

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

In the Matter of
Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991
Fax Ban Coalition Petition for Further Extension
of Stay
CG Docket No. 02-278

ORDER

Adopted: June 27, 2005

Released: June 27, 2005

By the Commission:

I. INTRODUCTION

1. In this Order, we delay until January 9, 2006, the effective date of the Commission's prior determination that an established business relationship will no longer be sufficient to show that an individual or business has given prior express permission to receive unsolicited facsimile advertisements.

II. BACKGROUND

2. On July 3, 2003, the Commission released the Report and Order revising many of its telemarketing and facsimile advertising rules pursuant to the Telephone Consumer Protection Act of 1991

1 See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, at 14127-28, para. 189 (2003) (Report and Order). See also 68 Fed. Reg. 44144 (July 25, 2003).

2 47 C.F.R. § 64.1200(a)(3)(i) provides that "a facsimile advertisement is not 'unsolicited' if the recipient has granted the sender prior express invitation or permission to deliver the advertisement, as evidenced by a signed, written statement that includes the facsimile number to which any advertisements may be sent and clearly indicates the recipient's consent to receive such facsimile advertisements from the sender."

3 47 C.F.R. § 64.1200(f)(3) defines the term "established business relationship" as: 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 the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

(TCPA).<sup>4</sup> Among other things, the TCPA prohibits any person from sending an “unsolicited advertisement to a telephone facsimile machine.”<sup>5</sup> As used in the TCPA, “[t]he term ‘unsolicited advertisement’ means 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.”<sup>6</sup> In the *Report and Order*, the Commission reversed its prior conclusion that an established business relationship provides companies with the necessary express permission to send facsimile advertisements to their customers.<sup>7</sup> Instead, the Commission concluded that the recipient’s express invitation or permission must be in writing and include the recipient’s signature.<sup>8</sup> The Commission also concluded that, in the context of telemarketing calls, an established business relationship expires 18 months after the recipient’s last purchase or transaction, or 3 months after the recipient’s last application or inquiry.<sup>9</sup>

3. On August 18, 2003, the Commission issued an *Order on Reconsideration* that extended, 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>10</sup> The Commission explained that comments filed after the release of the *Report and Order* indicated that many organizations may need additional time to secure this prior written permission from individuals and businesses to which they fax advertisements.<sup>11</sup> In addition, the Commission noted that the extension would allow the opportunity to consider any petitions for reconsideration and other filings that may be made on this issue.<sup>12</sup> The Commission retained the discretion to extend the effective date further should circumstances warrant such an action.<sup>13</sup>

4. On October 3, 2003, the Commission released an order staying the 18-month and three-month time limitations imposed on the duration of the “established business relationship” as applied to the sending of unsolicited facsimile advertisements,<sup>14</sup> “pending either a decision on this issue on reconsideration or January 1, 2005, when the extension of the established business relationship to

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<sup>4</sup> See *Report and Order*.

<sup>5</sup> 47 U.S.C. § 227(b)(1)(C).

<sup>6</sup> 47 U.S.C. § 227(a)(4).

<sup>7</sup> *Id.* at 14127-28, para. 189. See also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, at 8779, n.87 (1992) (concluding that an established business relationship evidences permission to send an unsolicited facsimile advertisement).

<sup>8</sup> *Report and Order*, 18 FCC Rcd at 14128-29, para. 191. See also 47 C.F.R. § 64.1200(a)(3)(i).

<sup>9</sup> *Report and Order*, 18 FCC Rcd at 14079, para. 113. Prior to the *Report and Order*, there was no expiration date related to the “established business relationship.”

<sup>10</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order on Reconsideration, 18 FCC Rcd 16972 at 16974-75, paras. 5-6 (*Order on Reconsideration*).

<sup>11</sup> *Order on Reconsideration*, 18 FCC Rcd at 16974, para. 5.

