

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

In the Matter of )
)
)
NATIONAL BUSINESS INFORMATION ) File No. EB-05-TC-052
CORPORATION )
) NAL/Acct. No. 200632170008
) FRN: 0015522121
Apparent Liability for Forfeiture )
)

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: September 19, 2006

Released: September 20, 2006

By the Commission:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL")<sup>1</sup>, we find that National Business Information Corporation ("NBIC")<sup>2</sup> apparently willfully or repeatedly violated section 227 of the Communications Act of 1934, as amended ("Act"), and the Commission's related rules and orders by delivering at least 34 unsolicited advertisements to the telephone facsimile machines of at least 8 consumers.<sup>3</sup> Based on the facts and circumstances surrounding these apparent violations, we find that NBIC is apparently liable for a forfeiture in the amount of \$153,000.

<sup>1</sup> See 47 U.S.C. § 503(b)(1). The Commission has the authority under this section of the Act to assess a forfeiture against any person who has "willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act ...." See also 47 U.S.C. § 503(b)(5) (stating that the Commission has the authority under this section of the Act to assess a forfeiture penalty against any person who is not a common carrier so long as such person (A) is first issued a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission nearest to the person's place of residence; and (C) subsequently engages in conduct of the type described in the citation).

<sup>2</sup> According to publicly available information, NBIC is headquartered at 1346 W. Arrowhead Rd., #302, Duluth, MN 55811; an alternate address, under the name International Directories Corporation ("IDC"), is 6924 Aloma Ave., Winter Park, FL 32792. See text accompanying n.14, infra. Therefore, all references in this NAL to "NBIC" encompass National Business Information Corporation as well as International Directories Corporation. NBIC's registered agent is Richard J. McHenry, Sr., who is also listed as the Chief Executive Officer. Don Murray is listed as the contact person for NBIC's Florida address. Accordingly, all references in this NAL to "NBIC" also encompass Richard J. McHenry, Sr., Don Murray, and all other principals and officers of these entities, as well as the corporate entities themselves.

<sup>3</sup> See 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(3); see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 18 FCC Rcd 14014, 14124, para. 185 (2003) (TCPA Report and Order) (stating that section 227 of the Act prohibits the use of telephone facsimile machines to send unsolicited advertisements).

## II. BACKGROUND

2. On August 31, 2005, in response to consumer complaints alleging that NBIC had faxed unsolicited advertisements, the Commission staff issued a citation<sup>4</sup> to NBIC, pursuant to section 503(b)(5) of the Act.<sup>5</sup> The staff cited NBIC for using a telephone facsimile machine, computer, or other device, to send unsolicited advertisements to a telephone facsimile machine, in violation of section 227 of the Act and the Commission's related rules and orders. According to the complaints, the unsolicited advertisements offered listings in a business directory.<sup>6</sup> The citation, which the staff served by facsimile and by certified mail, return receipt requested, warned NBIC that subsequent violations could result in the imposition of monetary forfeitures of up to \$11,000 per violation, and included a copy of the consumer complaints that formed the basis of the citation.<sup>7</sup> The citation informed NBIC that within 21 days of the date of the citation, it could either request a personal interview at the nearest Commission office, or could provide a written statement responding to the citation. NBIC did not request an interview or otherwise respond to the citation.

3. Despite the citation's warning that subsequent violations could result in the imposition of monetary forfeitures, we have received additional consumer complaints indicating that NBIC continued to engage in such conduct after receiving the citation.<sup>8</sup> We base our action here specifically on sworn declarations from 8 consumers establishing that NBIC continued to send 34 unsolicited advertisements to telephone facsimile machines after the date of the citation.<sup>9</sup>

4. Section 227(b)(1)(C) of the Act makes it "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."<sup>10</sup> The term "unsolicited advertisement" is defined in the Act and the Commission's rules 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." Under Commission rules and orders in effect at the time of the alleged violations discussed in this NAL, the Commission viewed an established business relationship between a fax sender and

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<sup>4</sup> Citation from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, File No. EB-05-TC-052, issued to NBIC on August 31, 2005.

<sup>5</sup> See 47 U.S.C. § 503(b)(5) (authorizing the Commission to issue citations to non-common carriers for violations of the Act or of the Commission's rules and orders).

