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THE JUNK FAX PREVENTION ACT OF 2004

HEARING

BEFORE THE

SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

JUNE 15, 2004

Serial No. 108–87

Printed for the use of the Committee on Energy and Commerce

Available via the World Wide Web: http://www.access.gpo.gov/congress/house

U.S. GOVERNMENT PRINTING OFFICE

95–441PDF WASHINGTON : 2004

For sale by the Superintendent of Documents, U.S. Government Printing Office
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CONTENTS

	Page
Testimony of:	
Graham, John H., President and Chief Executive Officer, American Society of Association Executives	18
Kaechele, Cheryl, Publisher, Allegan County News	23
McDonald, Walt, President, National Association of Realtors	11
Snowden, K. Dane, Chief, Consumer and Government Affairs Bureau, Federal Communications Commission	6
Material submitted for the record by:	
Brady, Phillip D., President, National Automobile Dealers Association, prepared statement of	34

THE JUNK FAX PREVENTION ACT OF 2004

TUESDAY, JUNE 15, 2004

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON TELECOMMUNICATIONS
AND THE INTERNET,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2322 Rayburn House Office Building, Hon Fred Upton, (chairman), presiding.

Members present: Representatives Upton, Cox, Deal, Shimkus, Buyer, Walden, Barton (ex officio), Markey, and Wynn.

Staff present: Kelly Cole, majority counsel; Will Nordwind, majority counsel and policy coordinator; Will Carty, legislative clerk; and Peter Filon, minority counsel.

Mr. UPTON. Good morning. Today's hearing is on the Junk Fax Prevention of 2004, which I plan on introducing tomorrow, hopefully with strong bipartisan support.

In 1991, Congress passed the Telephone Consumer Protection Act, which included landmark legislation that protected consumers from receiving unwanted and unsolicited commercial faxes. And for over 10 years, the FCC had interpreted that law to provide businesses with an exception to the general ban when they faxed commercial or advertising material to their existing business customers.

Then in 2003, the FCC made a major change in its interpretation of the law. Under the new FCC rules, every business, small, large, home-based, every association, every non-profit organization and every charity, would be required to obtain prior written approval from each individual before it sent a commercial fax. The logistical and financial costs of the new FCC rules, particularly to small business and non-profit associations, would be enormous, staggering.

For instance, a survey by the United States Chamber of Commerce suggested the cost to the average small business would be at least $5,000 in the first year and more than $3,000 every year after. The survey further indicates that it would take, on average, more than 27 hours of staff time to obtain the initial written consent from their customers and an additional 20 hours each year to keep the forms current.

Recent survey by the National Association Wholesale Distributors revealed that its member companies expected to pay an average of $22,500 just to obtain the consent forms. With our economy

in the fragile stages of an economic recovery, I would much rather see those dollars going toward production and job creation.

Given the dramatic impact which the new rules would have, last August, just before the new rules were to go into effect, Billy Tauzin and I wrote the FCC and requested that the FCC delay the effective date of the new rules. Thankfully, the FCC did; in fact, stayed the effective date until January 1 of 2005. Moreover, while the FCC currently has the new rules under reconsideration, I think it is the wisest course for Congress to step in and fix the law to resolve any lingering statutory interpretation problems which led to the FCC's new rules, and that is why we are here today.

The Junk Fax Prevention Act would clearly reinstate the established business relationship exemption to allow businesses, associations and charities to send commercial faxes to their customers and members without first receiving written permission. Additionally, the bill would establish ne opt-out safeguards to provide additional protections for fax recipients. Under the bill, senders of faxes must alert recipients of their right to opt out for future faxes and must abide by such requests. And, finally, the bill sets out FCC reporting requirements so that Congress can monitor the FCC's enforcement activity.

This act, I think, is common sense regulatory relief, and time is of the essence for Congress to pass it since many businesses will very soon need to begin making arrangements to be in compliance with the new rules by January of 2005. So I would ask my colleagues—tell my colleagues that I intend to introduce the bill tomorrow and expedite its consideration in both this subcommittee as well as the full committee perhaps as early as next week.

I look forward to hearing from today's witnesses, particularly my constituent and friend Cheryl Kaechele of the Allegan County News, which covers a good share of my congressional district. We appreciate all of you coming all this way, and I would yield to my friend and ranking member of the subcommittee, Mr. Markey, for an opening statement.

Mr. MARKEY. Thank you, Mr. Chairman, and thank you for having this hearing. Mr. Chairman, I was the principal House sponsor of the Telephone Consumer Protection Act of 1991, which addressed issues affecting telemarketing, automated dialing machines, pre-recorded messages and junk faxes, among other issues. Congress endorsed my call in 1991 for a general prohibition against just faxes because of the intrusive nature of that form of advertising.

Junk faxes represent a form of advertising in which the ad is essentially paid for by the recipient. The recipient of a junk fax pays for the fax paper and printer costs, pays in the form of precious time as lost, as the machine is tied up, and also in the form of the clutter in which important faxes are lost in the midst of a pile of junk faxes.

For these reasons and for additional important consumer privacy interests, I believe it is important that Congress retain the general prohibition against junk faxes and the essential enforcement remedies contained in the 1991 law which the draft legislation leaves in tact.

During the original implementation of the TCPA's junk fax provisions, the Federal Communications Commission included an exception to the general prohibition against sending a junk fax for established business relationships. In the statutory provisions addressing telephone solicitations, this term was included in the law to capture the notion of business relationships between commercial entities as well as relationships between entities and residential consumers that were not incidental or minor but voluntary two-way relationships.

This concept of an established business relationship permitted a commercial entity to invoke its ability to prove such a relationship with a consumer in order to contact that consumer in spite of the general prohibitions of the law. It was hoped that business relationships with consumers that were so established would be consistent with consumer expectations and not lead consumers to resent the contact or get irate at receiving such commercial solicitations.

The FCC has more recently determined that the term, "established business relationship," was not specifically included in the provisions addressing junk faxes and the TCPA and, therefore, rescinded this regulatory exception. The new rules require written permission from consumers and these new rules have been stayed from going into effect until January of 2005.

The legislation before us is designed to put specific language into the statute permitting an established business relationship to the general prohibition against junk faxes. Many businesses have complained that written permission is too onerous a regulatory requirement. While many other faxes that they stipulate are routinely sent in the ordinary course of business, presumably without complaints from the recipients of such faxes.

The draft is responsive to these complaints from many businesses. We must recognize, however, that many small business and residential consumers find many of these faxes to be a considerable irritant and strongly object to receiving them. The legislation, therefore, addresses additional issues.

First, the draft bill includes important consumer provisions that will avail consumers of the opportunity to stop junk faxes being sent to them, even under the established business relationship exception. This is something that wasn't in the original law, nor in the FCC's previous regulations, but it represents an important addition to the statute. My feeling is that even if a commercial entity can prove it has an established business relationship which allows it to legally send an unsolicited fax to a consumer, many consumers may still object and want to stop all future faxes.

The draft bill, therefore, requires entities to include on the first page of the unsolicited advertisement a notice informing consumers that they have the right not to receive any future junk faxes from the entity. And this notice must also include a domestic contact telephone and fax number for the consumer to express that request. This is an important right for consumers to have, and they shouldn't have to call Canada or the Cayman Islands to reach someone to object to receiving junk faxes.

Moreover, I think it is important to take a comprehensive look at overall enforcement of the junk fax law. While the existing stat-

ute has permitted consumers to take action in court to seek redress from jun fax senders, and this has served as a deterrent to some, I am concerned that some of the most egregious junk fax operations, the entities to broadcast such faxes to millions often escape enforcement. They may be found guilty, cited by the FCC and sometimes fined, but often it appears as if they either ignore the fine, skip town or live overseas.

For these reasons, the bill includes provisions that will give us an annual accounting of the FCC's enforcement activities, as well as a GAO analysis of what additional enforcement tools may be necessary to provide support deterrent, especially to the most egregious and abusive junk fax senders. I am hopeful that this legislation proceeds through the committee, that we can continue fine tune the bill and strengthen its consumer protection provisions.