<sup>12</sup> *Order on Reconsideration*, 18 FCC Rcd at 16974-75, para. 5. The Commission received numerous petitions for reconsideration and/or clarification of the telemarketing and fax rules, which are currently pending before the Commission. The vast majority of petitions address the Commission’s rules on unsolicited facsimile advertisements. See, e.g., Chamber of Commerce of the United States Petition for Reconsideration filed Aug. 25, 2003; Newspaper Association of America Petition for Reconsideration filed Aug. 22, 2003; Office of Advocacy, U.S. Small Business Administration Petition for Reconsideration filed Aug. 25, 2003.

<sup>13</sup> *Order on Reconsideration*, 18 FCC Rcd at 16974-75, paras. 5-6.

<sup>14</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, 18 FCC Rcd 19890 (2003) (*2003 Stay Order*); see also 47 C.F.R. § 64.1200(f)(3).

unsolicited facsimile advertisements is due to expire.”<sup>15</sup>

5. On August 10, 2004, approximately four months prior to the January 1, 2005 effective date established in the *Order on Reconsideration*, the Fax Ban Coalition (Coalition)<sup>16</sup> filed a petition requesting that the Commission further delay the effective date of the express written consent requirement through June 30, 2005.<sup>17</sup> Recognizing that the U.S. House of Representatives had approved a bill to amend the TCPA’s facsimile advertising provisions and to address issues such as the existence of an “established business relationship,” and that similar legislation had been introduced in the U.S. Senate, the Coalition argued that given the prospect of legislative action, a delay was warranted so that businesses could avoid incurring the costs associated with complying with the Commission’s facsimile advertising rules while Congress considered legislation to amend the TCPA.

6. On September 15, 2004, the Commission adopted an order granting the Coalition’s request.<sup>18</sup> The Commission delayed for a period of six months, through June 30, 2005, the effective date of the prior written consent requirement.<sup>19</sup> Finally, the Commission also extended the stay of the 18-month and three-month limitations on the duration of an “established business relationship” as applied to the sending of unsolicited facsimile advertisements through June 30, 2005.<sup>20</sup> The 108<sup>th</sup> Congress subsequently adjourned without passage of legislation related to TCPA.

7. On April 6, 2005, S.714, the Junk Fax Prevention Act, was introduced in the Senate to amend the TCPA.<sup>21</sup> This bill addresses issues raised in petitions before the Commission, such as the existence of an “established business relationship.”<sup>22</sup> On April 13, 2005, the U.S. Senate Committee on Commerce, Science, and Transportation (Senate Commerce Committee) held hearings on the bill. On April 14, 2005, the Senate Commerce Committee approved an amended version of the Junk Fax Prevention Act by unanimous consent.<sup>23</sup> On June 7, 2005, the Senate Commerce Committee reported the Junk Fax Prevention Act favorably with amendments to the full Senate.<sup>24</sup> On June 24, 2005, the Senate approved a bill to amend section 227 of the Communications Act of 1934, relating to the prohibition on unsolicited facsimile advertisement transmissions.<sup>25</sup>

8. Following the Senate Commerce Committee’s approval of the bill, the Coalition filed on April 15, 2005, a petition urging the Commission to further delay the effective date of the rules governing

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<sup>15</sup> *2003 Stay Order*, 18 FCC Rcd at 19890, para. 1.

<sup>16</sup> The associations and businesses of the Fax Ban Coalition “represent financial institutions, the real estate and housing communities, distributors, manufacturers, the travel industry, medical professionals, publishers, and large and small businesses.” *See Fax Ban Coalition, Petition For Extension of Stay*, CG Docket No. 02-278, dated August 10, 2004, at 2.

<sup>17</sup> *See Fax Ban Coalition, Petition For Extension of Stay*, CG Docket No. 02-278, dated August 10, 2004.

<sup>18</sup> *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No 02-278, Order, 19 FCC Rcd 20125 (2004) (*2004 Stay Order*).

<sup>19</sup> *See* 47 C.F.R. § 64.1200(a)(3)(i).

<sup>20</sup> *2004 Stay Order*, 19 FCC Rcd at 20127, para. 7.

<sup>21</sup> S. 714, 109<sup>th</sup> Cong., 1st Sess. (2005).

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

<sup>23</sup> *See* U.S. Senate Committee on Commerce, Science, and Transportation Press Release, *Commerce Committee Approves “Junk Fax Prevention” Bill*, April 14, 2005.

