

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  
 )  
Junk Fax Prevention Act of 2005 ) CG Docket No. 05-338

**REPORT AND ORDER AND THIRD ORDER ON RECONSIDERATION**

**Adopted: April 5, 2006**

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By the Commission:

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## I. INTRODUCTION

1. In this Order, we amend the Commission’s rules on unsolicited facsimile advertisements as required by the Junk Fax Prevention Act of 2005 (the Junk Fax Prevention Act).<sup>1</sup> Specifically, we (1) codify an established business relationship (EBR) exemption to the prohibition on sending unsolicited facsimile advertisements; (2) provide a definition of an EBR to be used in the context of unsolicited facsimile advertisements; (3) require 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; and (4) specify the circumstances under which a request to “opt-out” complies with the Act. We believe these rules balance the interests of entities that send facsimile advertisements with those of persons that wish to avoid such messages. In addition, we take this opportunity to address certain issues raised in petitions for reconsideration of the 2003 Report and Order<sup>2</sup> concerning the Telephone Consumer Protection Act’s (TCPA)<sup>3</sup> facsimile advertising rules.

## II. BACKGROUND

### A. Telephone Consumer Protection Act of 1991

2. On December 20, 1991, Congress enacted the TCPA to address a growing number of telephone marketing calls and certain telemarketing practices thought to be an invasion of consumer privacy.<sup>4</sup> In relevant part, the TCPA prohibits the use of any telephone facsimile machine, computer, or other device to send an “unsolicited advertisement” to a telephone facsimile machine.<sup>5</sup> An unsolicited advertisement is defined as “any material advertising the commercial availability or quality of any

<sup>1</sup> See Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005) (Junk Fax Prevention Act). Section 2(h) of the Junk Fax Prevention Act requires the Commission to issue regulations to implement these amendments no later than April 5, 2006.

<sup>2</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>3</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227.

<sup>4</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227.

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

property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."<sup>6</sup> The TCPA also requires those sending any messages via telephone facsimile machines to identify themselves to message recipients.<sup>7</sup> The TCPA did not expressly exempt persons with whom the sender has an EBR or tax exempt nonprofit organizations from the prohibition on sending unsolicited facsimile advertisements, although it did create such exemptions from the definition of "telephone solicitation."<sup>8</sup>

## B. TCPA Orders

3. In 1992, the Commission adopted rules implementing the TCPA, including restrictions on the transmission of unsolicited facsimile advertisements by facsimile machines.<sup>9</sup> The Commission's rules on unsolicited facsimile advertisements incorporated the language of the statute virtually verbatim.<sup>10</sup> The Commission stated that "the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the prohibition" on unsolicited facsimile advertisements.<sup>11</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>12</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>13</sup>

4. On July 3, 2003, the Commission revised many of its telemarketing and facsimile advertising rules under the TCPA.<sup>14</sup> The Commission reversed its prior conclusion that an EBR provides

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<sup>6</sup> 47 U.S.C. § 227(a)(4).

<sup>7</sup> Specifically, the TCPA provides that the facsimile include "in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual." 47 U.S.C. § 227(d)(1)(B).

<sup>8</sup> See 47 U.S.C. § 227(a)(3).

<sup>9</sup> 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.

<sup>10</sup> 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)(10) (the 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>11</sup> *1992 TCPA Order*, 7 FCC Rcd at 8779, para. 54, n.87.

<sup>12</sup> *Id.*

<sup>13</sup> *1992 TCPA Order*, 7 FCC Rcd at 8771, para. 35.

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

companies with the necessary express permission to send facsimile advertisements to their customers.<sup>15</sup> Instead, the Commission concluded that the recipient's express permission must be in writing and include the recipient's signature.<sup>16</sup> The Commission also revised the definition of an EBR, in the context of telephone solicitations, to limit the duration of that exception to 18 months after the recipient's last purchase or transaction, or three months after the recipient's last application or inquiry.<sup>17</sup> Following the release of the *2003 TCPA Order*, several entities filed petitions for reconsideration, most of which were related to the Commission's facsimile advertising rules.<sup>18</sup>

5. 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>19</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>20</sup> 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.<sup>21</sup> On October 1, 2004 and June 27, 2005, the Commission further delayed the effective date of these requirements.<sup>22</sup>

### C. Junk Fax Prevention Act of 2005

6. On July 9, 2005, Congress enacted the Junk Fax Prevention Act of 2005 which amends the facsimile advertising provisions of the TCPA.<sup>23</sup> In general, the Junk Fax Prevention Act: (1) codifies

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<sup>15</sup> *2003 TCPA Order*, 18 FCC Rcd at 14127-28, para. 189.

<sup>16</sup> *Id.* at 14128-29, para. 191. *See also* 47 C.F.R. § 64.1200(a)(3)(i).

<sup>17</sup> *Id.* at 14079, para. 113. *See also* 47 C.F.R. § 64.1200(f)(3). Prior to the *2003 TCPA Order*, the EBR definition applied to both telephone solicitations and unsolicited facsimile advertisement transmissions and contained no expiration date.

<sup>18</sup> Petitioners described a variety of specific types of communications and asked whether they are covered by the TCPA's facsimile advertising prohibition. *See* Appendix C for a list of petitions filed.

<sup>19</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>20</sup> *Id.* at 16974, para. 5.

<sup>21</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, 18 FCC Rcd 19890 (2003) (*EBR Duration Order*).

<sup>22</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, FCC 05-132 (rel. June 27, 2005) (*Stay Order*). In an Order adopted on December 9, 2005, the Commission further delayed the effective date of the written permission requirement until the conclusion of this rulemaking proceeding to implement the Junk Fax Prevention Act. *See infra*, n.31.

<sup>23</sup> *See supra*, n.1.

an EBR exemption to the prohibition on sending unsolicited facsimile advertisements;<sup>24</sup> (2) provides a definition of an EBR to be used in the context of unsolicited facsimile advertisements;<sup>25</sup> (3) requires 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>26</sup> and (4) specifies the circumstances under which a request to “opt-out” complies with the Act.<sup>27</sup> In addition, the Junk Fax Prevention Act authorizes the Commission to: (1) determine the “shortest reasonable time” that a sender must comply with a request not to receive future facsimile advertisements;<sup>28</sup> (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;<sup>29</sup> 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>30</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>31</sup>

### III. DISCUSSION

#### A. Established Business Relationship Exemption

8. Section 2(a) of the Junk Fax Prevention Act amends section 227(b)(1)(C) of the Act by adding an EBR exemption to the prohibition on sending unsolicited facsimile advertisements. Specifically, section 2(a) 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:

(C) to use any telephone facsimile machine, computer, or other device to send, to

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<sup>24</sup> Junk Fax Prevention Act, Sec. 2(a).

<sup>25</sup> Junk Fax Prevention Act, Sec. 2(b).

<sup>26</sup> Junk Fax Prevention Act, Sec. 2(c).

<sup>27</sup> Junk Fax Prevention Act, Sec. 2(d). In addition, the Junk Fax Prevention Act requires the Commission to submit an annual report to Congress regarding enforcement of the rules relating to the sending of unsolicited facsimile advertisements. Junk Fax Prevention Act, Sec. 3. The Junk Fax Prevention Act also requires the Comptroller General of the United States to conduct a study regarding complaints received by the Commission concerning unsolicited facsimile advertisements. *See* Junk Fax Prevention Act, Sec. 4.

<sup>28</sup> Junk Fax Prevention Act, Sec. 2(c).

<sup>29</sup> *Id.*

<sup>30</sup> Junk Fax Prevention Act, Sec. 2(e).

<sup>31</sup> *Rules and Regulations 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, FCC 05-206 (rel. December 9, 2005) (*JFPA NPRM*). In the Order, the Commission delayed the effective date of the written permission requirement at 47 C.F.R. § 64.1200(a)(3)(i) until the conclusion of the rulemaking.

a telephone facsimile machine, an unsolicited advertisement, unless –

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through –

- (I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or
- (II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution, except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before the date of enactment of the Junk Fax Prevention Act of 2005 if the sender possessed the facsimile machine number of the recipient before such date of enactment; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D), except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E).<sup>32</sup>

#### **1. Established Business Relationship with Recipient**

9. In the *JFPA NPRM*, the Commission proposed amending its rules in accordance with the specific requirements in section 2(a) of the Junk Fax Prevention Act regarding the express recognition of an EBR exemption.<sup>33</sup> The Commission also sought specific comment on whether to establish parameters defining what it means for a person to provide a facsimile number “within the context of [an] established business relationship” and what it means for a person to voluntarily agree to make a number available for public distribution.<sup>34</sup> In addition, the Commission proposed removing section 64.1200(a)(3)(i) of the Commission’s rules, which requires the recipient to obtain a signed, written statement indicating the recipient’s consent to receive facsimile advertisements from the sender.<sup>35</sup>

10. As noted in the *JFPA NPRM*, Congress concluded that an unsolicited advertisement from a sender with an EBR to the recipient will not be governed by the general prohibition found in section

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<sup>32</sup> Junk Fax Prevention Act, Sec. 2(a).

<sup>33</sup> *JFPA NPRM*, para. 9.

<sup>34</sup> *JFPA NPRM*, para. 10.

<sup>35</sup> *JFPA NPRM*, para. 9.

227(b)(1)(C) of the TCPA.<sup>36</sup> Instead, the Junk Fax Prevention Act permits the sending of fax advertisements if there exists an EBR between the sender and recipient and certain other conditions are met regarding how the facsimile number was obtained.<sup>37</sup>

11. In compliance with the requirements of the Junk Fax Prevention Act, we now amend section 64.1200(a)(3) of the Commission's rules to expressly recognize an EBR exemption from the prohibition on sending unsolicited facsimile advertisements.<sup>38</sup> The majority of commenters agree that incorporating such an exemption is necessary to ensure that the Commission's rules are consistent with the amended federal statute.<sup>39</sup> Industry commenters contend that faxing continues to be a preferred method of communication by many businesses and that an EBR exemption will allow companies to communicate effectively with their customers.<sup>40</sup> For example, commenters note that fax advertisements are routinely sent from real estate professionals to home buyers, from telephone directory publishers to advertisers, and from food service distributors to restaurants.<sup>41</sup> According to these commenters, such advertisements are sent based on legitimate EBRs between the senders and recipients.<sup>42</sup> Although some oppose an EBR exemption for fax advertising,<sup>43</sup> the Commission's mandate is to implement the statute as enacted by Congress. Moreover, the opt-out requirements in the statute will permit consumers to prevent future unwanted faxes—even those from companies with which they conduct business.

12. To ensure that the EBR exemption is not exploited, we conclude that an entity that sends a facsimile advertisement on the basis of an EBR should be responsible for demonstrating the existence of the EBR.<sup>44</sup> The entity sending the fax is in the best position to have records kept in the usual course of

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<sup>36</sup> *Id.*

<sup>37</sup> Junk Fax Prevention Act, Sec. 2(a).

<sup>38</sup> We correspondingly remove section 64.1200(a)(3)(i) from the Commission's existing rules, as facsimile senders will now be permitted to send facsimile advertisements to recipients with which they have an EBR without first securing the recipient's written permission. *See* S. REP. NO. 109-76 at 8 ("This legislation is designed to permit legitimate businesses to do business with their established customers and other persons with whom they have an established business relationship without the burden of collecting prior written permission to send these recipients commercial faxes").

<sup>39</sup> *See, e.g.*, ASTA Comments at 6; MFC Comments at 2; NAW Comments at 3-6; NEPA Comments at 2; PRC Comments at 2; SHRM Comments at 3; Westfax Comments at 1-2.

<sup>40</sup> *See, e.g.*, NAEDA Comments at 1; ABM Comments at 3.

<sup>41</sup> NAR Reply Comments at 2; YPA Comments at 1; IFDA Comments at 1.

<sup>42</sup> *Id.*

<sup>43</sup> *See, e.g.*, McKenna Reply Comments at 4 (transmitting unsolicited fax ads constitutes a conversion of, use of, and destruction of the recipient's property, no different from other forms of dominion or occupation); Biggerstaff Comments at 10; Hallikainen Comments at 1 (supports an opt-in approach to faxing).

<sup>44</sup> NNA Comments at 8 (asserting that if a recipient takes action against a sender it believes to have sent an unsolicited fax outside of the context of an EBR, the burden would be on the sender to prove the relationship); Texas OPC Reply Comments at 3 (the burden of proving the existence of an EBR should rest upon the party seeking to profit from the fax); McKenna Comments at 3. *But see* Everett Labs Comments at 6 (fax recipients who claim to be aggrieved should have the burden of disproving the existence of an EBR).

business showing an EBR, such as purchase agreements, sales slips, applications and inquiry records.<sup>45</sup> We emphasize that we are not requiring any specific records be kept by facsimile senders.<sup>46</sup> Should a question arise, however, as to the validity of an EBR, the burden will be on the sender to show that it has a valid EBR with the recipient.

## 2. Recipient's Facsimile Number

13. As set forth in the Junk Fax Prevention Act, an EBR alone does not entitle a sender to fax an advertisement to an individual consumer or business. The telephone facsimile number must also be provided voluntarily by the recipient.<sup>47</sup> Specifically, under the new rules, any person sending a fax advertisement under the EBR exemption must have obtained the facsimile number directly from the recipient within the context of the EBR, or ensure that the recipient voluntarily agreed to make the number available in a directory, advertisement, or site on the Internet which is accessible to the public. In accordance with the Junk Fax Prevention Act, an exception to this requirement will apply if the EBR was formed prior to July 9, 2005.<sup>48</sup>

### a. Facsimile Number Obtained Directly From Recipient

14. The provision of a telephone facsimile number to a business or other entity reflects a willingness to receive faxes from that entity. Accordingly, it would be permissible for the sender to fax an advertisement to a recipient that had provided a facsimile number to the sender, for example, on an application, information request, contact information form, or membership renewal form.<sup>49</sup> It also would be permissible for the recipient to provide to the sender its facsimile number orally over the telephone or through a website maintained by the fax sender. In circumstances such as these, we conclude that the consumer has provided the facsimile number in the context of an established business relationship with the fax sender.<sup>50</sup> In the event a recipient complains that its facsimile number was not provided to the sender, the burden rests with the sender to demonstrate that the number was communicated in the context

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<sup>45</sup> See AGs Comments at 9; Lorman Ed Services Comments at 17 (normal business records should suffice); AFSA Comments at 4 (as result of an EBR, there may be any number of documents, applications, agreements, and other communications exchanged between the parties). *But see* American Bankers Assoc Comments at 4 (the costs of maintaining evidence of an EBR could be enormous). We agree with ABA that digitized documents would be acceptable if they established the existence of the EBR.