I want to commend you, Chairman Upton, for your willingness to work with me and Ranking Member Dingell, and we look forward to continuing our progress on this bill with Chairman Barton and the other colleagues in the coming weeks. Thank you.

Mr. UPTON. Thank you. The Chair would recognize the chairman of the full committee, Mr. Barton, for an opening statement.

Chairman BARTON. Thank you, Chairman Upton. I appreciate the opportunity to testify today and appreciate you holding this hearing on the Junk Fax Prevention Act of 2004. I want to commend you for the bipartisan effort to make sure that this bill can become law this year.

The committee has tackled many issues that frustrated consumers, including telemarketing and spam. Today, we are going to tackle junk faxes. There is nothing in this bill that will make it easier to send unsolicited faxes to consumers. Current law does not allow companies, organizations, businesses or charities to fax unsolicited advertisements, and this bill makes no changes to those strong consumer protections.

What the bill does do is remedy a problem in the original Telephone Consumer Protection Act. For those companies and associations with an existing business relationship, this bill would allow commercial faxes to be sent to those relationships. Without a law to fix this problem, all organizations will be forced to get written permission for each fax that it sends. This would present a huge logistical and financial hurdle that would have an enormous negative impact.

For instance, school associations would be forced to initiate the tedious process of collecting written permission slips from its thousands of member just to send a fax. Small businesses who market on a national level would be pulled away from running their businesses to manually contact each customer to get permission to send them a fax. This bill will remove that hurdle and allow commercial faxing without written permission if there is an existing business relationship.

But the bill goes a step further. If those who have an existing business relationship choose that they no longer wish to receive a commercial fax, this bill would give them the right to opt out of receiving future faxes. This is a strong protection that would provide a necessary fix to the current law. It properly, in my opinion, balances the need for efficient and effective communication between

businesses and its customers and also provides the required consumers protections to ensure those who don't want faxes don't receive faxes.

I look forward to working at the full committee, not only with Chairman Upton, Ranking Member Markey but with the ranking member of the full committee, Mr. Dingell, if we need to improve this bill. The Junk Fax Prevention Act is a good step and right direction, and I hope that we can move it through it subcommittee, full committee, through the House, through the Senate and on to the President's desk sometime this year.

I want to thank you, Mr. Upton, for your strong work on this, and I would yield back the balance of my time.

Mr. UPTON. Thank you. Mr. Wynn?

Mr. WYNN. Thank you, Mr. Chairman.

Mr. UPTON. Mr. Shimkus?

Mr. SHIMKUS. I woll also defer.

Mr. UPTON. Mr. Deal?

Mr. DEAL. I defer.

Mr. UPTON. At this point, I will ask unanimous consent that all members have an opportunity to put their opening statements in as part of the record, and we will proceed with the panel.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. PAUL E. GILLMOR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

I would like to thank the Chairman for calling us here to not only examine the details of the Junk Fax Prevention Act, but also to address both consumer and industry concerns with regard to the FCC's unsolicited fax advertisement rules scheduled to be implemented on January 1st of next year.

Of note, I welcome the well-balanced panel of witnesses and look forward to hearing more about the history of this rulemaking as well as its recent revisions and potential impacts on the parties represented today.

Like the measure before us, we should continue to focus our efforts on maintaining a balance of protecting businesses and consumers' privacy while at the same time ensuring that those who market them are not overly burdened.

Again, I thank the Chairman and yield back the remainder of my time.

PREPARED STATEMENT OF HON. BARBARA CUBIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WYOMING

Thank you, Mr. Chairman.

I look forward to our hearing today on stemming the scourge of "junk faxes." This problem goes back many years and many Congresses. In 1991, the Congress essentially banned "junk faxes," referred to as "unsolicited advertisements" under the Telecommunications Consumer Protection Act (TCPA). The law did, however, allow for "prior express invitation or permission" to be given by the intended recipient of the fax. This "permission" must have been what the FCC interpreted as authorizing unsolicited faxes under an "existing business relationship." Unfortunately, since these laws and regulations went on the books, they have not been effective in stemming instances of "junk faxes" clogging consumer's fax machines.

In an effort to shore up the rules, the FCC whipsawed in the other direction, and last summer revised its regulations to require written authorization to be provided for folks to receive these unsolicited advertisements. Now I am hearing that these regulations are too restrictive.

No one wants to unduly burden legitimate commerce. But I think everyone would agree with me that we need to reduce, and hopefully eliminate, the abuses that have been going on for years. I am not certain, however, that an existing business relationship is the best avenue to protect consumers. Perhaps the better course is to clarify what constitutes "prior express invitation or permission" to receive these faxes. After all, we are in an electronic age, where electronic signatures are allowed

for commerce, even paying one's taxes to the I.R.S., so why can't we leverage technology to help expedite a recipient's authorization?

I would like to hear from the FCC what they could do to improve the rule, in light of the outcry we've heard since last August, to address the concerns of the groups represented here, while keeping in mind that it is consumers, small businesses, and other fax owners who bear the cost-shifting burden of paper and toner that fax spamming entails.

That's why I look forward to hearing from our distinguished panel on these matters Today and look forward to a productive dialog on solutions for this very real problem.

I yield back the balance of my time.

Mr. UPTON. We are pleased to say that we have Mr. Dane Snowden, Chief of the Consumer and Government Affairs Bureau from the FCC here with us today, along with Mr. Walt McDonald, president of the National Association of Realtors thank you for making the trip; Mr. John Graham, president and chief executive officer of the American Society of Association Executives, and Ms. Cheryl Kaechele, publisher of the Allegan County news from Allegan, Michigan on behalf of the National Newspaper Association.

We appreciate your testimony being submitted in advance, and if you could limit your opening statement to about 5 minutes, that would be terrific, and Mr. Snowden, we will start with you. Thank you for being with us this morning.

STATEMENTS OF K. DANE SNOWDEN, CHIEF, CONSUMER AND GOVERNMENT AFFAIRS BUREAU, FEDERAL COMMUNICATIONS COMMISSION; WALT MCDONALD, PRESIDENT, NATIONAL ASSOCIATION OF REALTORS; JOHN H. GRAHAM, PRESIDENT AND CHIEF EXECUTIVE OFFICER, AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES; AND CHERYL KAECHELE, PUBLISHER, ALLEGAN COUNTY NEWS

Mr. SNOWDEN. Thank you. Good morning, Chairman Upton, Ranking Member Markey and members of the subcommittee. My name is Dane Snowden, and I am the Chief of the Consumer and Governmental Affairs Bureau at the FCC. I appreciate the opportunity to appear before you, and I look forward to discussing both the history of the rules on the transmission of unsolicited fax advertisements under the Telephone Consumer Protection Act, as well as the FCC's role in implementing and enforcing these rules.

As many of you know, Congress passed the TCPA in 1991 in an effort to address a growing number of telephone marketing calls and certain telemarketing practices Congress found to be an invasion of consumer privacy and even a risk to public safety. The statute also restricts the use of telephone fax machines to send unsolicited advertisements, making it unlawful, "to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." The TCPA's fax provision acts as a ban on fax advertisements unless the recipient has given prior express invitation or permission to receive the fax.

In adopting rules in 1992 to implement the TCPA, the Commission stated that the statute leaves the Commission without discretion to create exemptions from or limit the effects of the fax prohibition. The Commission indicated however that fax transmissions from persons or entities that have an established business relation-

ship with the recipient can be deemed to be invited or permitted by the recipient.

In 2002, the Commission initiated a rulemaking proceeding to update its rules under the TCPA. A part of that review included the restrictions on fax advertising. Specifically, we sought comment on the continued effectiveness of the fax rules, including whether an established business relationship establishes the requisite express permission to receive fax advertisements. We also sought comment on any developing technologies that might warrant revisiting the rules. The record we compiled indicated the many individuals and businesses are in fact inundated with unsolicited faxes.

Some commenters explained that advertisers continue to send faxes despite efforts to be removed from the sender's fax lists. Again, according to the record, such faxes can be burdensome and costly to receive.