<sup>24</sup> *See* S. REP. NO. 109-76 (2005).

<sup>25</sup> *See* Junk Fax Prevention Act of 2005, S. 714, 109<sup>th</sup> Congress (2005).

unsolicited facsimile advertisements through December 31, 2005.<sup>26</sup> The Coalition maintains that a further delay is warranted to avoid irreparable injury to the members of the Coalition and negative impact on the Nation's economy.<sup>27</sup> The Coalition further argues that delay is particularly important while Congress considers legislation to amend the TCPA and the Commission considers petitions for reconsideration and requests for clarification.<sup>28</sup> The Coalition argues that without a further stay by the Commission, Coalition members would have to undertake efforts imminently to comply with the Commission's facsimile advertising rules which go into effect July 1, 2005, and incur the significant costs associated with such efforts.<sup>29</sup> According to the Coalition, an extension of the stay until December 31, 2005 would allow its members to avoid these costs until Congress takes action or the Commission addresses the pending petitions for reconsideration and clarification.<sup>30</sup>

### III. DISCUSSION

9. We now further delay, until January 9, 2006, the effective date of section 64.1200(a)(3)(i) of the Commission's rules.<sup>31</sup> In light of the on-going developments in Congress and pending resolution of the petitions for reconsideration and clarification of the Commission's facsimile advertising rules, we believe the public interest would best be served by delaying the effective date of the written consent requirement and the 18-month and three-month limitations on the duration of the established business relationship as applied to the sending of facsimile advertisements until January 9, 2006.<sup>32</sup> This delay will provide the Commission requisite time to address the petitions for reconsideration filed on these issues.

### IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that, pursuant to Sections 1-4, 227, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, and 303(r), this Order in CG Docket No. 02-278 IS ADOPTED and that the *Report and Order*, FCC 03-153, IS MODIFIED as set forth herein.

11. IT IS FURTHER ORDERED, that the Fax Ban Coalition's Petition for Further Extension of Stay is GRANTED to the extent discussed herein.

12. IT IS FURTHER ORDERED, that the effective date for: 1) the Commission's determination that an established business relationship will no longer be sufficient to show that an individual or business has given their express permission to receive unsolicited facsimile advertisements;

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<sup>26</sup> Fax Ban Coalition, Petition For Further Extension of Stay, CG Docket No. 02-278, dated April 15, 2005.

<sup>27</sup> *Id.* at 6.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 9-10. *See also* Letter from Gerard J. Waldron, Counsel for National Association for Realtors, to Marlene H. Dortch, FCC, dated April 28, 2005 (*citing* cost estimates from the SBA in this proceeding that estimate that small businesses will pay an average of \$22,500 to obtain consent forms and an average of \$20,000 in annual compliance costs). Letter from Thomas M. Sullivan, Office of Advocacy, U.S. Small Business Administration, to Marlene H. Dortch, FCC, dated Nov. 21, 2003.

<sup>30</sup> *Id.* at 10.

<sup>31</sup> *See* 47 C.F.R. § 64.1200(a)(3)(i). We choose this date, the first non-holiday Monday of the new year, rather than the date proposed by the Coalition, to avoid imposition of new requirements during the holiday season, when many businesses might be operating with reduced personnel, if at all.

<sup>32</sup> We are skeptical that further extensions will be necessary absent the unusual circumstances present here, which include the likelihood of near-term amendment to the applicable statute and the pendency of potentially relevant petitions for reconsideration.

2) the 18-month and three-month limitations on the duration of the established business relationship as applied to the sending of facsimile advertisements; and 3) the requirement that the sender of a facsimile advertisement first obtain the recipient's express permission in writing, as codified at 47 C.F.R. § 64.1200(a)(3)(i), IS January 9, 2006, and that this Order is effective upon publication in the Federal Register.<sup>33</sup>

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>33</sup> Because entities might otherwise be required to take steps to be in compliance with the 2003 prior written consent facsimile advertising requirements, we find good cause, pursuant to 5 U.S.C. § 553(d), to make this Order effective on less than thirty days' notice.