<sup>46</sup> See CBS Reply Comments at 4 (the sender should have the flexibility to demonstrate the existence of an EBR through the presentation of records that it chooses to retain rather than be subject to extensive recordkeeping requirements).

<sup>47</sup> See Junk Fax Prevention Act, Sec. 2(a); *see also supra*, para. 8. See EPIC Comments at 1 (Commission should recognize that a person has voluntarily agreed to make a number available for public distribution only where that person has explicitly stated that they wish to receive unsolicited commercial messages).

<sup>48</sup> See Junk Fax Prevention Act, Sec. 2(a).

<sup>49</sup> See Lorman Ed Services Comments at 16 (suggesting a recipient's seminar registration form, product order form or warranty card should all count as voluntarily providing the number in the course of an EBR). Similarly, a business card containing a fax number that is provided by the recipient to the sender would permit the sending of a facsimile advertisement.

<sup>50</sup> See *infra*, paras. 37-40 on third parties acting as agents for the sender.



of the EBR.

**b. Facsimile Number Obtained from Directory, Advertisement or Internet Site**

15. The Junk Fax Prevention Act requires that, if the sender relies on an EBR and obtains the facsimile number from a directory, advertisement or site on the Internet, the sender must ensure that the recipient voluntarily agreed to make the number available for public distribution.<sup>51</sup> Commenters contend that it would be unduly burdensome for senders of facsimile advertisements to verify that a consumer voluntarily agreed to make the facsimile number public in every instance.<sup>52</sup> We agree. Therefore, we determine that a facsimile number obtained from the recipient's *own* directory, advertisement, or internet site was voluntarily made available for public distribution, unless the recipient has noted on such materials that it does not accept unsolicited advertisements at the facsimile number in question.<sup>53</sup> For instance, if the sender obtains the number from the recipient's own advertisement, that advertisement would serve as evidence of the recipient's agreement to make the number available for public distribution.<sup>54</sup> On the other hand, if the sender obtains the number from sources of information compiled by third parties—*e.g.*, membership directories, commercial databases, or internet listings—the sender must take reasonable steps to verify that the recipient consented to have the number listed, such as calling or emailing the recipient.<sup>55</sup> We agree that membership directories requiring a fee to use are limited in distribution and, as such, the information included within the directory is made available to subscribers

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<sup>51</sup> Junk Fax Prevention Act, Sec. 2(a). *See also* EPIC Comments at 1 (the mere presence of a fax number in a directory should not constitute the voluntary agreement for dissemination to senders).

<sup>52</sup> *See, e.g.*, NNA Comments at 8; NAR Comments at 3-4 (asserting that any rules must allow senders to obtain facsimile numbers from public sources to whom persons have made their fax numbers publicly available); Everett Labs Comments at 5-6.

<sup>53</sup> *See* AHLA Comments at 3; NIADA Comments at 2; Reed Elsevier Comments at 8. *But see* EPIC Comments at 1 (the Commission should recognize that a person has voluntarily agreed to make a number available for public distribution only where that person has explicitly stated that they wish to receive unsolicited commercial messages); Texas OPC Comments at 4 (voluntary agreement to receive fax advertisements should not be found unless the website also contains a statement expressly indicating this).

<sup>54</sup> Another example might be a number obtained from the recipient's own letterhead or fax cover sheet. *See* NFIB Comments at 4; Lorman Ed Services Comments at 17; Reed Elsevier Comments at 8 (for a fax number listed in a directory, which an individual reasonably can assume is public, senders can assume that such number has voluntarily been provided for public distribution). *But see* Texas OPC Reply Comments at 4 (no consent can be inferred from the mere fact that the recipient's fax number appears on a website).

<sup>55</sup> *See* AGs Comments at 10 (a doctor who publishes her fax number in a medical society directory should not be deemed to have made the number publicly available if there is no reasonable expectation that the directory is intended for use by third parties for marketing purposes); Lorman Ed Services Comments at 17-18; Biggerstaff Comments at 15 (explaining that list brokers mine for numbers, combining lists of numbers from multiple sources and then reselling those lists in directories); EPIC Comments at 2; NAW Comments at 4-5 (noting that some Senators and their staff raised concerns during the JFPA legislative process that a mass retailer would be permitted to purchase a bulk fax list and fax advertisements to every number on it under the EBR exemption because everyone has purchased something at a Wal-Mart, but opposing a requirement that businesses verify fax numbers from a legitimate public source). *But see* American Bankers Assoc Comments at 3 (opposing a requirement that senders verify a list of compiler's data as voluntary); ASTA Comments at 6 (there are no apparent practical steps that can be expected beyond a simple inquiry of the directory vendor).

and purchasers, not to the general public.<sup>56</sup> We also reiterate that senders of facsimile advertisements must have an EBR with the recipient in order to send the advertisement to the recipient's facsimile number. The fact that the facsimile number was made available in a directory, advertisement or website does not alone entitle a person to send a facsimile advertisement to that number.

**c. Established Business Relationship Formed Prior to July 9, 2005**

16. Finally, as the Commission noted in the *JFPA NPRM*, the Junk Fax Prevention Act provides a third avenue for the sender to obtain the facsimile number.<sup>57</sup> Pursuant to the statute, the amended rules shall provide that if the EBR was in existence prior to July 9, 2005, and the sender also possessed the facsimile number before July 9, 2005, the sender may send facsimile advertisements to that recipient without demonstrating how the number was obtained or verifying it was provided voluntarily by the recipient.<sup>58</sup> We emphasize that, to fall within this exception, a valid EBR must have been formed between the sender and recipient before July 9, 2005. For example, a business that sold a product to a consumer in 2004 and secured that consumer's facsimile number in 2004, would be permitted to fax an advertisement to the consumer regardless of how the facsimile number was obtained. We agree with those commenters that contend it would be burdensome for senders to prove a facsimile number was in their possession prior to July 9, 2005.<sup>59</sup> Therefore, we adopt a presumption that if a valid EBR existed prior to July 9, 2005, the sender had the facsimile number prior to that date as well.<sup>60</sup> In the event the recipient alleges a violation of these provisions, the sender will need to provide proof that the EBR existed prior to July 9, 2005.<sup>61</sup>

**B. Definition of Established Business Relationship**

17. As noted in the *JFPA NPRM*, the Junk Fax Prevention Act includes a definition of an

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<sup>56</sup> See Biggerstaff Comments at 16; see also ABM Comments at 6 (fax number in association directories that are for use only by members ought not be considered to have been provided by the facsimile machine owners for the purpose of making them publicly available. A sender should be required to ascertain whether or not the fax number was intended by the owner to be made public).

<sup>57</sup> Junk Fax Prevention Act, Sec. 2(a) (“ . . . except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before the date of enactment of the Junk Fax Prevention Act of 2005 if the sender possessed the facsimile machine number of the recipient before such date of enactment . . .”).

<sup>58</sup> Junk Fax Prevention Act, Sec. 2(a). See also Commission's amended rule at 47 C.F.R. § 64.1200(a)(3)(ii)(C).

<sup>59</sup> See ABA Comments at 3; NNA Comments at 9; YPA Comments at 3; Staples Comments at 3 (it is unlikely that either a sender or recipient will be able to produce paper records, documenting the date on which a fax number was obtained or provided).

<sup>60</sup> This presumption could be rebutted, for example, with evidence that the recipient did not use the facsimile number before July 9, 2005. See AFSA Comments at 3; YPA Comments at 3; NNA Comments at 3; Staples Comments at 1 (Commission should establish a rebuttable presumption that a sender acquired a recipient's fax number prior to July 9, 2005); DMA Comments at 9 (the issue of what is voluntary will arise only where there is *already* an EBR between the sender and recipient).

<sup>61</sup> See CTTC Comments at 1 (a reasonable person could expect a solicitor will be able to access a file or record on someone to establish the existence of the EBR); NIADA Comments at 3.

EBR to be used in the context of unsolicited facsimile advertisements.<sup>62</sup> The statute provides that “[t]he term ‘established business relationship, . . . shall have the meaning given the term in section 64.1200 of title 47 . . . as in effect on January 1, 2003, except that such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber. . . .’<sup>63</sup> The January 1, 2003 definition did not include any time limitations on the EBR.<sup>64</sup> The Junk Fax Prevention Act, however, authorizes the Commission to limit the duration of the EBR in the context of unsolicited facsimile advertisements after a 3-month period beginning from the date of enactment of the statute.<sup>65</sup> Therefore, the Commission sought comment in the *JFPA NPRM* on whether to limit the EBR.<sup>66</sup> We specifically sought comment on whether it is appropriate to limit the EBR duration for unsolicited facsimile advertisements in the same manner as telephone solicitations.<sup>67</sup>

### 1. EBR Definition

18. Based on the record,<sup>68</sup> and in accordance with the Junk Fax Prevention Act, we adopt as part of the Commission’s rules the following definition of an EBR for purposes of sending unsolicited facsimile advertisements:

For purposes of paragraph (a)(3) of this section, the term established business relationship means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential

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<sup>62</sup> *JFPA NPRM*, para. 12.

<sup>63</sup> Junk Fax Prevention Act, Sec. 2(b).

<sup>64</sup> In 2003, the Commission limited the duration of the EBR for telephone solicitations to 18 months following a purchase or transaction and three months after an application or inquiry. *See 2003 TCPA Order*, 18 FCC Rcd at 14079, para. 113.

<sup>65</sup> Junk Fax Prevention Act, Sec. 2(f). (“[The Commission] may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall—(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) determine whether with respect to small businesses, the costs would not be unduly burdensome; and (ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on the date of enactment of the Junk Fax Prevention Act of 2005”).

<sup>66</sup> *JFPA NPRM*, para. 16.

<sup>67</sup> *JFPA NPRM*, para. 17. *See also* 47 C.F.R. § 64.1200(f)(3) (limiting the duration of the EBR for telephone solicitations to 18 months following a purchase or transaction and three months after an application or inquiry).

<sup>68</sup> NEPA Comments at 4; NNA Comments at 10, Lorman Ed Services Comments at 8-9; CBA Comments at 6.

subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.<sup>69</sup>

19. This definition extends the EBR exemption to faxes sent to both business and residential subscribers. Once established, the EBR will permit an entity to send facsimile advertisements to a business or residential subscriber until the subscriber “terminates” it by making a request not to receive future faxes.<sup>70</sup> This definition also clearly contemplates that the EBR could be formed by any of the following: an inquiry, application, purchase or transaction by the business or residential subscriber.<sup>71</sup> Consistent with the legislative history of the TCPA, an inquiry by a consumer could form the basis of the EBR.<sup>72</sup> However, the definition makes clear that the inquiry or application must be about products or services offered by the entity. Thus, we conclude that an inquiry about store location or the identity of the fax sender, for instance, would not alone form an EBR for purposes of sending facsimile advertisements.<sup>73</sup> Merely visiting a website, without taking additional steps to request information or provide contact information, also does not create an EBR.<sup>74</sup>

20. In addition, we conclude that the EBR exemption applies only to the entity with which the business or residential subscriber has had a “voluntary two-way communication.” It would not extend to affiliates of that entity, including a fax broadcaster which is retained to send facsimile ads on behalf of that entity.<sup>75</sup> While the fax broadcaster may transmit an advertisement on behalf of an entity that has an EBR with the recipient, it is not permitted to use that same EBR to send a fax advertisement on behalf of another client.<sup>76</sup> We find that, unlike the national do-not-call registry, which allows consumers to avoid most unwanted telemarketing calls by registering a telephone number once every five years, the Junk Fax Prevention Act requires a consumer to opt-out of unwanted fax advertisements from each entity with

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<sup>69</sup> See amended rule at 47 C.F.R. § 64.1200(f)(5).

<sup>70</sup> We note that the act of terminating the EBR exemption will only terminate the relationship for purposes of receiving communications constituting “unsolicited advertisements.” A fax regarding collection of a debt that does not contain an advertisement will not be subject to the facsimile advertising rules. See ACA Comments at 9-11. See also ABM Comments at 13 (opt-out should terminate EBR). But see SIA Comments at 2-3 (an opt-out request should not terminate the EBR as a recipient may choose to opt out from certain types of advertisements but remain on the list for other advertisements).

<sup>71</sup> See AGs Comments at 9 (should limit the EBR to these specific actions by the consumer).

<sup>72</sup> See H.R. REP. NO. 102-317 at 14-15 (1991) (noting that if an investor had written to a mutual fund or responded to an ad requesting additional information, the fund’s manager could make follow-up calls).

<sup>73</sup> See Sutton Comments at 1 (the Commission should clarify that efforts to discover the identity of junk faxers do not create an EBR exemption for future unwanted faxes).

<sup>74</sup> See Biggerstaff Comments at 34.

<sup>75</sup> See AGs Comments at 11. See also Texas OPC Comments at 5 (the EBR exception should only apply when the seller is the party claiming the EBR. The EBR should not be transferable).

<sup>76</sup> See AGs Comments at 11; Biggerstaff Comments at 24; Fax Ban Coalition Reply Comments at 9 (no legal basis to distinguish between a fax physically transmitted by an employee of the sender and the same fax that is physically transmitted by a transmitting service used by the sender).

which the consumer has an EBR. We believe that to permit companies to transfer their EBRs to affiliates would place an enormous burden on consumers to prevent faxes from companies with which they have no direct business relationship.

## 2. Limits on Duration of Established Business Relationship

21. Industry commenters overwhelmingly oppose limiting the duration of the EBR.<sup>77</sup> They argue that any time limits on the EBR would interfere with routine business transactions, would unduly burden senders, and would not provide a corresponding benefit to recipients, particularly in light of the Junk Fax Prevention Act's opt-out notice requirements.<sup>78</sup> Specifically, these commenters maintain that keeping records of an EBR that is limited in duration would involve significant costs to businesses that send faxes to their customers.<sup>79</sup> In addition, many of these commenters maintain that Congress required the Commission to first review complaints filed under the new rules before taking action to limit the duration of the EBR.<sup>80</sup> These commenters disagree as to what limits might be appropriate should the Commission determine to limit the EBR.<sup>81</sup> They argue that business-to-business relationships do not fall into predictable cycles, and that an 18-month limit might make sense for one business, but would be inadequate for another.<sup>82</sup>

22. Other commenters urge the Commission to limit the EBR, arguing that the shifting of costs to a recipient that must deal with unsolicited facsimile advertisements weighs in favor of imposing limits on the EBR.<sup>83</sup> They support varying time limits.<sup>84</sup>

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<sup>77</sup> See, e.g., YPA Comments at 4; CTTC Comments at 1; ABA Comments at 4; Westfax Comments at 4; NFIB Comments at 2; Lorman Ed Services Comments at 13 (arguing that limits on the EBR would severely reduce the number of consumers to whom sending educational seminar notification and reminders could be sent); ACB Comments at 2 (maintaining that every bank or mortgage broker that sends faxes with advertising content will have to keep detailed and continuously updated records of their customers' last inquiries and transactions); NADA Comments at 1-2 (indicating that unlike telemarketing calls, most faxes are sent between businesses); NAR Comments at 1-2. *But see* AGs Comments at 11.