The Commission in 1992 found that "prior express invitation or permission" could be interpreted broadly enough to allow an "established business relationship" to suffice. However, a more extensive consideration of the statutory language in our 2003 rulemaking, informed by enforcement experience, led us to a different outcome.

The record revealed that inclusion of an established business relationship within the meaning of prior express permission had resulted in consumers and businesses alike, particularly small businesses, assuming the unwanted advertising costs of faxing of any entity with which they conduct business. Therefore, based on the record before us, we reversed our prior conclusion that an established business relationship provides companies with the necessary express permission to send faxes to their customers. We instead determined that companies that wish to fax unsolicited advertisements to customers must obtain their express permission before transmitting faxes to them.

Under the revised rules, which will not become effective until January 1 of 2005, such permission must be provided in writing and include the recipient's signature and fax number. This written permission requirement was designed to ensure that consumers and businesses have a means to control the messages sent to their fax machines. Since the FCC adopted rules to implement the TCPA, the Commission has aggressively enforced the rules on sending fax advertisements despite the fact that identifying and tracking down the senders of junk fax messages can be, and quite frankly is, a very difficult task.

Complaints filed with the Commission often contain insufficient information for the FCC to pursue alleged violations, primarily because some fax senders do not include adequate identification information or a working telephone number on their faxes. Instead, senders of junk faxes often disguise their identities with aliases, acronyms or simply provide no identifying information whatsoever. Nevertheless, under Chairman Powell, the Commission, through our enforcement bureau, has been able to identify violators and issue forfeiture orders totaling $6.9 million in penalties for junk faxing. The Commission has also issued over 233 citations for faxes sent in violation of the TCPA. Most recently, the Commission issued a forfeiture of nearly $5.4 million against fax.com for violating the TCPA and FCC's junk fax rules.

As part of our normal rulemaking process, the Commission is currently reviewing the numerous petitions filed seeking review of the fax rules. Many such petitions are from entities that did not comment on the fax rules in our 2003 proceeding, including each of the panelists here today. Since the release of our item, they, along with others, argue that the elimination of the established business relationship exemption, on which businesses have come to rely, will cause serious disruption to routine business operations. They point out that for businesses in trade or membership associations, the fax machine continues to be a valuable tool for communicating with customers and conducting routine business.

Because these petitions are currently pending before the Commission, I am extremely limited as to what I can say about them. I will, nevertheless, endeavor to answer as many of your questions as I can. The goal of the TCPA is to protect consumers from certain marketing practices that can be intrusive and costly. As companies continue to advertise via fax, we must ensure that consumers and businesses alike have a means to control the messages they receive on their fax machines.

I thank you, and I look forward to answering any of your questions.

[The prepared statement of K. Dane Snowden follows:]

PREPARED STATEMENT OF K. DANE SNOWDEN, CHIEF, CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU, FEDERAL COMMUNICATIONS COMMISSION

I. INTRODUCTION

Good morning Chairman Upton, Ranking Member Markey, and members of the Subcommittee. My name is K. Dane Snowden, and I am Chief of the Consumer & Governmental Affairs Bureau of the Federal Communications Commission ("FCC" or "Commission"). I appreciate this opportunity to appear before you to discuss the history of the rules on the transmission of unsolicited facsimile advertisements under the Telephone Consumer Protection Act of 1991 (TCPA), as well as the FCC's role in implementing and enforcing these rules.

In 2002, the FCC initiated a rulemaking proceeding to update its rules under the TCPA, which culminated in the establishment of the popular and successful national "do-not-call" registry. While the do-not-call registry certainly garnered a great deal of media attention with over 60 million telephone numbers now registered on the list, the Commission undertook at the same time a comprehensive review of the unsolicited fax rules under the TCPA. The Commission asked for public comment on the effectiveness of those rules and on any developing technologies that might warrant revisiting the restrictions on fax advertising. Based on the FCC's own extensive enforcement experience and on the record before us, the Commission revised the rules implementing the TCPA to require any entity transmitting a fax advertisement to first obtain the recipient's express permission in writing. We concluded that an established business relationship would no longer be sufficient to constitute the necessary permission under the TCPA to allow the lawful transmission of an advertisement to a person's fax machine. I appreciate this opportunity to explain the Commission's action in 2003 and how these revised rules differ from our prior ruling in 1992 on sending fax advertisements.

II. BACKGROUND

A. The TCPA and 1992 Commission Rules

On December 20, 1991, Congress passed the TCPA to address a growing number of telephone marketing calls and certain telemarketing practices Congress found to be an invasion of consumer privacy and even a risk to public safety. The statute also restricts the use of telephone facsimile machines to send unsolicited advertisements, making it unlawful "to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." In addition, the TCPA requires all fax messages to identify the sender on the first page or on each page of a transmission.

It is important to emphasize that the TCPA treats fax advertising differently than it does telemarketing calls. In defining a "telephone solicitation," the TCPA excludes calls to consumers with whom a company has either their "prior express invitation or permission" or an "established business relationship." Thus, a company may make a telemarketing call to an existing customer. If that customer asks not to be called again, the company must place the consumer on its company-specific do-not-call list and honor the consumer's request not to be called. The TCPA does not, however, expressly exempt from its fax provision those faxes that are sent to "established business relationship" customers. Instead, the TCPA's fax provision acts as a ban on fax advertisements unless the recipient has given "prior express invitation or permission" to receive the fax. Neither the statute nor the legislative history contemplates a mechanism for consumers to "opt out" of unwanted fax transmissions, as is the case with telemarketing calls.

In adopting rules in 1992 to implement the TCPA, the Commission stated in its Report and Order that the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the fax prohibition. The Commission noted, however, that fax transmissions from persons or entities that have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient. The Commission subsequently made clear in 1995 that the existence of an established business relationship between a fax sender and recipient establishes consent to receive telephone facsimile advertisement transmissions.

B. Enforcement

Since the FCC adopted rules to implement the TCPA, the Commission has aggressively enforced the rules on sending fax advertisements, despite the fact that identifying and tracking down the senders of junk fax messages can be a difficult task. Complaints filed with the Commission often contain insufficient information for the FCC to pursue alleged violations—primarily because fax senders do not include adequate identification information or a working telephone number on their faxes. Instead, senders of junk faxes often disguise their identities with aliases, acronyms, or simply provide no identifying information whatsoever.

It is also worth noting that the obstacles that senders of junk faxes use to avoid identification create a significant challenge for enforcement action within the one-year statute of limitations period for proposing forfeiture penalties. This is because before the Commission can consider a forfeiture penalty against most senders of junk faxes, it is required under section 503 of the Communications Act to issue a warning citation to any violator that does not hold a Commission authorization (which would include most fax senders). Only if the non-licensee violator subsequently engages in conduct described in the citation may the Commission propose a forfeiture, and the forfeiture may only be issued as to the subsequent violations. Nevertheless, the Commission has issued forfeiture orders totaling over $6.9 million in penalties for junk faxing. The Commission has also issued 233 citations for faxes sent in violation of the TCPA. Most recently, the Commission issued a forfeiture of nearly $5.4 million against Fax.com for violating the TCPA and the Commission's junk fax rules. This enforcement action marked the largest forfeiture the Commission had ever issued with respect to the sending of unlawful faxes.

Despite a general ban on unsolicited facsimile advertisements, and aggressive enforcement by the Commission, unwanted faxed advertisements have proliferated, particularly as facsimile service providers (or fax broadcasters) enable sellers to send advertisements to multiple destinations at relatively little cost.

III. RECENT COMMISSION ACTION

Against this backdrop, the Commission decided to review the fax rules under the TCPA when it took up the telemarketing rules in September of 2002. In a Notice of Proposed Rulemaking, the Commission sought comment on both telemarketing and fax practices and asked whether any of the rules should be revised to ensure the TCPA's mandate was being carried out. Specifically, we sought comment on the continued effectiveness of the fax rules, including whether an established business relationship establishes the requisite express permission to receive faxed advertisements, and on any developing technologies that might warrant revisiting the rules.