<sup>6</sup> See, e.g., Complaint letter from Jill Gilbert, AHA Services, Inc., dated August 26, 2005, which was attached to the citation (stating that her company regularly receives multiple unwanted fax advertisements from NBIC, even though she has requested that NBIC stop sending the faxes, and her company has had no prior business association with NBIC).

<sup>7</sup> Commission staff mailed the citation to NBIC's Minnesota and Florida addresses. See n.2, *supra*. Although the U.S. Postal Service returned to the Commission as "unclaimed" the copy of the citation sent to NBIC's Florida address, NBIC signed the return receipt for the citation sent to its Minnesota address.

<sup>8</sup> See Appendix for a listing of the consumer declarations from complainants requesting Commission action.

<sup>9</sup> We note that evidence of additional instances of unlawful conduct by NBIC may form the basis of subsequent enforcement action.

<sup>10</sup> 47 U.S.C. § 227(b)(1)(C).

recipient as constituting prior express invitation or permission to send a facsimile advertisement.<sup>11</sup>

5. Section 503(b) of the Act authorizes the Commission to assess a forfeiture of up to \$11,000 for each violation of the Act or of any rule, regulation, or order issued by the Commission under the Act by a non-common carrier or other entity not specifically designated in section 503 of the Act.<sup>12</sup> In exercising such authority, we are to take into account “the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”<sup>13</sup>

### III. DISCUSSION

#### A. Violations of the Commission’s Rules Restricting Unsolicited Facsimile Advertisements

6. We find that NBIC apparently violated section 227 of the Act and the Commission’s related rules and orders by using a telephone facsimile machine, computer, or other device to send at least 34 unsolicited advertisements to the 8 consumers identified in the Appendix. This NAL is based on evidence that these 8 consumers received unsolicited fax advertisements from NBIC *after* the Bureau’s citation. Each of those facsimile transmissions advertises a business directory, as well as an offer to be listed in that directory. NBIC has apparently been sending the faxes from the Minnesota and Florida locations where Commission staff sent the citation,<sup>14</sup> using both the NBIC name as well as the name “International Directories Corporation.” In addition, NBIC has recently been listing a Canadian address on some of its facsimile advertisements.<sup>15</sup>

7. One example of NBIC’s facsimile advertisements begins with the statement “RETURN THIS PAGE FOR YOUR FREE COPY OF THE NATIONAL CONTRACTORS GUIDE.” The

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<sup>11</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12408, para. 37 (1995) (*1995 TCPA Reconsideration Order*); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 20 FCC Rcd 11424 (2005). Under the Junk Fax Prevention Act of 2005, Pub. L. 109-21, 119 Stat. 359 (2005), Congress amended the Communications Act to specify, among other things, the conditions under which an established business relationship provides an exception to the prohibition on unsolicited fax advertising. The Commission recently released rules to implement the Junk Fax Prevention Act, including rules that determined specific time parameters for the established business relationship exception. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006). These revised rules were not in effect at the time of the alleged violations in this case, although the Commission’s original established business relationship exception was in effect, as noted above.

<sup>12</sup> Section 503(b)(2)(C) provides for forfeitures up to \$10,000 for each violation in cases not covered by subparagraph (A) or (B), which address forfeitures for violations by licensees and common carriers, among others. *See* 47 U.S.C. § 503(b). In accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, Pub. L. 104-134, Sec. 31001, 110 Stat. 1321, the Commission implemented an increase of the maximum statutory forfeiture under section 503(b)(2)(C) to \$11,000. *See* 47 C.F.R. § 1.80(b)(3); *Amendment of Section 1.80 of the Commission’s Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 15 FCC Rcd 18221 (2000); *see also Amendment of Section 1.80(b) of the Commission’s Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 19 FCC Rcd 10945 (2004) (this recent amendment of section 1.80(b) to reflect inflation left the forfeiture maximum for this type of violator at \$11,000).

<sup>13</sup> 47 U.S.C. § 503(b)(2)(D); *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, Report and Order*, 12 FCC Rcd 17087, 17100-01 para. 27 (1997) (*Forfeiture Policy Statement*), *recon. denied*, 15 FCC Rcd 303 (1999).