<sup>78</sup> Lorman Ed Services Comments at 10; NNA Comments at 10 (would require burdensome recordkeeping and involve substantial costs); NADA Comments at 2.

<sup>79</sup> See, e.g., AFSA Comments at 3; NAW Comments at 6-11, NFIB Comments at 3-4; NNA Comments at 10-11.

<sup>80</sup> See IFDA Comments at 3; Huntington Natl Bank Comments at 2; ABM Comments at 8; YPA Comments at 4; SBA Advocacy Comments at 7; NEPA Comments at 5; NAWD Comments at 7; ACA Comments at 9.

<sup>81</sup> YPA Comments at 4 (18 months for transactions and three months for inquiries is too short); NEPA Comments at 6 (Commission should not limit the EBR more narrowly for fax communications than for telephone solicitations); Lorman Ed Services Comments at 15 (a five-year limit would be appropriate); ATA Comments at 3 (to the extent the Commission imposes limits, it should enact the same limits that it imposed for telephone solicitations); SIA Comments at 2 (18/3-month limits would provide uniformity in telemarketing and fax regulation).

<sup>82</sup> See, e.g., NNA Comments at 11-12; CTTC Comments at 2; Lorman Ed Services Comments at 15; ARTBA Comments at 2.

<sup>83</sup> AGs Comments at 12; Texas OPC Reply Comments at 3; PRC Comments at 3; EPIC Comments at 4.

23. As required by the Junk Fax Prevention Act, we intend to closely monitor implementation of the new EBR exemption and opt-out policies adopted herein.<sup>85</sup> Within one year of the effective date of this Order, the Commission will evaluate its complaint data to determine whether the EBR exception has resulted in a significant number of complaints regarding facsimile advertisements, and whether such complaints involve facsimile advertisements sent based on an EBR of a duration that is inconsistent with the reasonable expectations of consumers.<sup>86</sup>

### C. Notice of Opt-Out Opportunity

24. Section 2(c) of the Junk Fax Prevention Act adds language to the TCPA that requires senders to include a notice on the first page of the unsolicited advertisement that instructs the recipient how to request that they not receive future unsolicited facsimile advertisements from the sender.<sup>87</sup> In accordance with the Junk Fax Prevention Act, we amend our rules to require that all unsolicited facsimile advertisements contain a notice on the first page of the advertisement stating that the recipient is entitled to request that the sender not send any future unsolicited advertisements.<sup>88</sup> This notice must include a domestic contact telephone number and a facsimile machine number for the recipient to transmit such a request to the sender and, as discussed below, at least one cost-free mechanism for transmitting an opt-out request.<sup>89</sup> We emphasize that including an opt-out notice on a facsimile advertisement alone is not sufficient to permit the transmission of the fax; an EBR with the recipient must also exist.

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<sup>84</sup> AGs Comments at 12 (limits should be shorter than 18/3); Strang Comments at 4 (supports one month for inquiries and six months for purchases); PRC Comments at 3 (does not believe 18/3-month limits strike a good balance, as unwanted faxes are more intrusive than unwanted telephone calls because faxes come all through the night); Worsham Comments at 1 (12 months from purchase; one month from inquiry); SHRM Comments at 8 (supports a limit on the EBR of 30 months for professional and trade associations); HPC Comments at 3 (18/3-month limits are appropriate).

<sup>85</sup> See Junk Fax Prevention Act, Sec. 2(f); see also *supra*, n.65.

<sup>86</sup> See Junk Fax Prevention Act, Sec. 2(f). We note, however, that because the Commission's facsimile advertising rules recognize an EBR exception, it is reasonable to expect that many such recipients of facsimile advertisements from senders with whom they have an EBR would not file complaints with the Commission.

<sup>87</sup> Junk Fax Prevention Act, Sec. 2(c) (“[The Commission] shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement; (ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful[.]”). See also S. REP. NO. 109-76 at 8 (“The Committee . . . added the requirement that every unsolicited facsimile advertisement contain an opt-out notice that gives the recipient the ability to stop future unwanted fax solicitations. . .”).

<sup>88</sup> Amended rule at 47 C.F.R. § 64.1200(a)(3)(iii) and (iv).

<sup>89</sup> See NAA Comments at 13 (supports the requirement to include both a telephone number and facsimile number). See also S. REP. NO. 109-76 at 12 (“Section 2(c) would also require that the telephone and fax numbers, and the cost-free mechanism, provided to a recipient must permit an individual or business to make an opt-out request at any time”).

## 1. Clear and Conspicuous

25. In the *JFPA NPRM*, we sought comment on whether it was necessary to set forth in our rules the circumstances under which the opt-out notice will be considered “clear and conspicuous.”<sup>90</sup> Some commenters argue that as long as the notice is on the first page and is apparent to a reasonable consumer, the Commission should not further define what will be considered “clear and conspicuous.”<sup>91</sup> Others urge the Commission to provide specific guidance to ensure consumers are aware of their opt-out rights and sending parties have standards by which they can comply with the law.<sup>92</sup> We are persuaded that rules specifying the font type, size and wording of the notice might interfere with fax senders’ ability to design notices that serve their customers.<sup>93</sup> However, we make some additional determinations about the opt-out notice so that facsimile recipients have the information necessary to avoid future unwanted faxes.

26. Consistent with the definition in our truth-in-billing rules, “clear and conspicuous” for purposes of the opt-out notice means a notice that would be apparent to a reasonable consumer.<sup>94</sup> We also conclude that the notice must be separate from the advertising copy or other disclosures and placed at either the top or bottom of the fax.<sup>95</sup> Many facsimile advertisements today contain text covering the entire sheet of paper, making it difficult to see an opt-out notice that is placed amongst the advertising material. Thus, the notice must be distinguishable from the advertising material through, for example, use of bolding, italics, different font, or the like. We clarify that, in accordance with the Junk Fax Prevention Act, if there are several pages to the fax, the first page of the advertisement must contain the opt-out notice.<sup>96</sup>

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<sup>90</sup> *JFPA NPRM*, para. 20.

<sup>91</sup> YPA Comments at 6; *see also* American Bankers Assoc Comments at 4; NFIB Comments at 4-5; SBA Advocacy Comments at 7; Westfax Comments at 11; NAR Comments at 8; MFC Comments at 13 (suggesting the Commission use standards similar to the CAN-SPAM rules – “clearly legible, use sufficiently large type, and be placed so as to be readily apparent to a customer”).

<sup>92</sup> Strang Comments at 5; Texas OPC Comments at 7; NIADA Comments at 5 (should do so in such a way that entities retain the flexibility to determine how to meet the clear and conspicuous standard); AGs Comments at 12; EPIC Comments at 5.

<sup>93</sup> *But see* Strang Comments at 2 (should specify the exact wording, location on the page, and font type and size to be used).

<sup>94</sup> *See* amended rule 47 C.F.R. § 64.1200(f)(2). *See also* truth-in-billing requirements at 47 C.F.R. § 64.2401(e).

<sup>95</sup> *See* S. REP. NO. 109-76 at 12 (“...[S]ection 2(c) would require that the opt-out notice complies with the current provisions of Section 227(d)...which require that any unsolicited fax being sent contain in the margins at the top or bottom of each page the date and time it is sent, the identification of the sender of the message, and the telephone number of the sending machine”). *See also* Texas OPC Comments at 7. *But see* NNA Comments at 12 (suggesting that placing opt-out notices at the extreme top or bottom may cause the notice to be cut off during transmission).

<sup>96</sup> Junk Fax Prevention Act, Sec. 2(c). If a cover page accompanies the advertisement, we encourage senders to include the notice on the cover page as well. *See* Bank of America Comments at 3 (should interpret statutory phrase “first page of unsolicited advertisement” as the fax cover sheet or first page of fax message); Huntington (continued....)

## 2. Cost-Free Opt-Out Mechanism

27. The Junk Fax Prevention Act requires that the notice identify “a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement[.]”<sup>97</sup> In accordance with the statute, we amend the rules to require senders to identify a cost-free mechanism in their notices.<sup>98</sup> Industry members oppose a rule requiring the provision of a toll-free number, arguing that a toll-free number would be costly and answering the calls or setting up an automated system to do so would be overly burdensome, particularly for small businesses.<sup>99</sup> Of these commenters, some suggest that senders be permitted to provide a website address through which consumers can opt-out of future faxes.<sup>100</sup> Some consumer advocates contend that senders should be required to provide the toll-free telephone number, as many consumers do not have access to the Internet.<sup>101</sup>

28. In an effort to balance the needs of consumers who wish to opt-out of faxes with the interests of business, we find that a website address, email address, toll-free telephone number, or toll-free facsimile machine number will constitute “cost-free mechanisms” for purposes of our rules.<sup>102</sup> We also conclude that a local telephone number may be considered a cost-free mechanism so long as the advertisements are sent to local consumers for whom a call to that number would not result in long distance or other separate charges.<sup>103</sup> Senders of facsimile advertisements need make available only one of these mechanisms to comply with this requirement. A website or email address will allow businesses, particularly small businesses, to avoid excessive costs associated with maintaining a toll-free telephone number.<sup>104</sup> If a sender uses a website for receiving opt-out requests, it must describe the opt-out

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Natl Bank Comments at 4-5 (cover page, where used, should be considered the first page of the facsimile); CBS Corp Comments at 7 (if cover sheet used, notice should appear on cover sheet).

<sup>97</sup> Junk Fax Prevention Act, Sec. 2(c).

<sup>98</sup> See AGs Comments at 20 (to require a recipient to incur charges simply to request that no more fax ads be sent would shift additional costs onto the shoulders of recipients contrary to the purposes of the JFPA).

<sup>99</sup> See, e.g., NNA Comments at 4; NFIB Comments at 5.

<sup>100</sup> See ASAE Comments at 6; DMA Comments at 10; ABA Comments at 2; ASAE Comments at 6.

<sup>101</sup> AGs Comments at 21; EPIC Comments at 6.

<sup>102</sup> See Comerica Comments at 1. See also Texas OPC Reply Comments at 10 (recipient must pay for a postcard and postage or paper, envelope and postage, which is not cost-free).

<sup>103</sup> NFIB Comments at 5. See also S. REP. NO. 109-76 at 10 (noting that the cost-free mechanism might include either a toll-free or a local telephone number).

<sup>104</sup> Given that we are not mandating that senders offer a toll-free telephone number for consumers to make opt-out requests, we find no reason to exempt small business from the cost-free mechanism requirement. As discussed above, businesses can use a website address or email address for receiving such requests. The record contains little empirical evidence that the costs associated with setting up a website or email address would be unduly burdensome to a small business given their revenues. See Junk Fax Prevention Act, Sec. 2(c) (“[The Commission may...subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders [from the requirement to provide a cost-free mechanism for a recipient to transmit an opt-out request], but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses”). We also note that a third party could be retained to maintain any of these (continued....)



mechanism and procedures clearly and conspicuously on the first page of the website.

29. As noted above, apart from the cost-free mechanism required by the statute, the opt-out notice must contain a domestic contact telephone number and facsimile machine number.<sup>105</sup> If the cost-free mechanism offered by the sender is either a domestic toll-free telephone number or toll-free facsimile machine number, the sender will be in compliance with both sets of requirements.<sup>106</sup> We agree with the Attorneys General commenters that the facsimile number should be a number that is separate and distinct from the telephone number to ensure consumers are less likely to find a busy line and can make opt-out requests without delay.<sup>107</sup> It is the responsibility of the sender to ensure that the number(s) are available to accept opt-out requests. In accordance with the statute, the new rules will require the sender to accept opt-out requests 24 hours, 7 days a week at the number(s), website or email address identified in the opt-out notice.<sup>108</sup>

### 3. Timeframe for Honoring Opt-Out Requests

30. The Junk Fax Prevention Act requires that the opt-out notice on the facsimile advertisement states that “failure to comply, within the shortest reasonable time, as determined by the Commission, with such a[n opt out] request . . . is unlawful.”<sup>109</sup> In the *JFPA NPRM*, we sought comment on the “shortest reasonable time” within which a facsimile sender should comply with an opt-out request.<sup>110</sup> Of the comments filed, many were from businesses and trade organizations that support a period of 30 days within which senders must comply with opt-out requests.<sup>111</sup> Other commenters support a shorter period of time for honoring do-not-fax requests, such as 10 or 15 days, noting the costs associated with continuing to receive unwanted faxes after an opt-out request is made.<sup>112</sup> CTTC

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opt-out mechanisms, although the sender remains liable for ensuring that opt-out requests are honored timely. *See also* ABM Comments at 12; SBA Advocacy Comments at 9.

<sup>105</sup> Junk Fax Prevention Act, Sec. 2(c).

<sup>106</sup> Huntington Natl Bank Comments at 8.

<sup>107</sup> AGs Comment at 19.

<sup>108</sup> CTTC Comments at 2. *See also* amended rule at 47 C.F.R. § 64.1200(a)(3)(iii)(E).

<sup>109</sup> Junk Fax Prevention Act, Sec. 2(c).

<sup>110</sup> *JFPA NPRM*, para. 20.

<sup>111</sup> American Bankers Assoc Comments at 5; NEPA Comments at 6; NNA Comments at 13; NFIB Comments at 6; NAR Comments at 8 (members might not have the resources to instantaneously incorporate consumer requests into do-not-fax lists); Westfax Comments at 12; SHRM Comments (supports 45 days); ABM Comments at 10; MFC Comments at 14 (supports 31 days, so that senders can remove numbers on a monthly basis).