With regard to the effectiveness of the rules under the existing regime, the record we compiled indicated that many individuals and businesses are, in fact, inundated with unsolicited faxes. Some commenters explained that advertisers continue to send them faxes despite efforts to be removed from senders' fax lists. The record revealed that, in addition to the cost of paper and toner associated with receiving faxes, consumers and businesses—both small and large—are burdened by the time spent reading and disposing of faxes. In addition, the record demonstrated that

when fax machines must print unsolicited advertisements and are not operational for other purposes, there is a loss in productivity for those businesses.

In reviewing whether an established business relationship between a fax sender and recipient establishes the requisite express permission to receive facsimile advertisements, the Commission received comments from a small number of businesses that opposed the elimination of the established business relationship "exemption" for faxing. These businesses argued that doing so would interfere with ongoing business relationships and raise business costs. Consumer advocates, however, maintained that the TCPA requires companies to obtain express permission from consumers—even their existing customers—before transmitting a fax to a consumer. They argued that consumers should not have to 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, without their permission. Some businesses indicated that facsimile advertisements interfere with receipt of faxes connected to their own business, and that the time spent collecting and sorting such faxes increases their own labor costs.

In addition, the Commission reviewed closely the express language of the TCPA and its legislative history. One of Congress's primary concerns behind the TCPA was to protect the public from bearing the costs of unwanted advertising. It restricts certain practices found to impose unacceptable costs on consumers, such as autodialed calls to wireless numbers and unsolicited advertisements sent to fax machines. Although the TCPA expressly excludes calls to persons with whom a company has an "established business relationship" from the restrictions on "telephone solicitations," it does not contain a similar exception from the fax prohibition. Similarly, the legislative history describes the need to protect ongoing business relationships in terms of companies being able to make telemarketing calls to their customers. It contains no similar references to an established business relationship for fax senders. As some commenters pointed out, Congress initially included in the TCPA an EBR exemption for sending faxes, but removed it from the final version of the statute. Instead, the legislative history focuses exclusively on the concern that, in the words former Representative Matthew Rinaldo (R-NJ), "unsolicited and unwanted faxes can tie up a machine for hours and thwart the receipt of legitimate and important messages."

Although the Commission in 1992 noted that "prior express invitation or permission" could be interpreted broadly enough to allow an "established business relationship" to suffice, a more extensive consideration of the statutory language in our 2003 rulemaking informed by our enforcement experience, led us to a different outcome. The record in our proceeding revealed that inclusion of an established business relationship within the meaning of prior express permission had resulted in consumers and businesses assuming the unwanted advertising costs of faxing, of any entity with which they conduct business. Therefore, we reversed our prior conclusion that an established business relationship provides companies with the necessary express permission to send faxes to their customers. We instead determined that companies that wish to fax unsolicited advertisements to customers must obtain their express permission before transmitting faxes to them. Under the revised rules (which will not become effective until January 1, 2005), such permission must be provided in writing, including through electronic mail, and include the recipient's signature and facsimile number. This written permission requirement was intended to ensure that consumers and businesses have a means to control the messages sent to their fax machines.

IV. CURRENT STATUS OF FAX RULES

Following the release of the Commission's 2003 Report and Order, businesses, associations, and other entities that advertise via fax filed comments indicating that obtaining written permission from persons to whom they fax will be burdensome—both time consuming and costly. In light of these additional claims, the Commission immediately stayed the effective date of the written consent requirement until January 1, 2005. In the interim, we also concluded that businesses could continue to rely on an established business relationship for permission to send fax advertisements. And, we clarified that the time limitations on the duration of an established business relationship for telephone solicitations—18 months from any purchase or transaction and 3 months from an inquiry or application—would not apply to the sending of unsolicited advertisements.

The stay has provided the Commission with an opportunity to review industry and consumer concerns. As part of our normal rulemaking process, numerous petitions have been filed with the Commission, seeking review of the fax rules. Many

such petitions are from entities not involved in our 2003 proceeding. These petitioners have asked the Commission to reinstate the established business relationship "exemption" for faxing and to allow businesses to secure permission orally or via fax. They argue that elimination of the established business relationship exemption, on which businesses have come to rely, will cause serious disruption to routine business operations. They point out that businesses and membership and trade associations use the fax machine to send customers a variety of communications, such as invitations to conferences and event, pricing sheets, announcements of weekly specials and real estate listings. According to these businesses, the fax machine continues to be a valuable tool for communicating with customers and conducting normal business. Because these petitions for reconsideration are currently before the Commission, I am extremely limited as to what I can say about the Commission's deliberations regarding these matters.

V. CONCLUSION

The goal of the TCPA is to protect consumers from certain marketing practices that can be intrusive and costly to the consumer. As companies continue to advertise via facsimile, we must ensure that consumers and businesses have a means to control the messages they receive on their fax machines.

I look forward to answering any questions you have.

Mr. UPTON. Thank you.

Mr. McDonald.

STATEMENT OF WALT MCDONALD

Mr. MCDONALD. Chairman Upton, Representative Markey and members of the subcommittee, my name is Walt McDonald, and I am president of the National Association of Realtors. NAR is the Nation's largest trade association with over 1 million members. Our members include brokers, salespeople, property managers and other professionals engaged in every aspect of the real estate business.

I appreciate the opportunity to share some thoughts with you regarding the Junk Fax Prevention Act of 2004 and commend this subcommittee for its leadership in recognizing that the Federal Communication Commission's revised rules governing the use of facsimile transmission are a radical departure from current practice and would significantly interfere with day-to-day business activities.

First, let me say that NAR members understand and strongly support the goal of the Telephone Consumer Protection Act. Realtors themselves are recipients of unsolicited fax that tie up our business fax machines. NAR does, however, question the need for change that the FCC has made to the TCPA rules. The prior rule with its established business relationship exception has worked well over the past 12 years. In reversing its rule, the Commission did not note any consumer complaints with the result of the established business relationship rule. However, it is clear that the Commission revised rule to address unsolicited fax will have the unintended consequences of interfering with solicited fax.

Despite all the advantages in technology, the prices of buying and selling a home is still dependent upon fax. While fax are most commonly used today to facilitate the paperwork associated with home sales, fax also are used in ways that could be construed as advertisement and would therefore meet the FCC definition of an unsolicited fax. Real estate professionals use fax to communicate quickly with consumers who have contacted them about real estate.

Take the case of a seller looking for an agent to list their home. After an initial phone call, an agent routinely will offer to fax comparable market analysis for seller's review prior to an actual meeting. This CMA provides comparable listing data on homes on markets, describes what the agent will do to market the home and proactively solicits the listing. Under the revised rule, faxing is presentation or even information on other homes on the market would not be permissible without prior signed permission.

Real estate brokers and agents also use fax to send home listing information directly to potential buyers upon request. Under the revised rule, a real estate agent could no longer follow up with consumer inquiries with a fact of available properties. In a tight housing market, which we have experienced throughout the country, the delay caused by having to obtain written permission could mean the difference between a buyer getting the house they want or losing it.

Consider, too, how awkward this scenario would be when a potential customer calls and asks for information on a home for sale. Under the revised rule, the agent would not be able to fax the information. Instead, the agent would have to explain why he can't fax the information direct to consumer to a web site where they can provide the required written consent or for an address so that the agent can mail or courier the information along with the consent form for future use.

This will cause frustration, suspicion and in some cases I think ill will. This wold be a giant step backwards in a business where good customer service depends on quick turnaround time. Similarly, NAR and its State and local associations routinely fax communications to their members. These faxes inform members about upcoming continuing education classes or products and services available to them. And sometimes at member-preferred pricing. Once again, since these opportunities are available for a fee, these faxes would meet the definition of an unsolicited fax.

The FCC has argued that obtaining written permission is not difficult. We disagree. Each of the means proposed by the FCC for obtaining a written permission, the face-to-face meeting, direct mail, emails with electronic signatures all present a challenge for consumers. Interestingly enough, one technology which is fast, inexpensive and widely available is not an allowed means of distributing or returning the permission form. That technology is a fax. In discussion with the FCC staff, they have indicated that faxing the permission form would not be allowed since the form could be construed as a solicitation for which written permission is needed.

