission's exemption represented. The pre-amendment TCPA drew a distinction between a "telephone solicitation" (*i.e.*, a "live" telemarketing call) and an "unsolicited advertisement" (*i.e.*, a facsimile advertisement). A "telephone solicitation" was defined as:

> . . . the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (§ 227(a)(3)). An "unsolicited advertisement" was defined as:

> . . . any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

Id. (§ 227(a)(4)). The definition of "telephone solicitation" expressly provided for an "established business relationship" exemption to liability. However, the definition for "unsolicited advertisement" did not include such an exemption. The only exemption to liability for an "unsolicited advertisement" was "prior express invitation or permission." *Id.*

The Commission was not authorized to create this exemption in the pre-amendment TCPA. Had Congress wanted such an exemption it would have said so in the definition of "unsolicited advertisement," just as it did in the definition of "telephone solicitation." Congress' inclusion of the exemption in one definition but not in another should have been respected by the Commission. *See Rodriguez v. U.S.*, 480 U.S. 522, 525 (1987) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.") (internal citations, quotations, and brackets omitted); *Russello v. U.S.*, 464 U.S. 16, 23 (1983) ("Had Congress intended to restrict §[](a)(1) . . . it presumably would have done so expressly as it did in the immediately following subsection (a)(2). . . . The short answer is that Congress did not write the statute that way.").

Congress' intent that there should not be such an exemption was also clear from the fact that a prior version of the TCPA included the exemption, but Congress deleted it from the final version that was passed. *See* H.R. 1304, 102d Cong., 1st Sess. Sec. 3, Sec. 227(a)(4) (Nov. 18, 1991). The Commission was not free to simply "pencil back in" the exemption after Congress erased it because the Commission disagreed with the policy decision made by Congress. Congress writes the law, not the Commission. *See Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974) (deletion of a provision from a prior version of statute "strongly militates against a judgment that Congress intended a result that it expressly decline[s] to enact.");

Commonwealth of Pa., Dept. of Public Welfare v. U.S. Dept. of Health & Human Services, 928 F.2d 1378, 1386 (3d Cir.1991) ("Because the Conference had before it the Senate's suggestion for an exception due to 'circumstances beyond control of the state' and did not include it, but adopted instead a version closer to that offered by the House, we believe HHS may not reinsert the omitted language by regulation.").

The Commission tacitly recognized the irrationality of the exemption when it rescinded it in 2003. However, under pressure from various telemarketing interest groups, the Commission made the rescission prospective only. Then the Commission repeatedly extended the effective date for the rescission, such that several years later the rescission still has yet to take effect. What the Commission fails to understand is that the exemption was void *ab initio* for lack of authority—the Commission could not perpetuate for any amount of time an exemption that was unlawful for the Commission to create in the first place.

The amendment to the TCPA to include the exemption highlights the absence of it in the prior version of the statute. There would have been no need for the amendment if the prior version of the TCPA included such an exemption (nor a need for it if the Commission's exemption were valid). Congress' creation of an exemption in 2005 did not validate the unauthorized action the Commission took in 1992 by creating an exemption on its own without Congressional authority.

Conclusion

For the foregoing reasons, the established business relationship liability exemption for facsimile advertisements created by the Commission in 1992 should be eliminated.

. . .

. . .

RESPECTFULLY SUBMITTED this 31st day of August 2005.

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Certificate of Service

I, Christopher A. LaVoy, hereby certify that an original and four copies of the Comments of Starkle Ventures, LLC were sent via overnight Federal Express on August 31, 2005 to:

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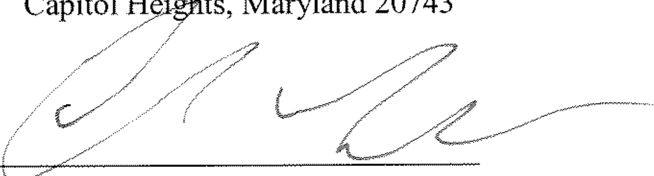

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