<sup>112</sup> Biggerstaff Comments at 19; AGs Comments at 16-17; Empire Comments at 2 (the time period should be ten business days); Strang Reply Comments at 3 (a do-not-fax request should be honored within seven days of receipt, but in no case should exceed 14 days); Sutton Comments at 7 (should be honored within 24 hours); EPIC Comments at 5 (senders should be able to honor within five days); Texas OPC Reply Comments at 6 (reasonable time would be 3-10 business days).

maintains that legitimate businesses that receive such requests will honor them immediately.<sup>113</sup>

31. In accordance with the Junk Fax Prevention Act, we conclude that senders must comply with an opt-out request within the shortest reasonable time of such request. Taking into consideration both large databases of facsimile numbers and the limitations on certain small businesses to remove numbers for individuals that opt-out, we conclude that a reasonable time to honor such requests must not exceed 30 days from the date such a request is made.<sup>114</sup> The record demonstrates that 30 days will provide a reasonable opportunity for persons, including small businesses, to process requests and remove the facsimile numbers from their lists or databases.<sup>115</sup> Consistent with our rules for company-specific do-not-call requests, facsimile senders with the capability to honor do-not-fax requests in less than 30 days must do so.<sup>116</sup> We believe that any period greater than 30 days will likely impose additional costs and burdens on consumers and businesses that have taken steps to avoid facsimile messages by making opt-out requests. We also conclude that the sender must remove the facsimile number from its fax lists within the 30-day period, regardless of whether it believes the number may be used by more than one individual.<sup>117</sup> We believe it is reasonable to presume that persons making opt-out requests on behalf of a business' facsimile machine are authorized to do so. Senders must honor such opt-out requests made by the business, even if doing so restricts faxes sent to all employees of that business. This determination is consistent with our findings in the do-not-call context in which a do-not-call request applies to all persons at the residence associated with that telephone number.<sup>118</sup>

32. We decline to limit the time period during which an opt-out request remains in effect as suggested by NFIB.<sup>119</sup> We recognize that, like telephone numbers, facsimile numbers change hands over time. However, as noted above, the national do-not-call registry requires consumers to re-register just once every five years to avoid most telemarketing calls. In the absence of a similar do-not-fax list, a consumer would need to make numerous—perhaps hundreds—of opt-out requests every five years to

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<sup>113</sup> CTTC Comments at 2. According to the Attorneys General commenters, the Federal Trade Commission is taking steps to shorten from 10 to 3 days its timeframe within which senders of commercial email messages must comply with opt-out requests from recipients under the CAN-SPAM Act. *See* AGs Comments at 16-17.

<sup>114</sup> *See* ASAE Comments at 5 (30 days is the shortest reasonable time as many associations are lightly staffed and depend upon the generosity of volunteers); NIADA Comments at 6; DMA Comments at 9 (supports 30 days).

<sup>115</sup> American Bankers Assoc Comments at 5; NEPA Comments at 6; NNA Comments at 13; NFIB Comments at 6; NAR Comments at 8 (members might not have the resources to instantaneously incorporate consumer requests into do-not-fax lists); Westfax Comments at 12; ABM Comments at 10; MFC Comments at 14 (31 days, which is the timeframe within which telemarketers must scrub their lists using the national do-not-call registry).

<sup>116</sup> *See* 47 C.F.R. § 64.1200(d)(3); *see also* 2003 TCPA Order, 18 FCC Rcd at 14069, para. 94.

<sup>117</sup> *See* American Bankers Assoc Comments at 5 (explaining that a business may need to investigate whether the opt-out request is for a fax number used by only one individual or if others use the number and whether the opt out is valid for all users).

<sup>118</sup> *See Consumer.net v. AT&T*, 15 FCC Rcd 281, 297 (1999). *See* DMA Comments at 6 (a fax sender should be permitted to rely on consent provided by any member of a business recipient's personnel with apparent authority to act on its behalf; senders should honor an opt-out request by an employee of a business with apparent authority to submit a request).

<sup>119</sup> NFIB Comments at 6. *See also* CBA Comments at 15.

avoid receiving unwanted faxes.<sup>120</sup> Instead, we conclude that a consumer who wishes to receive faxes at a new number or resume receiving faxes after previously opting out should notify the sender of such changes by giving prior express permission to the sender.<sup>121</sup> We also encourage facsimile senders to update their facsimile number databases, when consumers subsequently transact business, file applications or make inquiries.

#### 4. Identification Requirements and Opt-Out Notice

33. As noted in the *JFPA NPRM*, the Commission's existing rules require senders of facsimile messages to identify themselves on the message, along with the telephone number of the sending machine or the business, other entity, or individual sending the message.<sup>122</sup> The TCPA also requires facsimile messages to include the date and time they are sent.<sup>123</sup> We sought comment on the interplay between this identification requirement and the opt-out notice requirement under the Junk Fax Prevention Act.<sup>124</sup> A few commenters identified additional burdens associated with complying separately with both requirements.<sup>125</sup> We conclude that senders that provide their telephone number and facsimile number as part of the opt-out notice will satisfy the Commission's identification rule so long as they also identify themselves by name on the facsimile advertisement.

#### D. Request to Opt-Out of Future Unsolicited Advertisements

34. The Junk Fax Prevention Act requires that a request not to send future unsolicited facsimile advertisements meet certain requirements.<sup>126</sup> In accordance with the statutory provisions, we

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<sup>120</sup> See *supra*, para. 20.

<sup>121</sup> See AGs Comments at 23 (a do-not-fax request must be honored until the recipient gives express consent to receive solicitations).

<sup>122</sup> *JFPA NPRM*, para. 17. See also 47 C.F.R. § 68.318(d). We note that the "sender" of the facsimile advertisement is the person on whose behalf the advertisement is sent. Under the Commission's rules, the fax broadcaster must also identify itself if it demonstrates a high degree of involvement in the sender's facsimile messages, such as supplying the numbers to which a message is sent. See 47 C.F.R. § 68.318(d). Verizon urges the Commission to amend its current Caller Identification (Caller ID) rules to require that fax broadcasters transmit the same caller ID information that is currently required of telemarketers. Verizon alleges that there is a growing trend by fax broadcasters to engage in "caller ID spoofing," whereby they manipulate their caller ID data to disguise the true telephone number from which the calls have been placed. See Verizon Comments at 1. Although outside the scope of the NPRM, we will monitor caller ID spoofing to determine whether action is warranted to address the practice in the future.

<sup>123</sup> See 47 U.S.C. § 227(d)(1)(B).

<sup>124</sup> *JFPA NPRM*, para. 17.

<sup>125</sup> See, e.g., Westfax Comments at 12.

<sup>126</sup> Junk Fax Prevention Act, Sec. 2(d) ("[The Commission] shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates; (ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and (iii) the person making the request has not, subsequent (continued....)

adopt rules requiring that an opt-out request identify the telephone number or numbers of the facsimile machines or machines to which the request relates. In addition, the request must be made using the telephone number, facsimile number, website address or email address provided by the sender in its opt-out notice. Most commenters argue that permitting opt-out requests to be made through other avenues not identified in the notice will impair an entity's ability to account for all requests and process them in a timely manner.<sup>127</sup> As discussed above, the sender is required to include a telephone number and facsimile number on the advertisement, and if neither numbers are cost-free (*i.e.*, they are not 800 toll-free numbers or local numbers for local recipients), then the sender must have a website or email address to permit recipients to opt-out of future facsimile messages. Requiring recipients to use one of the methods identified on the facsimile should reasonably permit any consumer to avoid future facsimile messages from the sender. Under the new rules, the sender will be prohibited from sending facsimile advertisements to a person that has submitted a request that complies with these requirements.<sup>128</sup>

### 1. Interplay Between Established Business Relationship Exemption and Opt-Out Request

35. We agree with the majority of commenters that an opt-out request should be honored irrespective of whether the recipient continues to do business with the sender.<sup>129</sup> Therefore, our rules will reflect that a do-not-fax request will terminate the EBR exemption from the prohibition on sending facsimile advertisements.<sup>130</sup> This determination is consistent with the Commission's rules on telephone solicitations, whereby a telephone subscriber's seller-specific do-not-call request terminates any EBR exemption with that company even if the subscriber continues to do business with the seller.<sup>131</sup>

36. As set forth in the statute, a sender may resume sending facsimile advertisements to a consumer that has opted-out of such communications if that consumer subsequently provides his express invitation or permission to the sender.<sup>132</sup> Of the comments received on this issue, most agree that when a consumer has made an opt-out request of the sender, it should be up to the sender to demonstrate that the

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to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine").

<sup>127</sup> American Bankers Assoc Comments at 5; Westfax Comments at 9; Huntington Natl Bank Comments at 8; NIADA Comments at 8; YPA Comments at 6; NFIB Comments at 5; ARTBA Comments at 3. *But see* Biggerstaff Comments at 22 (maintaining that it would be inconsistent to prescribe only fixed and limited methods by which a fax advertiser must accept a do-not-fax request when there are no such restrictions in the telemarketing context). We encourage senders that are on actual notice of a recipient's opt-out request to honor the request even if not sent by the methods identified in the sender's opt-out notice.

<sup>128</sup> *See infra*, discussion on prior express invitation or permission, paras. 45-48. *See also* amended rule at 47 C.F.R. § 64.1200(a)(3)(vi).

<sup>129</sup> NAWD Comments at 11-12; NNA Comments at 15; Westfax Comments at 8; AGs Comments at 25; Biggerstaff Comments at 22; CTTC Comments at 1 (the act of opting out will not only stop unsolicited advertisements, it will effectively terminate the EBR for purposes of the TCPA); NIADA Comments at 7.

<sup>130</sup> *See* amended rule at 47 C.F.R. § 64.1200(a)(3)(vi).

<sup>131</sup> *See* 47 C.F.R. § 64.1200(f)(3)(i) and amended as 47 C.F.R. § 64.1200(f)(4)(i).

<sup>132</sup> Junk Fax Prevention Act, Sec. 2(d).

consumer subsequently gave his express permission to receive faxes.<sup>133</sup> As discussed in more detail below, our rules will permit such permission to be granted in writing or orally.<sup>134</sup> Senders that claim their facsimile advertisements are delivered based on the recipient's prior express permission must be prepared to provide clear and convincing evidence of the existence of such permission.

## 2. Third Parties and Fax Broadcasters

37. The record reveals that fax broadcasters,<sup>135</sup> which transmit other entities' advertisements to telephone facsimile machines for a fee, are responsible for a significant portion of the facsimile messages sent today.<sup>136</sup> The Commission sought comment in the *JFPA NPRM* on whether to specify that if the entity transmitting the facsimile advertisement is a third party agent or fax broadcaster, that any do-not-fax request sent to that agent will extend to the underlying business on whose behalf the fax is transmitted.<sup>137</sup> The majority of commenters maintain that a third party should not be responsible under the law for accepting and communicating opt-out requests to senders.<sup>138</sup> Some commenters argue that to hold third parties responsible for processing opt-out requests will unduly restrict any third party's ability to send faxes to consumers on behalf of other entities.<sup>139</sup>

38. We conclude that the sender—the business on whose behalf the fax is transmitted—is responsible for complying with the opt-out notice requirements and for honoring opt-out requests. Regardless of whether the sender includes its own contact information in the opt-out notice or the contact information of a third party retained to accept opt-out requests, the sender is liable for any violations of the rules. This determination is consistent with the Commission's telemarketing rules.<sup>140</sup> Third parties, including fax broadcasters, need only accept and forward do-not-fax requests to the extent the underlying

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<sup>133</sup> See *JFPA NPRM*, para. 25. See also AGs Comments at 22; B. Sachau Comments; NIADA Comments at 8; NAWD Comments at 13 (given the private right of action, it would be imprudent to rely on the recipient to prove that his opt-out had been superseded).

<sup>134</sup> See amended rule at 47 C.F.R. §64.1200(a)(3)(v)(C).

<sup>135</sup> The term facsimile broadcaster means a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee. See 47 C.F.R. § 64.1200(f)(4) and amended as (f)(6).

<sup>136</sup> See Biggerstaff Comments at 1-2; Texas OPC Comments at 15-17; Verizon Comments at 4.

<sup>137</sup> *JFPA NPRM*, para. 25.

<sup>138</sup> See American Bankers Assoc Comments at 5 (the question attempts to deputize broadcast fax companies as surrogates for a type of national do-not-fax list); NAWD Comments at 12; ABM Comments at 14; NFIB Comments at 7 (applying a do-not-fax request to third party senders could result in NFIB members not receiving vital information to which their membership entitles them); ASTA Comments at 11. *But see* AGs Comments at 25.

<sup>139</sup> American Bankers Assoc Comments at 5; NFIB Comments at 7. *But see* Strang Comments at 7 (a do-not-fax request to a fax broadcaster must apply to all customers of that broadcaster unless the consumer specifically asks for faxes from particular advertisers).

<sup>140</sup> See 47 C.F.R. § 64.1200(d)(3) ("...If [do-not-call] requests are recorded or maintained by a party other than the person or entity on whose behalf the telemarketing call is made, the person or entity on whose behalf the telemarketing call is made will be liable for any failures to honor the do-not-call request").

business contracts out such responsibilities to them.

39. We take this opportunity to emphasize that under the Commission's interpretation of the facsimile advertising rules, the sender is the person or entity on whose behalf the advertisement is sent.<sup>141</sup> In most instances, this will be the entity whose product or service is advertised or promoted in the message. As discussed above, the sender is liable for violations of the facsimile advertising rules, including failure to honor opt-out requests. Accordingly, we adopt a definition of sender for purposes of the facsimile advertising rules.<sup>142</sup>

40. Under the current rules, a fax broadcaster also will be liable for an unsolicited fax if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile advertisements, and we will continue to apply this standard under our revised rules.<sup>143</sup> If the fax broadcaster supplies the fax numbers used to transmit the advertisement, for example, the fax broadcaster will be liable for any unsolicited advertisements faxed to consumers and businesses without their prior express invitation or permission.<sup>144</sup> We find that a fax broadcaster that provides a source of fax numbers, makes representations about the legality of faxing to those numbers or advises a client about how to comply with the fax advertising rules, also demonstrates a high degree of involvement in the transmission of those facsimile advertisements. In addition, we conclude that a highly involved fax broadcaster will be liable for an unsolicited fax that does not contain the required notice and contact information.<sup>145</sup> In such circumstances, the sender and fax broadcaster may be held jointly and severally liable for violations of the opt-out notice requirements. Based on our own enforcement experience, and the fact that highly involved fax broadcasters will have firsthand knowledge of the inclusion of the opt-out notice, we determine that such a fax broadcaster must, at a minimum, ensure that the faxes it transmits on behalf of each sender contain the necessary information to allow a consumer to opt out of a particular sender's faxes in the future. Otherwise, the consumer may have no means of stopping unwanted faxes transmitted by the fax broadcaster on behalf of various advertisers.

#### **E. Professional or Trade Organizations**

41. The Junk Fax Prevention Act authorizes the Commission to consider exempting nonprofit organizations from the opt-out notice requirements discussed above.<sup>146</sup> Specifically, the statute provides

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<sup>141</sup> NAR Comments at 12 (asking the Commission to clarify the definition of "sender"); ABM Comments at 10 (a definition of "sender" would help distinguish between the business on whose behalf the fax is sent and a vendor who does nothing more than transmit a fax).

<sup>142</sup> See amended rule at 47 C.F.R. §64.1200(f)(8).