Finally, we would like to have been able to quantify for you some of the costs associated with the implementation of these FCC rules. Unfortunately, though, we are unable to predict how many of the 1 million realtors and approximately 12 million home sellers and buyers would have had to interact if they revised rules had been in place last year when 6 million homes were sold throughout the country.

In our written testimony; however, we have presented some conservative simple assumptions. We estimate that over 67 million written permissions would have to be required to sustain last year's roughly 6 million home sales. Obviously, the dollar cost in-

volved in preparation, distribution and management of the 67 million forms would be sizable, and a result NAR believes that it is critical that the established business relationship exception which has functioned well since the FCC first issued the rules to implement the TCPA some 12 years ago. We think it is important that they be reestablished and that alternate means of giving consent be allowed. We believe that narrowly drafted technical correction language of the Junk Fax Act can rectify the problem created by the new rules and continue to protect consumers from unwanted faxes that are already prohibited under TCPA rules.

We look forward to working with you to achieve this end, and thank you for the opportunity to be here today.

[The prepared statement of Walt McDonald follows:]

PREPARED STATEMENT OF THE NATIONAL ASSOCIATION OF REALTORS®

Chairman Upton, Representative Markey, and Members of the Subcommittee, the NATIONAL ASSOCIATION OF REALTORS® (NAR) appreciates the opportunity to share its thoughts regarding the Junk Fax Prevention Act of 2004. NAR is the nation's largest professional trade association with a million members who belong to over 1500 REALTOR® associations and boards at the state and local levels. NAR membership includes brokers, salespeople, property managers, appraisers and counselors as well as others engaged in every aspect of the real estate industry.

NAR commends the Subcommittee for its leadership in recognizing that the Federal Communication Commission's (FCC) revised rules governing the use of facsimile transmissions are a radical departure from current practice, would significantly interfere with day-to-day businesses activities and impose a significant new compliance burden on business of all types.

NAR understands the goal of Congress in enacting the Telephone Consumer Protection Act (TCPA) to protect consumers' privacy expectations to not be bothered by unwanted faxes. As business people and consumers, REALTORS® are often the recipients of unsolicited faxes that tie up the fax machines vital to their real estate practices and business communications. We strongly support, therefore, the goals of the TCPA and believe that the law's provisions banning unsolicited faxes are appropriate. Likewise, we appreciate the FCC's efforts to craft rules to effectively implement the law and the Commission's willingness to meet with NAR members as we have worked to understand the new fax requirements.

We do, however, question the need for the changes that the FCC has made to the rules governing the fax provisions of the law. The prior rules, with an established business relationship (EBR) exception for faxes sent by firms to established clients and allowances for alternative forms of permission, have worked well over the past twelve years since implementation. The prior ruling created settled expectations among consumers and businesses alike.

Now, however, it is also very clear to us that the Commission's new rules which are intended to stop unsolicited, junk faxes will have the *unintended* consequences of interfering with solicited faxes. In the case of the real estate industry, for example, faxes sent in response to a consumer inquiry or in the course of normal business and desired by the recipient (consumer, agent or firm) will no longer be allowed. These new rules will also interfere with NAR's and its state and local associations' abilities to satisfy their members' expectations regarding communications and service to those members.

As a result, we believe that it is critical that (1) the established business relationship (EBR) exception which has functioned well since the FCC first issued rules to implement of the TCPA some twelve years ago be reestablished and (2) alternative means of giving consent also be allowed. These steps are necessary so that communication with existing clients and those who have inquired about a good or service is not subject to overly burdensome and disruptive regulation.

We believe that narrowly crafted, technical correction language such as is being considered by the Committee in the Junk Fax Act of 2004 can rectify the problems created by the new rules while at the same time continuing to protect consumers and businesses from unwanted faxes that are already prohibited by the TCPA.

Background

The Telephone Consumer Protection Act (TCPA) of 1991 prohibits the use of any telephone facsimile machine, computer or other device to send an "unsolicited adver-

tisement" to a telephone facsimile machine. An unsolicited advertisement is defined "as any material advertising the commercial availability or quality of any property, goods or services which is transmitted to any person without that person's prior express invitation or permission." [1]

When first implementing the new law in 1992, the Federal Communications Commission determined that an established business relationship constituted express invitation or permission to receive an unsolicited fax. As part of its July 2003 Do-Not-Call (DNC) rulemaking, the FCC revised that original interpretation.

In reversing its long-standing rule, the FCC determined that the TCPA requires a person or entity to obtain the express invitation or permission from the recipient before transmitting any unsolicited fax advertisement. This express invitation or permission must be in writing and include the recipient's signature. The recipient must clearly indicate that he or she consents to receiving such faxed advertisements from the company and individual within the company to which permission is given. Furthermore, the consent form must provide the individual and their business fax number to which faxes may be sent. The permission form cannot be faxed to the recipient or submitted via fax to the business to whom permission to fax is granted.[2]

The Importance of Faxed Information to the Real Estate Industry

Despite all the advances in communication technology, the process of buying and selling a house is still heavily dependent on the ability to send and receive faxed information. Consequently, real estate brokers and agents use facsimiles regularly to communicate with other real estate professionals, settlement and other service firms, as well as with both home buyers and sellers.

The most common use of fax by the real estate sales industry today is to facilitate the completion of the paperwork associated with the sales transaction, i.e. offers to purchase, counteroffers, disclosure forms, etc. While these transactional faxes seemingly would be exempt from the new rules, faxes are also routinely used for purposes that would unfortunately meet the current definition of an "unsolicited" fax.

Business to Business Faxes. Real estate sales agents and brokers commonly use facsimiles to quickly share new property listings with other real estate professionals who are active in a given market and may have clients interested in purchasing a newly listed property. In a recent survey by NAR, REALTORS® also indicated that faxes are commonly used to inform other real estate professionals of price reductions on a property that had been viewed by that agent's clients or the time and date of open houses for newly listed homes. Such faxes communicate valuable market information that benefits recipients and their clients in a manner that is both timely and cost-effective.

Business to Consumer Faxes. Real estate sales professionals also use faxes to communicate in a quick and cost-effective manner with consumers who are looking to sell or buy a home.

In the case of a homeowner interested in selling their home, a seller may contact an agent or a number of agents about listing their home. In response to the contact, an agent would typically prepare a comparative market analysis which would (1) describe what the agent would do to market the home, (2) provide comparable listing data on homes currently on the market so as to begin discussions about a suggested listing price and (3) proactively solicit the listing.

In those situations where time is of the essence, such an analysis is faxed for review prior to any face-to-face meeting. In some cases, such as the sale of a resort or inherited property, a face-to-face meeting may not even occur due to time or distance constraints. In all cases, this informational exchange takes place prior to any formal business agreement, i.e. listing agreement, which could provide the vehicle for the necessary written permission to fax. Under the new rules, faxing this listing presentation or even comparative listing information would not be permissible without prior signed permission.

Real estate brokers and agents also routinely use faxes to send house listing information directly to potential buyers who may request it by telephone, but with whom the agent has not yet entered into a formal agreement for representation. Under the new rules, a real estate professional could no longer share new listings or follow-up a telephone, personal or even Internet-delivered inquiry with targeted research via fax. Consequently, the new rules meant to deal with unsolicited faxes would have the unintended effect of interfering with solicited faxes.

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[1] 47 C.F.R. § 64.1200(f)(10).

[2] 1992 Report and Order, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 7 FCC Rcd 8752, ¶ 191 (rel. Oct. 16, 1992)(CC Docket No. 92-90) ("1992 Report and Order").

In a tight housing market, the delay caused by having to obtain written permission from a potential client or another real estate professional before the relevant house listing information is sent could mean the difference between a buyer getting a house they want or losing it.

Consider too how awkward this scenario would be when a potential customer calls and asks for information on a home for sale. Under the new rule, the real estate professional would not be able to fax the information requested. Instead the agent or broker will have to explain why they can't fax the information, direct the consumer to a website where they can provide the required written consent or ask for an address so the real estate professional can mail or courier the information along with a consent form for future use. This will create frustration, suspicion and, in some cases, ill-will. This would be a giant step backwards in a business where good customer service depends on quick turnaround.