<sup>14</sup> *See* n.2, *supra*.

<sup>15</sup> *See, e.g.*, declaration dated June 21, 2006, from Jane E. Updegraff, Gem City Metal, facsimile attachments.

facsimile also provides a sample of how a recipient's listing would appear in the directory, and directs the recipient to fill out contact information, sign, and return the facsimile to NBIC for a "free" copy of the latest directory. In fine print, below the signature line, the fax includes the following language: "I am enclosing a payment of \$189.00 to cover the cost of inclusion in the 2006 edition. If payment is not enclosed when submitting this information, my company agrees to pay \$199.00 to cover the cost of inclusion if the company is to be billed."<sup>16</sup> Another example of the facsimile advertisements is in the form of an invoice. Sent under the name of IDC, this facsimile also shows the listing of the fax recipient's company as it will appear in the NBIC business directory, and states "Inclusion in the 2006 edition, The National Contractors Guide, to be published soon. A free copy . . . will be sent upon publication to those who have paid for inclusion. Total Amount Due For Inclusion \$199. \*\*\*Rush Payment to Beat The Deadline For Your Area." The facsimile is stamped "PAST DUE," and includes an invoice number and a signature block where the complainant allegedly signed previously to receive a copy of NBIC's directory.<sup>17</sup> None of the complainants, however, ordered either a business directory or a listing in that directory.<sup>18</sup> These facsimiles, which are representative of the others on which this NAL is based, fall within the definition of an "unsolicited advertisement" in effect at the time of the alleged violations.<sup>19</sup>

8. Further, according to their declarations, the consumers neither had an established business relationship with NBIC nor gave NBIC permission to send the facsimile transmissions.<sup>20</sup> Therefore, NBIC appears to have sent each facsimile transmission without the prior express consent of the consumers.<sup>21</sup> NBIC did not respond to the Commission's citation and thus has offered no evidence or arguments to defend or justify its faxing practices. Based on the entire record, including the consumer declarations, we conclude that NBIC apparently violated section 227 of the Act and the Commission's related rules and orders by sending 34 unsolicited advertisements to 8 consumers' facsimile machines.

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<sup>16</sup> Declaration dated August 8, 2006, from Kristi Guttuso, Hudson Bay Development Co., Inc, facsimile attachments. A copy of one of these facsimiles is attached in the Appendix as an example. We have redacted certain identifying information of the complainant.

<sup>17</sup> Declaration dated June 22, 2006, from Raul Garcia, True Champions, Inc., facsimile attachment. A copy of this facsimile is attached in the Appendix as an example. We have redacted certain identifying information of the complainant, including the apparently falsified signature.

<sup>18</sup> See, e.g., Declaration dated June 22, 2006, from Raul Garcia, True Champions, Inc. (stating that to the best of his knowledge, at no time did anyone in his household engage in any business transaction with IDC). This second type of advertisement appears to be designed to fraudulently convey that the recipient already ordered a business directory. The Commission staff has referred the possible fraud aspects of this case to the Federal Trade Commission.

<sup>19</sup> At the time of the alleged violations, the term "unsolicited advertisement" (then codified at 47 U.S.C. § 227(a)(4) and 47 C.F.R. § 64.1200(f)(10)) meant "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." The current definition is codified at 47 U.S.C. § 227(a)(5) and 47 C.F.R. § 64.1200(f)(13).

<sup>20</sup> See, e.g., Declaration dated June 30, 2006, from Les Ellsworth (stating that, to the best of his knowledge, at no time did anyone in his household give IDC prior express consent to deliver a facsimile advertisement, nor did anyone engage in any business transaction with IDC). All of the complainants involved in this action are listed in the Appendix below.

<sup>21</sup> Mere distribution or publication of a fax number does not establish consent to receive advertisements by fax. *1995 Reconsideration Order*, 10 FCC Rcd at 12408-09, para. 37; see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 18 FCC Rcd 14014, 14129, para. 193 (2003) (concluding that mere publication of a fax number in a trade publication or directory does not demonstrate consent to receive fax advertising).