<sup>143</sup> See 47 C.F.R. § 64.1200(a)(3)(ii) and amended rule 47 C.F.R. § 64.1200(a)(3)(vii). See also 47 C.F.R. § 68.318(d) ("If a facsimile broadcaster demonstrates a high degree of involvement in the sender's facsimile messages, such as supplying the number to which a message is sent, that broadcaster's name, under which it is registered to conduct business with the State Corporation Commission (or comparable regulatory authority), must be identified on the facsimile, along with the sender's name.") See also AGs Comments at 29.

<sup>144</sup> 47 C.F.R. § 64.1200(a)(3)(ii).

<sup>145</sup> See amended rule at 47 C.F.R. § 64.1200(a)(3)(vii).

<sup>146</sup> Junk Fax Prevention Act, Sec. 2(e) ("[The Commission] may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt (continued....)")

that the Commission may, after receiving public comment, 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.<sup>147</sup> The statute requires that the Commission first determine that such notice is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements.<sup>148</sup> We sought comment on whether to allow such organizations to send faxes that do not contain the opt-out notice.<sup>149</sup> We asked how members would obtain the necessary information to stop unwanted faxes if the associations do not provide such information, and we asked what benefits there are to nonprofit organizations if they are exempt from the opt-out notice requirement.<sup>150</sup>

42. Most commenters that are themselves trade associations or professional organizations argue that they exist to serve their members, and that members of an association know how to contact those associations should they no longer wish to receive fax messages.<sup>151</sup> They contend that most trade associations have a membership or customer service department that can assist the member with an opt-out request.<sup>152</sup> Other commenters oppose an exemption for nonprofits, arguing that such organizations should have no difficulty including an opt-out notice on their facsimile advertisements.<sup>153</sup> We are not persuaded that consumers will have the necessary tools to easily opt-out of unwanted faxes from trade

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nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only—(i) by regulation issued after public comment; and (ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements[.]”).

<sup>147</sup> *Id.*

<sup>148</sup> Junk Fax Prevention Act, Sec. 2(e).

<sup>149</sup> *JFPA NRPM*, para. 27.

<sup>150</sup> *Id.*

<sup>151</sup> See IFDA Comments at 4; ABM Comments at 15-16; ASAE Comments a 7-9; DMA Comments at 1-3; State Broadcasters Comments at 6; ABA Comments at 2 (ABA members include a clear notice on the face of each facsimile about how to access ABA's website and then be directed to a separate webpage that allows members to opt-out of receiving future facsimile ads); ASAE Comments at 2 (urging the Commission to find that simply joining a nonprofit association constitutes prior express invitation or permission, making the Junk Fax Prevention Act provisions inapplicable).

<sup>152</sup> American Bankers Assoc Comments at 6; SBA Advocacy Comments at 9; NNA Comments at 16, NFIB Comments at 7; NADA Comments at 4 (an exemption would assist our compliance efforts and eliminate inadvertent violations of federal law when communicating with our members); SHRM Comments at 6.

<sup>153</sup> Biggerstaff Comments at 25; Hallikainen Comments at 1; Strang Comments at 8; Westfax Comments at 12-13 (the opt-out notice is easy to put into the content of any facsimile and should be included on all advertisements); Lorman Ed Services Comments at 1 (such an exemption would confuse and burden association members); Lorman Ed Services Reply Comments at 8 (consumers need to know they have the right to opt out; a notice does that); PRC Comments at 4 (to eliminate an opt-out choice entirely when a fax is sent by a nonprofit or trade association would deprive the recipient of any control).

associations if the faxes received do not contain information on how to opt out. Moreover, we believe the benefits to consumers of having opt-out information readily available outweigh any burden in including such notices.<sup>154</sup> Facsimile advertisements impose direct costs on consumers for paper, toner, and time spent sorting and discarding unwanted faxes. Should consumers not have access to opt-out contact information, they may be forced to incur unacceptable costs associated with faxes sent from nonprofit organizations. In addition, the record reveals that trade associations already have mechanisms in place through which members communicate with the organization.<sup>155</sup> Therefore, inclusion of an opt-out notice on their fax messages should not be burdensome.

43. While neither the TCPA nor its amendments carve out an exemption for nonprofits from the facsimile advertising rules, we agree with those petitioners that argue that messages that are not commercial in nature—which many nonprofits send—do not constitute “unsolicited advertisements” and are therefore not covered by the facsimile advertising prohibition.<sup>156</sup> We clarify that messages that do not promote a commercial product or service, including all messages involving political or religious discourse, such as a request for a donation to a political campaign, political action committee or charitable organization, are not unsolicited advertisements under the TCPA.<sup>157</sup> We emphasize that, under the Junk Fax Prevention Act, even unsolicited advertisements transmitted by tax-exempt nonprofit organizations may be sent to persons with whom the senders have an established business relationship, subject to the other statutory requirements.

## F. Unsolicited Advertisement

### 1. Definition

44. The facsimile advertising rules apply to a fax communication that constitutes an “unsolicited advertisement” as defined in the TCPA.<sup>158</sup> The Junk Fax Prevention Act amends the term “unsolicited advertisement” by adding “in writing or otherwise” before the period at the end of that

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<sup>154</sup> We note that the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.

<sup>155</sup> DMA Reply Comments at 3; ABM Comments at 16.

<sup>156</sup> *See, e.g.*, ASAE Petition for Reconsideration, filed July 25, 2003; Consumer Electronics Association Petition for Reconsideration at 2-6, filed August 21, 2003; Independent Sector Comment at 2, filed August 25, 2003; Maryland Nonprofit Petition for Reconsideration at 2, filed August 25, 2003. We also emphasize that we are not carving out an exemption for tax-exempt nonprofits. Rather, consistent with the language of the TCPA, we do not intend for the clarifications in this Order to result in the regulation of noncommercial speech as commercial facsimile messages under the TCPA regulatory scheme.

<sup>157</sup> *See* American Dietetic Association Petition at 8, filed August 25, 2003; National Association of Business PACs Petition at 7-8, filed August 25, 2003. Under the Federal Election Commission’s rules, when a person pays a political committee for a commercially available product or service, such as a dinner sponsored by a political campaign, the full purchase price of the item or service is considered a contribution to the campaign. *See* FEC Comments at 2-3, filed October 14, 2003. Therefore, the fact that a political message contains an offer to attend a fundraising dinner or to purchase some other product or service in connection with a political campaign or committee fundraiser does not turn the message into an advertisement for purposes of the TCPA’s facsimile advertising rules.

<sup>158</sup> *See* 47 U.S.C. § 227(a)(4).



section.<sup>159</sup> We proposed amending the Commission's rules to reflect the change in the statutory language.<sup>160</sup> No commenter opposed the modification. Accordingly, we amend our rules at 64.1200(f)(10) so that the definition reads as follows:

The 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 the person's prior express invitation or permission, in writing or otherwise.<sup>161</sup>

## 2. Prior Express Invitation or Permission

45. Several commenters ask the Commission to explicitly recognize that "prior express invitation or permission" to send a facsimile advertisement may be obtained by means other than a signed written statement.<sup>162</sup> CBA urges the Commission not to specify the various other means, for fear that the Commission might overlook certain legitimate methods and forms of permission.<sup>163</sup> We clarify that, as an initial matter, a sender that has an EBR with a consumer may send a facsimile advertisement to that consumer without obtaining separate permission from him.<sup>164</sup> In the absence of an EBR, the sender must obtain the prior express invitation or permission from the consumer before sending the facsimile advertisement.<sup>165</sup> Prior express invitation or permission may be given by oral or written means, including electronic methods.<sup>166</sup> We expect that written permission will take many forms, including email, facsimile, and internet form. Whether given orally or in writing, prior express invitation or permission must be express, must be given prior to the sending of any facsimile advertisements, and must include the facsimile number to which such advertisements may be sent.<sup>167</sup> It cannot be in the form of a "negative option."<sup>168</sup> However, a company that requests a fax number on an application form could include a clear statement indicating that, by providing such fax number, the individual or business agrees to receive

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<sup>159</sup> Junk Fax Prevention Act, Sec. 2(g).

<sup>160</sup> *JFPA NRPM*, para. 29.

<sup>161</sup> See amended rule at 47 C.F.R. § 64.1200(f)(13).

<sup>162</sup> See NEPA Comments at 9; NAR Comments at 16; Huntington Natl Bank Comments at 7.

<sup>163</sup> CBA Comments at 14-15; *see also* YPA Comments at 7.

<sup>164</sup> As discussed above, a sender that has received an opt-out request from a consumer must not continue to send facsimile advertisements regardless of whether there exists a business relationship between them.

<sup>165</sup> See 47 U.S.C. § 227(b)(1)(C) and (a)(4).

<sup>166</sup> As discussed above, we are removing the Commission's rule at section 64.1200(a)(3)(i) which requires the recipient to obtain a signed, written statement indicating the recipient's consent to receive facsimile advertisements from the sender. See *supra*, para. 11, n.38.

<sup>167</sup> AGs Comments at 28.

<sup>168</sup> A facsimile advertisement containing a telephone number and an instruction to call if the recipient no longer wishes to receive such faxes, would constitute a "negative option" as the sender presumes consent unless advised otherwise.

facsimile advertisements from that company or organization.<sup>169</sup>

46. We are concerned that permission not provided in writing may result in some senders erroneously claiming they had the recipient's permission to send facsimile advertisements. Commenters that discussed this issue agree that a sender should have the obligation to demonstrate that it complied with the rules, including that it had the recipient's prior express invitation or permission.<sup>170</sup> Senders who choose to obtain permission orally are expected to take reasonable steps to ensure that such permission can be verified. In the event a complaint is filed, the burden of proof rests on the sender to demonstrate that permission was given.<sup>171</sup> We strongly suggest that senders take steps to promptly document that they received such permission.<sup>172</sup> Express permission need only be secured once from the consumer in order to send facsimile advertisements to that recipient until the consumer revokes such permission by sending an opt-out request to the sender.

47. The record on the facsimile advertising rules has long reflected the fact that consumers incur costs for receiving fax communications.<sup>173</sup> Recipients assume the cost of the paper used, the cost associated with the use of the facsimile machine, and the costs associated with the time spent receiving a facsimile advertisement during which the machine cannot be used by its owner to send or receive other facsimile transmissions.<sup>174</sup> We therefore conclude that, in the absence of an EBR, facsimile requests for permission to transmit faxed advertisements would not be permissible, as they would impose costs on consumers who had not yet consented to receive such communications.<sup>175</sup>

48. Senders who claim they obtained a consumer's prior express invitation or permission to send them facsimile advertisements prior to the effective date of these rules will not be in compliance unless they can demonstrate that such authorization met all the requirements as adopted herein. In addition, entities that send facsimile advertisements to consumers from whom they obtained permission, must include on the advertisements their opt-out notice and contact information to allow consumers to stop unwanted faxes in the future.

### 3. "Transactional" Communications

49. We agree with those petitioners who argue that messages whose purpose is to facilitate,

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<sup>169</sup> Trade and membership organizations could do so on their membership renewal statements.

<sup>170</sup> Westfax Comments at 10; McKenna Comments at 2; YPA comments at 2 (maintaining that the Commission should be flexible as to the evidence necessary to prove the recipient granted permission to receive the fax).

<sup>171</sup> See Sauchau Comments; AGs Comments at 26.

<sup>172</sup> An example of such documentation could be the recording of the oral authorization. Other methods might include established business practices or contact forms used by the sender's personnel.

<sup>173</sup> See *2003 TCPA Order*, 18 FCC Rcd at 14127-28, para. 189; see also AGs Comments at 4-5, 20; McKenna Reply Comments at 4; Biggerstaff Comments at 4-5.

<sup>174</sup> Biggerstaff Comments at 4-5; AGs Comments at 1 (describing the costs and time spent dealing with junk faxes).

<sup>175</sup> This finding is also consistent with our telemarketing and CAN-SPAM rules for wireless devices, which do not permit the calling or text messaging to obtain prior express permission.

complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender are not advertisements for purposes of the TCPA's facsimile advertising rules.<sup>176</sup> For example, a receipt or invoice, the primary purpose of which is to confirm the purchase of certain items by the facsimile recipient, is not an advertisement of the commercial availability of such items. Similarly, messages containing account balance information or other type of account statement which, for instance, notify the recipient of a change in terms or features regarding an account, subscription, membership, loan or comparable ongoing relationship, in which the recipient has already purchased or is currently using the facsimile sender's product or service, is not an advertisement. Communications sent to facilitate a loan transaction, such as property appraisals, summary of closing costs, disclosures (such as the Good Faith Estimate) and other similar documents are not advertisements when their purpose is to complete the financial transaction.<sup>177</sup> A travel itinerary for a trip a customer has agreed to take or is in the process of negotiating is not an unsolicited advertisement. Similarly, a contract to be signed and returned by the agent or traveler that is for the purpose of closing a travel deal is not an advertisement for purposes of the prohibition.<sup>178</sup> A communication from a trade show organizer to an exhibitor regarding the show and her appearance will not be considered an unsolicited advertisement, provided the exhibitor has already agreed to appear.<sup>179</sup> We also conclude that a mortgage rate sheet sent to a broker or other intermediary or a price list sent from a wholesaler to a distributor (*e.g.*, food wholesaler to a grocery store) for the purpose of communicating the terms on which a transaction has already occurred are not advertisements.<sup>180</sup> A subscription renewal notice would be considered "transactional" in nature, provided the recipient is a current subscriber and had affirmatively subscribed to the publication. Finally, a notice soliciting bid proposals on a construction project would not be subject to the facsimile advertising prohibition, provided the notice does not otherwise contain offers for products, goods, and services. Similarly, bids in response to specific solicitations would not be covered by the rules, as such communications are presumably to facilitate a commercial transaction that the recipient has agreed to enter into by soliciting the bids.

50. In order for such messages to fall outside the definition of "unsolicited advertisement," they must relate specifically to existing accounts and ongoing transactions. Messages regarding new or additional business would advertise "the commercial availability or quality of any property, goods, or services..." and therefore would be covered by the prohibition.<sup>181</sup> Thus, applications and materials regarding educational opportunities and conferences sent to persons who are not yet participating or enrolled in such programs are unsolicited advertisements and require the recipient's permission or the

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<sup>176</sup> See, *e.g.*, Wells Fargo Petition for Reconsideration, filed August 25, 2003; Reed Elsevier Petition for Reconsideration, filed August 25, 2003; Proximity Marketing Request for Clarification, filed August 25, 2003; Financial Services Coalition Petition for Reconsideration at 6-7, filed August 25, 2003.

<sup>177</sup> See Financial Services Coalition Petition for Reconsideration at 4-7, filed August 25, 2003.

<sup>178</sup> However, we find that messages regarding travel deals, bonus commission offers and other promotional information are advertisements and would require the recipient's express permission in the absence of an established business relationship. See Travel Industry Group Petition for Reconsideration at 4, 6, filed August 25, 2003.