REALTOR® Association to Member Fax. Similarly, NAR and its state and local associations routinely use facsimiles to communicate effectively with their members. These facsimiles inform members about upcoming continuing educations classes, meetings, seminars, products, services, and membership renewal. This is information that members not only expect, but for which they have paid NAR, state and local associations dues in order to receive. Once again, many of these faxes will meet the definition of unsolicited fax advertisements and could not be sent under the new FCC rules.

The Feasibility of FCC-Suggested Means of Obtaining Permission

The FCC has argued that obtaining written permission is not a difficult thing to do. We disagree. A close examination of the business consent methods proposed by the FCC for business to obtain consent—"*direct mail, websites and interaction with their customers in their stores*"**—points out some of the hurdles unanticipated by the FCC that will be encountered by the real estate professional.**

Face-to-Face Meetings. As our previous examples have indicated, face-to-face meetings are not the norm and are impracticable prior to the occasion to fax. Unlike the corner grocery or restaurant, consumers do not routinely visit their local real estate firm offices. (Most consumers engage in a real estate transaction every seven years.) Consequently, most real estate practitioners will have not had a consumer's permission on file when a request for information is received.

A face-to-face meeting will require a special trip with the commitment of time, travel expenses, etc. At a minimum, these costs will increase the cost of a transaction that will need to be absorbed by the agent, firm or consumer. At its worst, a face-to-face meeting will be impracticable, if not impossible, e.g. where an owner lives out of the area as is commonly the case in a resort market or when property is inherited.

Courier. A permission form could be hand-delivered to a potential fax recipient via courier. This is not an inexpensive means of delivery and would be impracticable from a cost perspective for all but a very small number of transactions or those transactions with an assured outcome. In order to make a living, real estate real estate professionals commonly respond to large number of customer requests for information—only one in twelve contacts eventually results in a home sale and compensation.

Mail/Overnight Delivery. Using an overnight service will have the same cost drawbacks as a courier service. Both regular and overnight mail will suffer from the additional problem that an interested customer will have to wait 24 hours or more before the information that they requested can be delivered. In our "instant gratification" world—and an industry where quick customer service can be the difference between gaining a new customer or not—the delayed delivery would make this an unattractive approach.

Internet/E-Mail/Electronic Signature. Despite the rapid adoption that the Internet and e-mail have had in the United States, there are still significant numbers of households—including underserved minority, immigrant and low-income populations, etc.—with limited or no access to the Internet, e-mail or the technology which would allow them to access, let alone electronically sign, documents. Additionally, not all states have enacted legislation that allows for electronic signature of documents. This method, therefore, is seriously limited in those markets where real estate real estate professionals serve a population with limited access to this means of access or without the appropriate state enacting legislation.

Fax. We would point out that faxing a permission form to a consumer would be a quick and inexpensive way to disseminate the form and receive permission. However, in discussions held with the FCC staff on this matter and in its written guidance, the FCC has indicated that faxing the permission form would not be allowed

since the form itself could be construed as a solicitation or advertisement.[3] Likewise, a faxed permission form with a signature would not provide the necessary written permission because the signature is not a valid, original signature.

Faxes have been used by the real estate industry to deliver information to consumers and other real estate professionals because of (1) the speed of information transmission and (2) the minimal cost associated with that speedy transmission. While it is possible to use one of the FCC recommended means to obtain written permission, doing so will result in delay and increased costs for fax senders and recipients. It is hard to imagine that these new rules will not impede the ability of real estate professionals to quickly and efficiently help homebuyers and seller complete their real estate transactions.

The Magnitude of the Resources Needed for Compliance Purposes

While the cost of obtaining a signed permission in any one instance may not seem significant, in the aggregate, the magnitude of the new paperwork required for permission and/or the associated costs of alternative delivery methods (e.g. courier, overnight, or mail) required by the new rules are sizable. While no means exhaustive, we would offer the following *very* conservative estimates of simply the number of permissions that would be required for the real estate industry to continue to operate as it currently does.

Agent to a Consumer. Last year, approximately six million homes changed hands. If we make a *very* conservative assumption that each seller requested information from two potential listing agents that would typically be faxed today (listing presentations and/or comparable listing data that could be construed as a solicitation) and each buyer received two faxes from two different agents during their home search that were subject to the new rules (e.g. Multiple Listing Service (MLS) listing sheets on a particular property, for example), then approximately 24,000,000 faxes would have been sent and 24 million signed permission forms would now be required before those faxes could be sent. Those 24 million permission forms would have to be printed, delivered to the consumer by some means at a cost, returned to the agent also at a cost, filed and stored.

This estimate does not recognize that many families shop for a new home each year without purchasing a home. Consequently, the above estimate of 24 million permissions required is a significant underestimate of the volume of permission forms that would in fact be generated by the industry acting to comply with the new rules.

Agent to Agent/Real Estate Firms. According to our surveys, faxes are typically used by real estate real estate professionals to advertise open houses, announce new property listings and changes in asking prices for listed homes. To estimate the number of permissions needed to facilitate faxes for these purposes, we can conservatively assume that each of our one million, self-employed members will want to fax, at one time or another, to at least ten real estate firms/offices, ten individual agents home offices, five settlement service providers and five general business service providers. Thirty (30) million permissions, therefore, would need to be gathered to allow for unfettered faxing between real estate professionals and the other real estate professionals and firms with which they work.

Given that the real estate sales population changes significantly from year to year as new agents enter the industry, others leave the business, and fax numbers are changed and added, the need to seek permissions will be an ongoing yearly effort. Consequently, the 30 million estimate will be a first year figure that will be added to each year as new permissions are needed to stay current of all the changes that have ensued.

Real Estate Firms to Agents/Other Firms. In addition, the nation's 145,000 real estate firms, as legal entities distinct from their independent contractor agent sales force, would also need to obtain permission to fax to real estate professionals and other firms. Assuming that each firm will have the need to fax to ten other real estate firms, thirty agents, twenty settlement service providers and twenty other general business service firms, the number of permissions required to support the current level of fax activity that is accepted as common practice would total 11,600,000. Again, this figure is a first year estimate that will need constant updating to account for changes in the industry players and fax numbers.

REALTOR® Association to Member. In order for NAR and its state and local associations to continue to fax their one million members, an additional 3,000,000 signed written permission forms would be generated. REALTORS® do not join just the national association but join their state associations as well as their local associations. Hence, the need for 3 million separate permission forms to be circulated,

[3] 1992 Report and Order, ¶191.

complied, maintained and checked prior to any communications via fax would be undertaken. We would anticipate that this would be an annual exercise in which each of our associations would engage.

A Final Thought. It is important to recognize that each of the forgoing estimates of numbers of permissions to fax that would be required to comply with the FCC's new fax rules are only one part of the cost equation. We have not attempted to estimate the dollar cost of obtaining each of these permissions and maintaining the resulting records since to do so would require a level of detail that we do not have available to us. However, it is clear that given the shear magnitude of the numbers involved and the costs of preparation, distribution, and management of the resulting paperwork that the costs will be substantial.

Compliance Cost vs. Benefits Achieved

As we have illustrated, the costs associated with the elimination of the EBR and alternative means of granting permission to fax are enormous. The new rules do this despite the fact that the Commission's do-not-fax rules have worked for over a decade. In reversing the 1992 decision, the Commission did not note any consumer complaints that were a result of the established business relationship rule. Indeed, there is scant evidence of harm to justify the Commission's abrupt change.

Though there is not evidence of harm that needed to be fixed by eliminating the EBR exception or alternative means of giving the requisite permission, there is evidence of over ten years of business expectations in reliance on that exception. NAR, real estate professionals, and entities in countless other industries implemented a practice of routinely faxing information regarding products and services to other entities with which they have an established business relationship.