## B. Proposed Forfeiture

9. We find that NBIC is apparently liable for a forfeiture in the amount of \$153,000. Although the *Commission's Forfeiture Policy Statement* does not establish a base forfeiture amount for violating the prohibition against using a telephone facsimile machine to send unsolicited advertisements, the Commission has previously considered \$4,500 per unsolicited fax advertisement to be an appropriate base amount.<sup>22</sup> We apply that base amount to each of 34 of the apparent violations, for a total proposed forfeiture of \$153,000. NBIC shall have the opportunity to submit evidence and arguments in response to this NAL to show that no forfeiture should be imposed or that some lesser amount should be assessed.<sup>23</sup>

## IV. CONCLUSION AND ORDERING CLAUSES

10. We have determined that National Business Information Corporation apparently violated section 227 of the Act and the Commission's related rules and orders by using a telephone facsimile machine, computer, or other device to send at least 34 unsolicited advertisements to the 8 consumers identified in the Appendix. We have further determined that National Business Information Corporation is apparently liable for a forfeiture in the amount of \$153,000.

11. Accordingly, IT IS ORDERED, pursuant to section 503(b) of the Act, and section 1.80 of the Rules, 47 C.F.R. § 1.80, 47 U.S.C. § 503(b), that National Business Information Corporation is hereby NOTIFIED of this APPARENT LIABILITY FOR A FORFEITURE in the amount of \$153,000 for willful or repeated violations of section 227(b)(1)(C) of the Communications Act, 47 U.S.C. § 227(b)(1)(C), sections 64.1200(a)(3) of the Commission's rules, 47 C.F.R. § 64.1200(a)(3), and the related orders described in the paragraphs above.

12. IT IS FURTHER ORDERED THAT, pursuant to section 1.80 of the Commission's rules,<sup>24</sup> within thirty (30) days of the release date of this *Notice of Apparent Liability for Forfeiture*, National Business Information Corporation SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

13. Payment by check or money order, payable to the order of the "Federal Communications Commission," may be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251. Payment by overnight mail may be sent to Mellon Client Service Center, 500 Ross Street, Room 670, Pittsburgh, PA 15262-0001, Attn: FCC Module Supervisor. Payment by wire transfer may be made to: ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6229. The payment should note NAL/Acct. No. 200632170008.

14. The response, if any, must be mailed both to the Office of the Secretary, Federal Communications Commission, 445 12<sup>th</sup> Street, SW, Washington, DC 20554, ATTN: Enforcement Bureau – Telecommunications Consumers Division, and to Colleen Heitkamp, Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, 445 12<sup>th</sup> Street, SW, Washington, DC 20554, and must include the NAL/Acct. No. referenced in the caption.

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<sup>22</sup> See *Get-Aways, Inc.*, Notice of Apparent Liability For Forfeiture, 15 FCC Rcd 1805 (1999); *Get-Aways, Inc.*, Forfeiture Order, 15 FCC Rcd 4843 (2000); see also *US Notary, Inc.*, Notice of Apparent Liability for Forfeiture, 15 Rcd 16999 (2000); *US Notary, Inc.*, Forfeiture Order, 16 FCC Rcd 18398 (2001); *Tri-Star Marketing, Inc.*, Notice of Apparent Liability For Forfeiture, 15 FCC Rcd 11295 (2000); *Tri-Star Marketing, Inc.*, Forfeiture Order, 15 FCC Rcd 23198 (2000).

<sup>23</sup> See 47 U.S.C. § 503(b)(4)(C); 47 C.F.R. § 1.80(f)(3).

<sup>24</sup> 47 C.F.R. § 1.80.

15. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

16. Requests for payment of the full amount of this *Notice of Apparent Liability for Forfeiture* under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, SW, Washington, DC 20554.<sup>25</sup>

17. IT IS FURTHER ORDERED that a copy of this *Notice of Apparent Liability for Forfeiture* shall be sent by Certified Mail Return Receipt Requested to National Business Information Corporation, Attention: Richard J. McHenry, Sr., CEO, 1346 W. Arrowhead Rd., #302, Duluth, MN 55811; and to National Business Information Corporation aka Business Information Corporation, Attention: Don Murray, 6924 Aloma Ave., Winter Park, FL 32792.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>25</sup> 47 C.F.R. § 1.1914.