<sup>179</sup> See, *e.g.*, Reed Elsevier Petition for Reconsideration at 4, filed August 25, 2003.

<sup>180</sup> Commercial facsimile messages that advertise the commercial availability or quality of property, goods, or services, but purport to be "price sheets" or "rate sheets" in order to evade the TCPA rules, are nevertheless unsolicited advertisements, if not sent for the purpose of facilitating, completing, or confirming an ongoing transaction.

<sup>181</sup> See 47 U.S.C. § 227(a)(4).

existence of an established business relationship before faxing the recipient such information.<sup>182</sup> Similarly, a rate sheet on financial products transmitted to a *potential* borrower or *potential* brokers would not be considered merely “transactional” in nature and would require the sender to either have an established business relationship with the recipient or first obtain express permission from the recipient.

51. In response to arguments that a *de minimis* amount of advertising information should not convert a communication into an “unsolicited advertisement,”<sup>183</sup> we conclude that a reference to a commercial entity does not by itself make a message a commercial message. For example, a company logo or business slogan found on an account statement would not convert the communication into an advertisement, so long as the primary purpose of the communication is, for example, to relay account information to the fax recipient.<sup>184</sup>

#### 4. Offers for Free Goods and Services and Informational Messages

52. We conclude that facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA’s definition.<sup>185</sup> In many instances, “free” seminars serve as a pretext to advertise commercial products and services. Similarly, “free” publications are often part of an overall marketing campaign to sell property, goods, or services. For instance, while the publication itself may be offered at no cost to the facsimile recipient, the products promoted within the publication are often commercially available. Based on this, it is reasonable to presume that such messages describe the “quality of any property, goods, or services.”<sup>186</sup> Therefore, facsimile communications regarding such free goods and services, if not purely “transactional,” would require the sender to obtain the recipient’s permission beforehand, in the absence of an EBR.

53. By contrast, facsimile communications that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited by the TCPA rules. An incidental advertisement contained in a newsletter does not convert the entire communication into an advertisement.<sup>187</sup> Thus, a trade organization’s newsletter sent via facsimile would not constitute

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<sup>182</sup> Such communications nevertheless could be sent to recipients with whom the sender has an EBR, so long as they also comply with the other statutory provisions, including the opt-out notice requirements.

<sup>183</sup> See Financial Services Coalition Petition for Reconsideration at 13, filed August 25, 2003; Travel Industry Group Petition for Reconsideration at 14, filed August 25, 2003.

<sup>184</sup> See Wells Fargo Petition for Reconsideration at 3, filed August 25, 2003; Travel Industry Group Petition for Reconsideration at 14, filed August 25, 2003.

<sup>185</sup> See Proximity Marketing Request for Clarification at 7, 12, filed August 25, 2003.

<sup>186</sup> See 47 U.S.C. § 227(a)(4).

<sup>187</sup> See Air Conditioning Contractors Petition for Reconsideration at 2-3, filed August 12, 2003. In determining whether an advertisement is incidental to an informational communication, the Commission will consider, among other factors, whether the advertisement is to a bona fide “informational communication.” In determining whether the advertisement is to a *bona fide* “informational communication,” the Commission will consider whether the communication is issued on a regular schedule; whether the text of the communication changes from issue to issue; and whether the communication is directed to specific regular recipients, *i.e.*, to paid subscribers or to recipients who have initiated membership in the organization that sends the communication. We may also consider the amount of space devoted to advertising versus the amount of space used for information or “transactional” messages and whether the advertising is on behalf of the sender of the communication, such as an (continued....)

an unsolicited advertisement, so long as the newsletter's primary purpose is informational, rather than to promote commercial products. We emphasize that a newsletter format used to advertise products or services will not protect a sender from liability for delivery of an unsolicited advertisement under the TCPA and the Commission's rules. We will review such newsletters on a case-by-case basis should they be brought to our attention.

54. Finally, we conclude that any surveys that serve as a pretext to an advertisement are subject to the TCPA's facsimile advertising rules.<sup>188</sup> The TCPA's definition of "unsolicited advertisement" applies to any communication that advertises the commercial availability or quality of property, goods or services, even if the message purports to be conducting a survey.<sup>189</sup>

### 5. Petitions for Reconsideration on EBR exemption

55. We also take this opportunity to dismiss as moot, any pending petitions, or parts thereof, that seek reconsideration of the Commission's 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 and those that seek reconsideration of the written permission requirement in section 64.1200(a)(3)(i) of the Commission's rules.<sup>190</sup> The Junk Fax Prevention Act codifies an established business relationship exception to the prohibition on sending unsolicited facsimile advertisements; therefore, such petitions are now moot.<sup>191</sup>

### G. Private Right of Action

56. The TCPA provides consumers with a private right of action in state court for any violation of the TCPA's prohibitions on the use of automatic dialing systems, artificial or prerecorded voice messages, and unsolicited facsimile advertisements.<sup>192</sup> Westfax raises concerns about class action lawsuits brought under the TCPA and asks the Commission to clarify the parameters of the private right of action.<sup>193</sup> As the Commission has stated in previous orders, Congress provided consumers with a private right of action, "if otherwise permitted by the laws or rules of court of a State." This language suggests that Congress contemplated that such legal action was a matter for consumers to pursue in appropriate state courts, subject to those state courts' rules.<sup>194</sup> We continue to believe that it is for Congress, not the Commission, either to clarify or limit this right of action. Therefore, we decline to make any determinations about the specific contours of the private right of action.

(Continued from previous page) \_\_\_\_\_  
announcement in a membership organization's monthly newsletter about an upcoming conference, or whether the advertising space is sold to and transmitted on behalf of entities other than the sender.

<sup>188</sup> See 47 U.S.C. § 227(a)(4) and 47 C.F.R. § 64.1200(f)(10); see also Travel Industry Group Petition for Reconsideration at 14-15, filed August 25, 2003.

<sup>189</sup> See 47 U.S.C. § 227(a)(4).

<sup>190</sup> See *infra*, Appendix C, List of Petitions Filed.

<sup>191</sup> See *infra*, para. 66.

<sup>192</sup> 47 U.S.C. § 227(b)(3).

<sup>193</sup> Westfax Comments at 5-6.

<sup>194</sup> See 2003 TCPA Order, 18 FCC Rcd at 14136, para. 206.

## H. Effective Date of Rules

57. The record reveals that facsimile senders may need additional time beyond 30 days to comply with the rules adopted herein.<sup>195</sup> For example, senders will need to ensure that opt-out contact information is provided on all facsimile advertisements. They also will need to put in place mechanisms to allow recipients to opt-out of unwanted facsimile advertisements and establish procedures for removing facsimile numbers for individuals that have opted out of such advertisements. We believe it is important to provide adequate time for senders to come into compliance with the rules adopted in this order. Therefore, the amended facsimile advertising rules will become effective within 90 days of date of publication in the Federal Register.<sup>196</sup>

## I. Filings in Response to this Order

58. The Commission recently opened a new docket—CG Docket No. 05-338—and asked that all filings addressing the facsimile advertising rules be filed in the new docket.<sup>197</sup> Any filings in response to this Report and Order also should be filed in CG Docket No. 05-338.

## IV. PROCEDURAL ISSUES

### A. Paperwork Reduction Act

59. The *Report and Order* contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding.

60. In addition, pursuant to the Small Business Paperwork Review Act of 2002, Public Law No. 107-198, *see* 44 U.S.C. § 3506(c)(4), in this present document we have assessed the effect of rule changes and find that there likely will be an increased administrative burden on businesses with fewer than 25 employees. We have taken steps to minimize the information collection burden for small business concerns, including those with fewer than 25 employees. The rules adopted herein do not require the maintenance of specific records for the sending of facsimile advertisements. We also decline to limit the duration of the EBR which might have resulted in an increase in recordkeeping burden for entities sending fax advertisements on the basis of an EBR. These measures should substantially alleviate any burdens on businesses with fewer than 25 employees.

### B. Congressional Review Act

61. The Commission will send a copy of this *Report and Order and Third Order on Reconsideration* in a report to be sent to Congress and the Government Accountability Office pursuant to

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<sup>195</sup> Huntington Natl Bank at 8 (suggesting a one-year compliance period); SHRM Comments at 10 (supports a 90-day period for organizations to come into compliance); CBA Comments at 16 (suggesting a year)

<sup>196</sup> Those rules requiring OMB approval under the Paperwork Reduction Act are not effective until approved by OMB.

<sup>197</sup> *See JFPA NPRM* at para. 27.

the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

### C. Accessible Formats

62. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice) or (202) 418-0432 (TTY). This *Report and Order and Third Order on Reconsideration* can also be downloaded in Word and Portable Document Format (PDF) at <http://www.fcc.gov/cgb/policy>.

### D. Final Regulatory Flexibility Analysis

63. Pursuant to the Regulatory Flexibility Act of 1980, as amended,<sup>198</sup> the Commission's Final Regulatory Flexibility Analysis regarding the *Report and Order and Third Order on Reconsideration* is attached as Appendix B.

## V. ORDERING CLAUSES

64. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1-4, 201, 202, 217, 227, 258, 303(r), and 332 of the Communications Act of 1934, as amended; 47 U.S.C. §§ 151-154, 201, 202, 217, 227, 258, 303(r), and 332; and sections 64.1200 and 64.318 of the Commission's Rules, 47 C.F.R. §§ 64.1200 and 64.318, the *Report and Order and Third Order on Reconsideration* IS ADOPTED, and Part 64 of the Commission's rules, 47 C.F.R. § 64.1200, IS AMENDED as set forth in Appendix A.

65. IT IS FURTHER ORDERED that the rules and requirements contained in this *Report and Order and Third Order on Reconsideration* and in Appendix A SHALL BECOME EFFECTIVE within 90 days of publication in the Federal Register. Those rules and requirements which contain information collection requirements under PRA are not effective until approved by OMB.

66. IT IS FURTHER ORDERED, that certain petitions for reconsideration and/or clarification of the facsimile advertising rules in CG Docket No. 02-278 ARE DENIED in part, GRANTED in part, and DISMISSED in part, as set forth herein. Specifically, those petitions filed by Air Conditioning Contractors of America, American Association of Advertising Agencies, *et al.*, American Business Media, American Dietetic Association, American Society of Association Executives, American Tire Distributors, Inc., America's Community Bankers, Association of Small Business Development Centers, California Association of Realtors, Chamber of Commerce of the U.S., *et al.*, Coalition for Healthcare Communication, Consumer Bankers Association, Consumer Electronics Association, Copia International, LTC, Faxts, Inc., Federal Election Commission, Financial Services Coalition, Independent Insurance Agents and Brokers of America, Independent Sector, Jobson Publishing, LLC, Maryland Association of Nonprofit Organizations, John Mayhill, National Association of Chain Drugstores, National Association of Realtors, National Retail Federation, Newsletter & Electronic Publishers Association, Newspaper Association of America, Presidential Classroom for Young Americans, Inc., Produce Marketing Association, Proximity Marketing, Reed Elsevier, Inc., Scholastic, Inc., State and Regional Newspaper Associations, Travel Industry Group, Wells Fargo & Co., and Yellow Pages Integrated Media Association ARE DISMISSED to the extent they seek reinstatement of the established business relationship exemption.

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<sup>198</sup> *See* 5 U.S.C. § 604.

67. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of the *Report and Order and Third Order on Reconsideration* to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary



**Appendix A****Final Rules**

Part 64 of the Code of Federal Regulations is amended as follows:

**PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS**

1. The authority citation for part 64 continues to read as follows:

Authority: 47 U.S.C. 154, 254(k); secs. 403(b)(2)(B), (C), Public Law 104-104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 222, 225, 226, 228, and 254 (k) unless otherwise noted.

\* \* \* \* \*

2. Subpart L is amended by revising the Subpart Heading L to read as follows:

**Subpart L – Restrictions on Telemarketing, Telephone Solicitation, and Facsimile Advertising**

\* \* \* \* \*

3. Section 64.1200 is amended to remove paragraph (a)(3)(i).

\* \* \* \* \*

4. Section 64.1200 is amended by removing the note for paragraph (f)(3) that reads as follows:

Paragraph 64.1200(f)(3) is stayed as of October 1, 2003, as it applies to the time limitations on facsimile advertisements. The Federal Communications Commission will publish a document in the Federal Register when the stay is lifted.

\* \* \* \* \*

5. Section 64.1200 is revised to read as follows:

§ 64.1200 Delivery restrictions.

(a) \* \* \*

(1) \* \* \*

(2) \* \* \*

(3) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless –

(i) the unsolicited advertisement is from a sender with an established business relationship, as defined in paragraph (f)(5) of this section, with the recipient; and

(ii) the sender obtained the number of the telephone facsimile machine through –

(A) the voluntary communication of such number by the recipient directly to the sender,

within the context of such established business relationship; or

- (B) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution. If a sender obtains the facsimile number from the recipient's own directory, advertisement, or internet site, it will be presumed that the number was voluntarily made available for public distribution, unless such materials explicitly note that unsolicited advertisements are not accepted at the specified facsimile number. If a sender obtains the facsimile number from other sources, the sender must take reasonable steps to verify that the recipient agreed to make the number available for public distribution.
  - (C) This clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005 if the sender also possessed the facsimile machine number of the recipient before July 9, 2005. There shall be a rebuttable presumption that if a valid established business relationship was formed prior to July 9, 2005, the sender possessed the facsimile number prior to such date as well; and
- (iii) the advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements. A notice contained in an advertisement complies with the requirements under this subparagraph only if –
- (A) the notice is clear and conspicuous and on the first page of the advertisement;
  - (B) the notice states that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under subparagraph (v) is unlawful;
  - (C) the notice sets forth the requirements for an opt-out request under subparagraph (v);
  - (D) the notice includes—
    - (I) a domestic contact telephone number and facsimile machine number for the recipient to transmit such a request to the sender; and
    - (II) if neither the required telephone number or facsimile machine number is a toll-free number, a separate cost-free mechanism including a website address or email address, for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. A local telephone number also shall constitute a cost-free mechanism so long as recipients are local and will not incur any long distance or other separate charges for calls made to such number; and
  - (E) the telephone and facsimile numbers and cost-free mechanism identified in the notice must permit an individual or business to make an opt-out request 24 hours a day, 7 days a week.
- (iv) A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in

subparagraph (iii).