Accordingly, while the compliance costs of the new rule in the aggregate would be quite high, the benefits would be minimal, because the faxes sent and received by real estate agents are the type routinely exchanged by those persons who do business together. These are not the type of "junk" faxes that the TCPA and Commission rule were designed to prohibit. But the Commissions' revised rule for the first time covers all faxes, including those integral to existing and new business relationships in the real estate market.

A Solution to the Problems Created by the New Fax Rules

NAR believes that the established business relationship exception to the TCPA rules should be reestablished and that others forms of consent should be allowed. In the matter of the EBR exception, NAR believes that the Commission correctly analyzed consumer expectations and the affect privacy interests in its 1992 rulemaking: "a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests."[4] Also, the Commission prudently found that the standards for a telephone solicitation and faxed advertisement should be the same and thus exempted established business relationships from both sets of rules.

With respect to the allowance for means of permission beyond express written permission, NAR believes that consent should be allowed that is:

- faxed;
- provided electronically (whether by a web-based "click-through: or in an e-mail);
- orally (in person, by telephone, or in a telephone message); or
- by automated means (in response to an automated fax-on-demand phone system by which the caller can request faxed information).

Written signed consent is unnecessary and imposes a requirement far out of proportion to the harm it seeks to address, and thus contradicts the intent of Congress in adopting the TCPA. The legislative history shows that Congress considered imposing a written requirement and decided against that high threshold of consent. The House Report accompanying the TCPA states that Congress "did not see a compelling need for [] consent to be in written form. Requiring written consent would, in the Committee's view, unreasonably restrict the subscriber's rights to accept solicitations of interest and unfairly expose businesses to unwarranted risk from accepting permissions or invitations from subscribers."[5] The Senate Report is equally on point. The Senate bill as introduced contained the phase "express written consent" in the context of telemarketing, but dropping the requirement tat consent be written was one of three changes the Senate Committee made before favorably reporting the bill. The Committee justified its decision to drop the written require-

[4] 1992 Report and Order, ¶ 34.

[5] H.R. Rep 102-317, at 13 (1991). Though this statement was made in the context of telephone solicitations, the same rationale applies equally to the fax context.

ment because the Committee found that mandatory written consent was ill-suited to the interests of consumers and sellers.[6]

A written consent requirement also is contrary to the Commission's telemarketing rules. Those regulations exclude from the definition of a telephone solicitation any call concerning the sale of goods or services in response to an individual's inquiry, when the individual would be expecting such a call.[7] In contrast, the fax advertising rules not only specify that a fax sent in the same situation is an "unsolicited advertisement," but actually prohibit such a fax.

This is problematic for two reasons. First, classifying a telephone call made in response to an inquiry as not a solicitation, but a fax sent in exactly the same circumstances as an unsolicited advertisement is confusing, contradictory, and arbitrary since the terms "solicitation" and "advertisement" have the same meaning. This is particularly the case since, under the plain meaning of the term, a fax is not unsolicited if the recipient has made a request for the information and there are numerous other ways to invite or permit a fax other than by providing prior written and signed consent.

Conclusion

In conclusion, we want to thank the leadership of the Subcommittee and the full Energy and Commerce Committee for the opportunity to share the views of the NATIONAL ASSOCIATION OF REALTORS® on the need for Congressional attention to the problems faced by the real estate industry as the result of the new fax regulations that will take effect January 1, 2005. We strongly believe that consumers looking for new homes and rental units will be disadvantaged by the new regime as will real estate professionals and firms. We urge you to take action to create the statutory authority for an established business relationship exception needed by the FCC to allow the EBR exception that has served consumers and businesses well for over a decade and clarify once again that permission can and should be allowed to be granted by means other than express written permission.

Mr. UPTON. Thank you. Mr. Graham?

STATEMENT OF JOHN H. GRAHAM

Mr. GRAHAM. Mr. Chairman, Ranking Member Markey and members of the subcommittee, my name is John Graham——

Mr. UPTON. If you'd just turn that mike on.

Mr. GRAHAM. My name is John Graham, president and CEO of the American Society of Association Executives. ASAE is a Washington-based association representing 24,000 members who represent and managed 11,000 trade, professional and individual voluntary organizations.

I wanted to thank you for the opportunity today to testify on the legislation before you, which ASAE strongly supports. The legislation addresses the unfortunate situation created by the new fax regulations issued last year by the Federal Communications Commission. These regulations, which have been stayed until January 1, 2005 following an almost unprecedented outcry from the association and business community, have fostered tremendous uncertainty for everyone. These new rules would require any organization or business to obtain prior written consent before it could legally send a fax of a commercial nature. For associations, this would require keeping physical records for members that range from hundreds to in some cases, like we just heard from NAR, nearly a million members and at this time when many associations are moving toward paperless registrations and membership records.

The situation has been further confused by the expansive nature of the FCC's determination of unsolicited advertisements covered

[6] S. Rep. 102-178, at 5 (1991).
[7] Report and Order ¶114.

by the new regulations. The new standard of prior written approval appears to apply to any fax associated with a current or future monetary exchange.

It also appears that the FCC would apply rules to activities such as fundraising by charitable organizations and to faxes involving those transactions. This would make these regulations some of the most intrusive requirements on the basic activities of both tax-exempt entities and for-profit businesses. It is therefore imperative that Congress act before these new rules take effect. Absent a statutory correction, these new rules will greatly hinder basic communications and commerce and have a chilling effect on the use of this important means of communication.

The legislation before you has several components on which we wish to comment. The bill reestablishes a statutory existing business relationship. This is critical for the use of faxing by associations as well as businesses. The bill also contains a new requirement of a mandatory opt-out for unsolicited faxes sent under the auspices of the reestablished EBR. This opt-out requirement is a new and important way to help consumers, whether they are private individuals or businesses, eliminate unwanted faxes.

As part of this requirement, the legislation before the committee also contains a provision to allow the FCC to consider waiving the opt-out provision for trade and professional associations. Members of these tax-exempt groups have chosen to join a particular organization which usually requires the payment of annual dues. These members expect communications, including faxes, as part of their membership.

Since tax-exempt associations are not commercial by either definition or nature, without such a provision for this regulatory flexibility, there is real likelihood for confusion as to the application of the Federal opt-out requirement. This situation is much more clear cut for a regular business or commercial operation but not for tax-exempt groups.

There are several items of the current law that we believe should be clarified in report language or clarifying legislative history. It should be clarified that unsolicited advertisements do not include charitable fundraising activities or faxes related to a specific or expected transaction. There appears to be agreement among both the majority and minority staff that neither current law nor the proposed changes would classify these types of faxes as unsolicited advertisements. However, the confusion created by the FCC regulations causes great concern. We believe it is appropriate that Congress clarify the situation.

In summary, we would hope that the committee and the entire Congress approve this corrective legislation as soon as possible. Associations and businesses are already planning for the onerous, burdensome and expensive task that will be necessary if the new rules take effect as scheduled. The earlier the corrective legislation is passed, the less time and money will be expended in planning for a worst-case scenario.

Thank you again for allowing me to come here to testify, and appreciate working with you on the pending legislation.

[The prepared statement of John H. Graham follows:]

PREPARED STATEMENT OF JOHN H. GRAHAM IV, PRESIDENT AND CEO, AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES

Mr. Chairman, Ranking Member Markey, and members of the subcommittee, my name is John Graham, and I am President and CEO of the American Society of Association Executives (ASAE). ASAE is a Washington, D.C.-based association comprised of more than 24,000 professionals who manage approximately 11,000 trade, individual, and voluntary organizations and associations. Almost all the associations represented by ASAE's membership are exempt from taxation under section 501(c)(3), 501(c)(4) or 501(c)(6) of the Internal Revenue Code.

I want to thank you for the opportunity to testify today on the legislation before you, the Junk Fax Prevention Act of 2004. ASAE strongly supports the swift passage of this important and necessary legislation.

The legislation before the subcommittee addresses the unfortunate situation created by the new federal facsimile regulations issued last year by the Federal Communications Commission (FCC). These regulations, which have been stayed until January 1, 2005, have fostered tremendous uncertainty in both the association and business community regarding this important and necessary form of communication.