## APPENDIX

<b>Complainant</b>	<b>Violation Date(s)</b>
Ed Schmidt, Schmidt Brothers Custom Homes, Inc.	11/29/05, 1/2/06
Gary Friedman, Cosmopolitan Trading	9/20/05 to 9/25/05 (5 faxes) <sup>26</sup>
Gene A. Taylor, Dorthy's Surrender	6/29/06
Jane E. Updegraff, Gem City Metal	12/3/05, 1/19/06
Kent W. Burkhardt, Burkhardt Enterprises	11/25/05
Kristi Guttuso, Hudson Bay Development Co., Inc.	1/26/06, 2/1/06, 2/2/06, 2/3/06, 2/5/06, 2/12/06, 2/16/06, 2/19/06, 2/26/06, 3/28/06
Les Ellsworth, Potpourri House	11/05 (2 faxes), 12/2005 (2 faxes), <sup>27</sup> 3/9/06, 3/16/06, 3/20/06, 3/23/06, 3/27/06, 3/29/06, 5/4/06 5/12/06
Raul Garcia, True Champions, Inc.	2/23/06

<sup>26</sup> Although without the exact dates, Mr. Friedman recalls receiving a total of 5 faxes between September 20, and September 25, 2005. *See* Declaration, dated July 18, 2006, from Gary Friedman.

<sup>27</sup> Although without the exact dates, Mr. Ellsworth recalls receiving 2 faxes in November, 2005, and 2 faxes in December, 2005. *See* Declaration, dated June 30, 2006, from Les Ellsworth.

[Redacted header information]

TO: Owner/Manager  
CNT5471

**RETURN THIS PAGE FOR YOUR  
FREE COPY  
OF THE NATIONAL CONTRACTORS GUIDE**

Below is your listing as it is set to appear in the 2006 edition of The National Contractors Guide. Please make any corrections and be sure to add both fax number, 800 number and email and web site addresses if applicable.

Corrections (Please type or print legibly):

Spokesperson's Name \_\_\_\_\_ Title \_\_\_\_\_

Company Name \_\_\_\_\_

Address 1 \_\_\_\_\_ City \_\_\_\_\_ Zip Code \_\_\_\_\_

Address 2 \_\_\_\_\_ City \_\_\_\_\_ Zip Code \_\_\_\_\_

Phone Number \_\_\_\_\_ 800 Phone No. \_\_\_\_\_

Fax No. \_\_\_\_\_

Email Address \_\_\_\_\_ Web Site \_\_\_\_\_

Sign To Receive A Free Copy Of The 2006 Edition:

Signed \_\_\_\_\_

My company wants a free copy of the 2006 edition of The National Contractors Guide when it is published. I am enclosing payment of \$169.00 to cover the cost of inclusion in the 2006 edition. If payment is not enclosed when submitting this information, my company agrees to pay \$169.00 to cover the cost of inclusion of the company in the 2006 edition.

International Directories Corporation,  
13B - 360 Main St.  
Suite 328  
Winnipeg, MB R3C 3Z8

**Fax Back Toll Free Now: (800) 603-3685**

Hudson Bay Development Co  
Inc.

[Redacted contact information]



International Directories Corporation

True Champions Inc.

Invoice

Invoice: 57251A

Your Listing Will Appear:

**PAST DUE**

Inclusion in the 2006 edition, The National Contractors Guide, to be published soon.

A free copy of the 2006 Edition valued at \$350.00 will be sent upon publication to those who have paid for inclusion.

**Total Amount Due For Inclusion \$199.00**

**\*\*\*Rush Payment to Beat The Deadline For Your Area\*\*\*  
Payment Should be Sent With Copy of Invoice To:**

International Directories Corporation  
Service Division  
6924 Aloma Ave.  
Winter Park, FL 32792-7003

The following signature and statement were received earlier on a returned update sheet authorizing making this offer:

By: \_\_\_\_\_

I, the undersigned, hereby certify that the information furnished herein is true and correct to the best of my knowledge and belief. I am enclosing payment of \$199.00 to cover the cost of inclusion in the 2006 edition of The National Contractors Guide when it is published. If payment is not enclosed when submitting this information, my acceptance is to pay \$199.00 to cover the cost of inclusion of this company in the 2006 edition.

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