- (v) A request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if –
- (A) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;
  - (B) the request is made to the telephone number, facsimile number, website address or email address identified in the sender’s facsimile advertisement; and
  - (C) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine.
- (vi) A sender that receives a request not to send future unsolicited advertisements that complies with subparagraph (v) must honor that request within the shortest reasonable time from the date of such request, not to exceed 30 days, and is prohibited from sending unsolicited advertisements to the recipient unless the recipient subsequently provides prior express invitation or permission to the sender. The recipient’s opt-out request terminates the established business relationship exemption for purposes of sending future unsolicited advertisements. If such requests are recorded or maintained by a party other than the sender on whose behalf the unsolicited advertisement is sent, the sender will be liable for any failures to honor the opt-out request.
- (vii) A facsimile broadcaster will be liable for violations of paragraph (a)(3) of this section, including the inclusion of opt-out notices on unsolicited advertisements, if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.

\* \* \* \* \*

6. Section 64.1200(f) is revised to read as follows:

(f) \* \* \*

(1) \* \* \*

(2) The term clear and conspicuous for purposes of subparagraph (a)(3)(iii)(A) means a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures, and placed at either the top or bottom of the facsimile.

(3) The term emergency purposes means calls made necessary in any situation affecting the health and safety of consumers.

(4) The term established business relationship for purposes of telephone solicitations means 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.

- (i) The subscriber's seller-specific do-not-call request, as set forth in paragraph (d)(3) of this section, terminates an established business relationship for purposes of telemarketing and telephone solicitation even if the subscriber continues to do business with the seller.
- (ii) The subscriber's established business relationship with a particular business entity does not extend to affiliated entities unless the subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.
- (5) The term established business relationship for purposes of paragraph (a)(3) on the sending of facsimile advertisements means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.
- (6) The term facsimile broadcaster means a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.
- (7) The term seller means the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.
- (8) The term sender for purposes of paragraph (a)(3) means the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement.
- (9) The term telemarketer means the person or entity that initiates 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.
- (10) The term telemarketing means 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.
- (11) The term telephone facsimile machine means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.
- (12) The term telephone solicitation means 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:
- (i) To any person with that person's prior express invitation or permission;
  - (ii) To any person with whom the caller has an established business relationship; or
  - (iii) By or on behalf of a tax-exempt nonprofit organization.
- (13) The 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, in writing or otherwise.

(14) The term personal relationship means any family member, friend, or acquaintance of the telemarketer making the call.

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## Appendix B

### Final Regulatory Flexibility Analysis

68. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>199</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking and Order (*JFPA NPRM*).<sup>200</sup> The Commission sought written public comment on the proposals in the *JFPA NPRM*, including comment on the IRFA. The only comment received on the IRFA was from the Office of Advocacy, U.S. Small Business Administration, and is discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.<sup>201</sup>

#### A. Need for, and Objectives of, the Report and Order and Third Order on Reconsideration

69. This Report and Order and Third Order on Reconsideration (*Order*) is necessary to comply with Congress' mandate for the Commission to issue regulations implementing the Junk Fax Prevention Act of 2005.<sup>202</sup> In this *Order*, and as set forth in the statute, we (1) codify an established business relationship (EBR) exemption to the prohibition on sending unsolicited facsimile advertisements; (2) provide a definition of an EBR to be used in the context of unsolicited facsimile advertisements that is not limited in duration; (3) require 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; and (4) specify the circumstances under which a request to "opt-out" complies with the Act.

70. Specifically, in accordance with the Junk Fax Prevention Act, the *Order* permits the sending of facsimile advertisements to recipients with whom the sender has an EBR, provided certain conditions are met regarding how the facsimile number was obtained.<sup>203</sup> In addition, the definition of EBR for purposes of sending facsimile advertisements extends the EBR exemption to faxes sent to both businesses and residential subscribers and is not limited in duration.<sup>204</sup> Under the new rules, senders of facsimile advertisements must include a notice describing the procedures for opting out of future faxes that is clear and conspicuous and located on the first page of the advertisement.<sup>205</sup> The rules require that an opt-out notice include a cost-free mechanism for the recipient to request not to receive future faxes. The cost-free mechanism must include a toll-free telephone number, toll-free facsimile number, website address, or email address. If the recipient makes a request not to receive future fax advertisements, the

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<sup>199</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>200</sup> See *Rules and Regulations 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, FCC 05-206, Appendix (rel. Dec. 9, 2005) (*JFPA NPRM*).

<sup>201</sup> See 5 U.S.C. § 604.

<sup>202</sup> See Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005) (Junk Fax Prevention Act).

<sup>203</sup> See *Order*, *supra*, paras. 8-16.

<sup>204</sup> See *id.*, *supra*, paras. 18-23.

<sup>205</sup> See *id.*, *supra*, paras. 24-29.

sender must honor that request within the shortest reasonable time, not to exceed 30 days.<sup>206</sup>

71. In addition, the *Order* declines to exempt small businesses from the cost-free mechanism requirement, in part because the Commission is not requiring senders to provide toll-free telephone numbers for recipients to make opt-out requests.<sup>207</sup> Finally, the *Order* does not carve out an exemption for tax-exempt nonprofit professional or trade associations from the opt-out notice requirement, noting that the benefits to consumers of having opt-out information readily available outweigh the burden in including such notices.<sup>208</sup>

72. Finally, the *Order* addresses certain issues raised in petitions for reconsideration of the 2003 *TCPA Order*<sup>209</sup> concerning the TCPA's facsimile advertising rules. Specifically, the *Order* provides guidance to fax senders on what messages do not constitute unsolicited advertisements for purposes of the fax rules and therefore could be sent without the prior permission of the recipient. The *Order* clarifies that messages that do not promote a commercial product or service, including all messages involving political or religious discourse, such as a request for a donation to a political campaign, political action committee or charitable organization, are not unsolicited advertisements under the TCPA.<sup>210</sup> The *Order* also concludes that messages whose purpose is to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender are not advertisements. These might include a receipt or invoice, the primary purpose of which is to confirm the purchase of certain items by the facsimile recipient, an account statement, or communications sent to facilitate a loan transaction already entered into by the recipient.<sup>211</sup> In addition, the *Order* determines that facsimile communications that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited by the TCPA rules.<sup>212</sup> An incidental advertisement contained in such a facsimile does not convert the entire communication into an advertisement.

#### **B. Summary of Significant Issues Raised by Public Comments in Response to the Supplemental IRFA**

73. The only comment filed directly in response to the IRFA was from the Office of Advocacy of the U.S. Small Business Administration (Advocacy).

74. In its comments, Advocacy identified five proposed rules that would impact small businesses. First, Advocacy noted the Commission's proposal to limit the duration of the EBR as it

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<sup>206</sup> See *id.*, *supra*, paras. 30-32.

<sup>207</sup> See *id.*, *supra*, para. 28, n.103.

<sup>208</sup> See *id.*, *supra*, para. 41-42.

<sup>209</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>210</sup> See *Order*, *supra*, para. 43.

<sup>211</sup> See *id.*, *supra*, para. 49.

<sup>212</sup> See *id.*, *supra*, para. 53.

applies to unsolicited fax advertisements.<sup>213</sup> Advocacy contends that, as required by the Junk Fax Prevention Act, the proposed rule does not include an analysis or determination that the EBR has resulted in a significant number of complaints.<sup>214</sup> Advocacy does not believe that the FCC has gathered the necessary information about complaints to limit the EBR. In addition, Advocacy contends that for small businesses to keep track of inquiries by customers would require a considerable increase in the amount of record-keeping and would impede the ability of small businesses to respond to such inquiries.<sup>215</sup>

75. Second, the Commission asked whether it was necessary to set forth rules on what is to be considered “clear and conspicuous” for purposes of an opt-out notice on a fax advertisement.<sup>216</sup> Advocacy believes that the clear and conspicuous requirement should be held to a reasonable standard and that “any further attempts by the FCC to define the notice requirement would likely become mired in minutia and would likely cause more confusion than guidance.”<sup>217</sup>

76. Third, Advocacy believes that 30 days to comply with a do-not-fax request is reasonable.<sup>218</sup> Fourth, Advocacy recommends that the Commission exempt small businesses from the cost-free mechanism requirement in the Junk Fax Prevention Act.<sup>219</sup> Advocacy contends that many small businesses (particularly very small businesses) do not have toll-free numbers. If the Commission determines not to exempt small businesses, Advocacy recommends that the FCC allow them to use alternatives to toll-free numbers because of the “great expense associated with maintaining toll-free numbers.”<sup>220</sup> They state that small businesses recommend e-mail, web-based systems, or the designation of a third party as viable alternatives. Advocacy also says that small businesses believe that once a small business has chosen a means of receiving do-not-fax requests, then opt-out requests should only be enforceable if they are received in that manner.<sup>221</sup> Finally, Advocacy indicates that small businesses believe an exemption for tax-exempt nonprofit associations from the opt-out notice requirement would be appropriate.<sup>222</sup>

### C. Description and Estimate of the Number of Small Entities To Which Rules Will Apply

77. The RFA directs agencies to provide a description of, and, where feasible, an estimate of,

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<sup>213</sup> SBA Advocacy Comments at 6.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *JFPA NPRM*, para. 20.

<sup>217</sup> SBA Advocacy Comments at 7.

<sup>218</sup> *Id.* at 7-8.

<sup>219</sup> *Id.* at 8-9.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 9.

<sup>222</sup> *Id.*



the number of small entities that may be affected by the rules adopted herein.<sup>223</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>224</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>225</sup> A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>226</sup>

78. A small organization is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”<sup>227</sup> Nationwide, as of 2002, there were approximately 1.6 million small organizations.<sup>228</sup> The term “small governmental jurisdiction” is defined as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”<sup>229</sup> As of 1997, there were approximately 87,453 governmental jurisdictions in the United States.<sup>230</sup> This number includes 39,044 county governments, municipalities, and townships, of which 37,546 (approximately 96.2%) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer. Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.<sup>231</sup>

79. A more precise estimate of small businesses affected might be made. The IFRA stated that the Commission’s rules on the sending of unsolicited facsimile advertisements would apply to any entity, including any telecommunications carrier, that uses the telephone facsimile machine to advertise.<sup>232</sup> Advocacy agreed, stating that “since what can be considered a commercial fax is so broad, it is appropriate for the FCC to consider that its rule could potentially impact almost all small businesses.”<sup>233</sup> Advocacy also noted that the U.S. Census Bureau updated its estimates based upon

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<sup>223</sup> 5 U.S.C. § 604(a)(3).

<sup>224</sup> 5 U.S.C. § 601(6).

<sup>225</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

<sup>226</sup> 15 U.S.C. § 632.

<sup>227</sup> 5 U.S.C. § 601(4).

<sup>228</sup> Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2002).

<sup>229</sup> 5 U.S.C. § 601(5).

<sup>230</sup> U.S. Census Bureau, *Statistical Abstract of the United States: 2000*, Section 9, pages 299-300, Tables 490 and 492.

<sup>231</sup> *See* SBA, *Programs and Services*, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

<sup>232</sup> *JFPA NPRM*, para. 48. We also sought comment on the entities that must comply with the rules.

<sup>233</sup> SBA Advocacy Comments at 5.

census information from 2002, which places the total number of small businesses in the United States (which it defines as firms with fewer than 500 employees) at 5.68 million.<sup>234</sup> Advocacy explains that ordinarily the SBA defines small business on an industry-by-industry basis. However, Advocacy contends that this is not practicable for the proposed rules because of its “broad applicability across industry lines which would create confusion on the part of small businesses” as to whether or not they are covered by the rules. Accordingly, Advocacy recommends the Commission consider adopting a new small business size standard for this rule.<sup>235</sup> Drawing from the input from small business groups, Advocacy recommends that the FCC adopt a size standard of 100 employees for this rulemaking. Based on the U.S. Census 2002 numbers, Advocacy indicates that 5.6 million firms would then qualify as small businesses.<sup>236</sup> Given that we are not exempting small businesses from the requirement to identify a cost-free mechanism for fax recipients to opt-out of future unwanted faxes, we conclude it is not necessary at this time to adopt a new small business size standard for this rule. Therefore, we estimate that, consistent with Advocacy’s comments, the rules apply to 5.68 million small entities across all industries in the United States.

#### **D. Description of Projected Reporting, Record Keeping, and Other Compliance Requirements**

80. The *Order* will likely result in increases in projected reporting, record keeping, and other compliance requirements for senders of facsimile advertisements. The statutory and rule changes affect both small and large companies. First, in accordance with the Junk Fax Prevention Act, the *Order* adopts an EBR exemption for sending fax advertisements. Should a question arise as to the validity of an EBR, the burden will be on the sender to show that it has a valid EBR with the recipient. However, the Commission emphasized that there is no requirement that senders of fax advertisements maintain any specific records demonstrating that an EBR exists. We believe the EBR can be demonstrated with records kept in the usual course of business, such as purchase agreements, sales slips, applications and inquiry records.<sup>237</sup>

81. In accordance with the Junk Fax Prevention Act, the Commission concluded that an EBR alone does not entitle a sender to fax an advertisement to an individual consumer or business. The sender must also ensure that the telephone facsimile number was provided voluntarily by the recipient. We find that it would be permissible for the sender to fax an advertisement to a recipient that had provided a facsimile number directly to the sender, for example, on an application, information request, contact information form, or membership renewal form.<sup>238</sup> In the event a recipient complains that its facsimile number was not provided to the sender, the burden rests with the sender to demonstrate, with such business records, that the number was communicated in the context of the EBR. Similarly, if the facsimile number was obtained from the recipient’s *own* directory, advertisement, or internet site, the Commission determined that it was voluntarily made available for public distribution, unless the recipient has noted on such materials that it does not accept unsolicited advertisements at the facsimile number in

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<sup>234</sup> *Id.* at 4 (citing U.S. Census Bureau, *Statistics of U.S. Businesses, Tabulations by Enterprise Size 2002* <<http://www.census.gov/csd/subs/usalli02.xls>>).

<sup>235</sup> SBA Advocacy Comments at 4.

<sup>236</sup> *Id.* at 5.

<sup>237</sup> See *Order*, *supra*, para. 12.

<sup>238</sup> See *id.*, *supra*, para. 14.

question. In such circumstances, the facsimile recipient's own advertisement would serve as evidence of the recipient's agreement to make the number available for public distribution.<sup>239</sup> If the sender obtains the number from sources of information compiled by third parties, the sender must take reasonable steps to verify that the recipient consented to have the number listed, such as calling or emailing the recipient. While the Commission is not requiring that any specific records be kept, should a question arise about how the facsimile number was obtained, the sender would need to demonstrate that it was voluntarily provided.<sup>240</sup> It is up to senders to determine the best way to do so if that becomes necessary.

82. The Junk Fax Prevention Act requires facsimile senders to include a notice on the first page of the unsolicited advertisement that instructs the recipient how to request that they not receive future unsolicited facsimile advertisements from the sender. In the *Order*, we require that all unsolicited facsimile advertisements contain a notice on the first page of the advertisement stating that the recipient is entitled to request that the sender not send any future unsolicited advertisements.<sup>241</sup> The notice must be separate from the advertising copy or other disclosures and placed at either the top or bottom of the fax. The notice also must include a domestic contact telephone number and a facsimile machine number, and at least one cost-free mechanism for transmitting an opt-out request. In the *Order*, the Commission concluded that a website address, email address, toll-free telephone number, or toll-free facsimile machine number will constitute "cost-free mechanisms" for purposes of the rules. For those facsimile senders that do not already have one of these mechanisms in place, they will need to implement one in order to give recipients a cost-free way of opting-out of faxes. In accordance with the statute, the mechanism must accept opt-out requests 24 hours a day, 7 days a week at the mechanisms identified in the notice.<sup>242</sup> The rules also require that highly involved fax broadcasters must ensure that the faxes it transmits on behalf of each sender contain the necessary information to allow a consumer to opt-out of a particular sender's faxes in the future.<sup>243</sup>

83. The new rules require that a facsimile sender that receives a request not to send future unsolicited advertisements that complies with the rules must honor that request within the shortest reasonable time from the date of such request, not to exceed 30 days from the date of such request and is prohibited from sending unsolicited advertisements to the recipient unless the recipient subsequently provides prior express invitation or permission to the sender.<sup>244</sup> Facsimile senders will need to take steps to remove such facsimile numbers from their faxing databases, or maintain do-not-fax lists to avoid sending advertisements to recipients that have opted out, within the shortest reasonable time, not to exceed 30 days. If a recipient subsequently provides the sender with his express permission to send advertisements, whether orally or in writing, the burden of proof rests with the sender to demonstrate that permission was given. Thus, we suggest that senders take steps to promptly document that they received such permission by, for instance, recording the oral authorization, or using established business practices

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<sup>239</sup> See *id.*, *supra*, para. 15.

<sup>240</sup> See *id.*

<sup>241</sup> See *id.*, *supra*, para. 24.

<sup>242</sup> See *id.*, *supra*, para. 29.

<sup>243</sup> See *Order*, *supra*, para. 38.

<sup>244</sup> See *Order*, *supra*, paras. 30-31.

or contact forms.<sup>245</sup>

#### **E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered**

84. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>246</sup>

85. In this *Order*, we adopt rules in accordance with the provisions in the Junk Fax Prevention Act. In doing so, we consider a number of alternatives to minimize the economic impact on small entities that must comply with the rules. In this *Order*, the Commission adopts an EBR exemption to the prohibition on sending unsolicited facsimile advertisements. The exemption will permit all entities, including small businesses, to send fax advertisements to their EBR customers without having to secure written permission from them first. In addition, the Commission was authorized by Congress to consider limiting the duration of the EBR. In the *Order*, the Commission determined not to limit the EBR and alternatively indicated it would closely monitor implementation of the new EBR exemption and opt-out policies adopted in the *Order*.<sup>247</sup> As part of its review, the Commission will evaluate the Commission's complaint data to determine whether the EBR exception has resulted in a significant number of complaints regarding facsimile advertisements and whether such complaints involve fax advertisements sent based on an EBR of a duration that is inconsistent with the reasonable expectations of consumers.<sup>248</sup>

86. In addition, the Junk Fax Prevention Act requires facsimile senders to include a clear and conspicuous notice on the first page of the unsolicited advertisement that instructs the recipient how to opt-out of future unwanted faxes. As discussed in the *Order*, the Commission considered defining clear and conspicuous to mean a notice that is on the first page of the advertisement and apparent to a reasonable consumer.<sup>249</sup> Alternatively, we considered providing additional guidance to ensure that consumers are aware of their opt-out rights and sending parties have standards by which they can comply with the law.<sup>250</sup> In the *Order*, the Commission determined that "clear and conspicuous" for purposes of the opt-out notice means a notice that would be apparent to a reasonable consumer and located on the first page of the fax advertisement. We further clarified that the notice must be separate from the advertising copy or other disclosures and placed at either the top or bottom of the fax.<sup>251</sup> However, we declined to

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<sup>245</sup> See *Order, supra*, para. 46.

<sup>246</sup> 5 U.S.C. § 603(c).

<sup>247</sup> See *Order, supra*, paras. 21-23.

<sup>248</sup> See *id., supra*, para. 23.

<sup>249</sup> See *id.*, para. 25.

<sup>250</sup> *Id.*

<sup>251</sup> See *id.*, para. 26.

adopt rules specifying the font type, size and wording of the notice.

87. The statute also requires that senders identify in their notices a cost-free mechanism for recipients to transmit opt-out requests to the senders. Rather than require senders to provide a toll-free telephone number for consumers to request that no future faxes be sent, the Commission chose an alternative approach that permits senders to use a website address, email address, toll-free telephone number, or toll-free facsimile number.<sup>252</sup> Allowing senders to use websites and email addresses should minimize any burdens on them, particularly small businesses for whom setting up a toll-free number might be costly. The Commission also determined that recipients must use the opt-out mechanisms identified by the senders in their notices so that such businesses, including small businesses, can more easily account for all opt-out requests and process them in a timely manner.<sup>253</sup>

88. In the *JFPA NPRM*, the Commission sought comment on whether to exempt small businesses from the requirement to provide a cost-free mechanism for a recipient to transmit an opt-out request.<sup>254</sup> As noted above, the Commission declined to require fax senders to offer a toll-free number for recipients to request that no future faxes be sent. Given that we are not mandating the use of toll-free numbers, as well as the support in the record for using websites and email addresses by small businesses, the Commission determined not to exempt small businesses from the cost-free mechanism requirement.<sup>255</sup> The Commission found that the record contained little empirical evidence that the costs associated with setting up a website or email address would be unduly burdensome to a small business given its revenues.<sup>256</sup>

89. The Commission also considered the burdens to businesses of having to comply with opt-out requests in the “shortest reasonable time.” The record revealed that some commenters support a period of 30 days within which senders must comply with opt-out requests. Other commenters support a shorter period of time for honoring do-not-fax requests, such as 10 or 15 days.<sup>257</sup> In the *Order*, the Commission determined to require senders to honor requests within the shortest reasonable time from the date of such request, not to exceed 30 days.<sup>258</sup> We believe this will permit both senders with large databases of facsimile numbers, as well as small businesses with limited resources, to remove numbers for individuals that opt-out of faxes.

90. Finally, the *Order* removes the Commission’s rule at section 64.1200(a)(3)(i) which requires the sender to obtain a signed, written statement indicating the recipient’s consent to receive facsimile advertisements.<sup>259</sup> The Commission determined instead that prior express invitation or

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<sup>252</sup> See *id.*, paras. 27-28.

<sup>253</sup> See *id.*, para. 34.

<sup>254</sup> *JFPA*, para. 22.

<sup>255</sup> See *Order, supra*, para. 27-28.

<sup>256</sup> *Id.*

<sup>257</sup> See *id.*, para. 30.

<sup>258</sup> See *id.*, para. 31.

<sup>259</sup> See *id.*, para. 11, n.38.

permission to send an advertisement may be given by oral or written means, including electronic methods. We noted that written permission could take many forms, including email, facsimile, and internet form. We believe this determination will permit small entities to obtain permission more easily from consumers who make inquiries, file applications, or request information.

#### **F. Report to Congress**

91. The Commission will send a copy of the *Order*, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the SBREFA.<sup>260</sup> In addition, the Commission will send a copy of the *Order*, including the FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Order* and the FRFA (or summaries thereof) will also be published in the Federal Register.<sup>261</sup>

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<sup>260</sup> See 5 U.S.C. § 801(a)(1)(A).

<sup>261</sup> See 5 U.S.C. § 604(b).

## Appendix C

Comments Filed

American Society of Travel Agents, Inc.	ASTA
American Society of Association Executives	ASAE
American Bar Association	ABA
American Financial Services Association	AFSA
America's Community Bankers	ACB
American Road & Transportation Builders	ARTBA
American Teleservices Association	ATA
ACA International	ACA
American Business Media	ABM
Attorneys General of Arkansas, Connecticut, Kentucky, and New Mexico	AGs
American Bankers Association	American Bankers Assoc
American Health Care Association	Am Health
American Hotel and Lodging Association	AHLA
Bank of America	Bank of America
B. Sachau	Sachau
Credit Union National Association	CUNA
Comerica Incorporated	Comerica
Coastal Training Technologies Corporation	CTTC
Consumer Bankers Association	CBA
Countrywide Home Loans	Countrywide
Direct Marketing Association	DMA
Electronic Privacy Information Center	EPIC
Douglas M. McKenna	McKenna
Everett Laboratories, Inc.	Everett Labs
Empire Corporate Federal Credit Union	Empire
Harold Hallikainen	Hallikainen
Huntington National Bank	Huntington Natl Bank
Housing Policy Council	HPC
International Foodservice Distributors Associations	IFDA
Independent Sector	IS
Jimmy Sutton	Sutton
Joint Comments of Direct Marketing Association, American Association of Advertising Agencies, Association of National Advertisers, Inc. and Magazine Publishers	Joint Associations
Joint Comments of Named State Broadcasters Association	State Broadcasters
Lorman Education Services	Lorman Ed Services
Michael Worsham	Worsham
Mortgage Finance Coalition	MFC
National Multi Housing Council	NMHC
National Association of Realtors	NAR
National Federation of Independent Businesses	NFIB
National Newspaper Association and Newspaper Association of America	NAA
National Association of Wholesaler-Distributors	NAWD

Newsletter & Electronic Publishers Association	NEPA
North American Equipment Dealers Association	NAEDA
National Independent Automobile Dealers Association	NIADA
Office of Advocacy, US Small Business Administration	SBA Advocacy
Privacy Rights Clearinghouse	PRC
Reed Elsevier, Inc.	Reed Elsevier
Robert Biggerstaff	Biggerstaff
Securities Industry Association	SIA
Society for Human Resource Management	SHRM
Sprint/Nextel	Sprint
Staples, Inc.	Staples
Texas Office of Public Utility Counsel	Texas OPC
Verizon	Verizon
Wayne G. Strang	Strang
Westfax, Inc.	Westfax
Yellow Pages Association	YPA

#### Reply Comments Filed

Robert Biggerstaff	Biggerstaff
CBS Corporation	CBS
Direct Marketing Association	DMA
Fax Ban Coalition	Fax Ban Coalition
Lorman Education Services	Lorman Ed Services
Douglas M. McKenna	McKenna
National Association of Realtors	NAR
National Association of Broadcasters	NAB
Wayne G. Strang	Strang
Texas Office of Public Utility Counsel	Texas OPC

#### Petitions For Reconsideration of 2003 Report and Order Filed

Air Conditioning Contractors of America (8/12/03)	Air Conditioning Contractors
American Association of Advertising Agencies, Association of National Advertisers, and National Association of Broadcasters (filed as AAAA/ANA/NAB) (8/25/03)	Advertising Agencies
American Business Media (8/25/03)	American Business Media
American Dietetic Association (8/6/03) (8/25/03)	Dietetic Association
American Society of Association Executives (7/25/03) (8/20/03)	ASAE
American Tire Distributors, Inc. (8/25/03)	American Tire
Association of Small Business Development Centers (filed as Donald Wilson) (8/11/03)	ASBDC
Biggerstaff, Robert (8/22/03)	Biggerstaff
Brautigam, Jr., Lawrence C. (8/25/03)	Brautigam
Brown, Dennis C. (8/18/03)	Brown
California Association of Realtors (8/25/03)	California Realtors



Chamber of Commerce of the United States, Associated General Contractors of America, Community Associations Institute, Credit Union National Association, National Association of Manufacturers, National Association of Wholesaler-Distributors, National Grocers Association, National Restaurant Association, and National Federation of Independent Business (filed as The Chamber of Commerce of the United States, et al.) (8/25/03)	Chamber of Commerce
Coalition for Healthcare Communication (8/25/03)	Coalition for Healthcare
Consumer Bankers Association (8/26/03 – LATE FILED)	Consumer Bankers
Consumer Electronics Association (8/21/03)	Consumer Electronics
Copia International, Ltd. (filed as Steve Hersee) (8/25/03)	Copia
Direct Marketing Association (8/25/03)	DMA
FaxDaily (filed as John Mayhill) (8/12/03)	FaxDaily
Faxts, Inc. (filed as Edwin Solot) (8/22/03)	Faxts
Financial Services Coalition (8/25/03)	Financial Services Coalition
Independent Insurance Agents and Brokers of America (8/25/03)	Independent Insurance Agents
Independent Sector (filed as Patricia Read) (8/25/03)	Independent Sector
Jobson Publishing LLC (8/25/03)	Jobson
Maryland Association of Nonprofit Organizations (filed as Henry W. Bogdan) (8/25/03)	Maryland Nonprofit
National Association of Business Political Action Committees (8/25/03)	Business PACs
National Association of Chain Drug Stores (8/25/03)	Chain Drug Stores
National Association of Realtors (8/25/03)	NAR
National Retail Federation (8/4/03) (refiled 9/17/03)	National Retail
Newsletter & Electronic Publishers Association (8/15/03)	Newsletter & Electronic Publishers
Newspaper Association of America and the National Newspaper Association (filed as Newspaper Association of America) (8/22/03)	Newspaper Association
Nextel Communications, Inc. (filed as Nextel Communicaitons, Inc.) (8/25/03)	Nextel
Office of Advocacy, U.S. Small Business Administration (8/25/03)	Office of Advocacy
Presidential Classroom for Young Americans Inc. (8/20/03)	Presidential Classroom
Produce Marketing Association (8/18/03)	Produce Marketing
Proximity Marketing (8/6/03) (8/25/03)	Proximity Marketing
Reed Elsevier Inc. (8/25/03)	Reed Elsevier
Scholastic Inc. (8/21/03)	Scholastic
Travel Industry Group (8/25/03)	Travel Industry Group
Wells Fargo & Company (8/25/03)	Wells Fargo
Yellow Pages Integrated Media Association (8/25/03)	Yellow Pages

**Oppositions to Petitions for Reconsideration Filed**

National Association of State Utility Consumer Advocates (10/14/03) (filed as NASUCA)	NASUCA
Oney, Walter (9/23/03)	Oney
Strang, Wayne G. (10/20/03)	Strang
Yellow Pages Integrated Media Association (10/14/03)	Yellow Pages
YP.Net (10/14/03)	YP.Net

**Replies to Oppositions Filed**

America's Community Bankers (11/3/03) (filed as America Community Bankers)	Community Bankers
Biggerstaff, Robert (10/31/03)	Biggerstaff
National Association of Wholesaler-Distributors (11/5/03)	Wholesaler-Distributors
National Federation of Independent Business (11/3/03)	NFIB
Office of Advocacy, U.S. Small Business Administration (10/30/03)	Office of Advocacy