While in many ways faxing is not as technologically advanced as other forms of communication, it remains a very valuable and important tool both for our everyday dealings with our members and for regular commerce on the part of our nation's business community. Despite the evolution of e-mail and electronic attachments, faxing is still a key part of the operations of the organizations represented by our members and of basic commerce.

BACKGROUND

As you all are well aware, last year the FCC issued regulations to alter the treatment of fax communications under the 1991 Telephone Consumer Protection Act, to be effective in August 2003. In their rulemaking, the FCC repealed the "existing business relationship" principal, or EBR, that had guided facsimile communications for 10 years. As part of the FCC's rewrite of its regulations to implement the "do-not-call" rules, the FCC determined that the EBR exception for faxes could not be supported by existing law, despite the existence of these regulations for a decade.

EFFECT OF THE FCC'S NEW REGULATIONS

Consequently, the FCC's new rules would require any organization or business to obtain prior written consent before it could legally send a fax of a "commercial" nature to any other person or place of business. This consent would have to be obtained for each person and for each fax number in order to comply with the new rules. An organization or business could not simply get a blanket permission form, let alone verbal permission, but instead would need signed permission from each fax recipient stating the specific fax number for which permission is granted. Consent forms could not even be faxed under our understanding of the FCC regulations, but would have to be distributed by another method such as by regular mail or e-mail.

For associations, this would require keeping physical records substantiating permission for memberships that range from hundreds of members to, in some cases, near or above one million members. And these physical records would have to be maintained at a time when many associations are moving towards "paperless" registration and membership records as new systems are being developed to take advantage of technological capabilities and innovations.

The situation has been further confused by the expansive nature of the FCC's determination of unsolicited advertisements covered by the new regulations. The new standard of prior written approval appears to apply to any fax that in any way could be considered commercial in nature. In discussions with FCC staff, this standard appears to cover any fax associated with a monetary charge, or any fax that might be associated with a future monetary charge. As such, it appears to apply to notices of annual meetings of an association if a registration fee is required, an annual membership renewal notice, education seminars with an associated fee, information on books and publications that members can purchase, and other basic communications that are routinely sent to members.

It also appears that the FCC would apply the new prior written approval requirement to activities such as fundraising by charitable organizations and to basic transactions between associations and their members and between businesses and their customers. This would make these regulations some of the most intrusive requirements on the basic activities of both tax-exempt entities and for profit businesses.

FCC RULES DELAYED PENDING DELIBERATION ON THE ISSUE BY CONGRESS

Fortunately, the FCC has delayed the effective date of these new regulations until January 1, 2005. This delay, announced shortly before the regulations were to take effect last year, came after an almost unprecedented outcry from the association and business community objecting to the new rules. The FCC has stated that this delay will give Congress time to examine whether legislative changes are appropriate before the new rules take effect.

Because of the obvious cost and administratively burdensome nature of these new rules, ASAE, on behalf of hundreds of associations, filed Petitions for Stay and Emergency Clarification with the FCC to encourage more deliberate consideration of these new rules and to allow time to determine congressional intent. More than 1,500 ASAE members ultimately signed onto the petitions.

While ASAE and other entities have asked that the FCC return to its prior interpretation of the federal fax laws, it appears clear that they will not do this absent legislative action by Congress. Now that they have determined that, in their opinion, they never had the authority to grant the EBR exception that existed for a decade, it does not appear that they will return to what they view as an incorrect interpretation of current law.

NEED FOR ACTION BY CONGRESS

Because of this, it is imperative that Congress act to rationalize our federal fax laws before these new rules take effect. Absent a statutory correction, these new rules will greatly hinder basic communications and commerce after the end of the year, at great expense and burden to associations and businesses.

The need for Congress to act promptly is further dictated by the "private right of action" that exists under current law. Under this provision as it has evolved over the years, private citizens can sue in state court for up to $1,500 per violation if they receive an unsolicited fax. As the law is currently drafted, a single fax can contain multiple violations, each subject to a potential $1,500 judgment. Moreover, we are seeing a surge in frivolous lawsuits that could not have been envisioned or intended by Congress.

The newest twist on this activity is the assignment of the right to sue under the private right of action provision. In the most egregious cases, individuals have actually solicited and purchased faxes from office support personnel for minimal sums such as $2 per fax in exchange for a signed document assigning the right to sue for damages. Some of our members have actually had their associations sued by a third party for faxes sent to their own members, despite the fact that the communication was desired and not in violation of the law.

It is important to note that these lawsuits are often filed across state lines, and a written demand letter generally offers to settle for an amount less than the cost of fighting the action. This has amounted in some cases to extortion and financial harassment of law abiding associations and businesses. A simple Internet search can find step-by-step instructions, including sample demand letters, suggested strategy, and forms for assigning rights to sue. While the intent of this provision was to arm consumers with a weapon to fight illegal faxes, in many cases it is being used to terrorize law abiding associations, businesses and citizens whose faxes fall into the hands of unscrupulous individuals.

While we understand that the abuses of the private right of action cannot be addressed in this bill, the pattern that has developed in filing frivolous lawsuits underscores the need to pass the pending legislation as soon as possible. If January 1, 2005 comes around and the new FCC rules take effect, there will be literally millions of technical violations of the law that could result in an avalanche of lawsuits. This prospect would have a chilling effect on the use of an important means of communication in our nation.

DISCUSSION OF LEGISLATION PROPOSAL BEFORE THE SUBCOMMITTEE

The legislation before you has several components on which we wish to comment. The bill reestablishes a statutory "existing business relationship." This is critical for the use of faxing by associations and businesses. It allows entities to fax legitimate information covered by the law without the fear of retribution in state courts. It essentially restores the situation that existed prior to the FCC rule change last summer.

The bill also contains a new requirement of a mandatory "opt-out" for unsolicited faxes sent under the auspices of the newly reestablished EBR. This opt-out information must appear prominently on the first page of the fax stating that the receiver may make a request not to receive any future unsolicited faxes. It must include a

domestic telephone and facsimile number that can be accessed during regular business hours. While this opt-out requirement is reasonable, we caution as to the exact enforcement of this provision.

While the requirement calls for this information to be provided "in a conspicuous notice" on the first page of the fax communication, we are concerned that human or mechanical errors could result in faxing of pages out of order or other unavoidable "glitches." Our concern is that this would trigger a technical violation of the law, inappropriately subjecting the sender to liability under the private right of action. We would hope that this issue could be addressed in either legislative or report language so that the intent of the law can be enforced without punitive consequences. Additionally, we would request that report language discuss the requirements necessary to comply with the "conspicuous notice" criteria. Many organizations and businesses design faxes to be sent on one page, and we believe it is possible to comply with this requirement without devoting the type of space that would in many cases require the faxing of multiple pages.

This opt-out requirement is a new and important right to help consumers, whether they are private individuals or businesses, eliminate unwanted faxes. It should be noted, however, that many current faxes that are unwanted are already illegal under current law. New requirements may not be effective in reducing the actions of those who willfully choose to violate the law. Prudence, then, needs to be exercised to insure that new requirements do not unduly burden law-abiding citizens and businesses who want to operate in accordance with federal and state laws governing faxing.

The legislation before the committee also contains a provision that would allow the FCC, after receiving public comment, to waive the opt-out provision for trade and professional associations similar to the types represented by ASAE. This flexibility would apply only to a tax-exempt organization faxing to its members on items related to the exempt purpose of the organization. If this legislation is enacted into law and the FCC exercises this provision, which of course we would encourage them to do, it would work to relieve some of the new regulatory burden of the opt-out provision that may be unnecessary for membership organizations. By definition, members of these tax-exempt groups have chosen to join a particular organization, which usually requires the payment of annual dues. These members expect communications, including faxes, as part of their membership. Associations generally have opt-out rules already in place for member communication, and know that members have the choice not to renew their membership if such requests are not respected.

Since much of the fax material sent to members is often not an "unsolicited advertisement," this provision, if implemented by the FCC, could help prevent confusion in determining which faxes under federal law require a mandated opt-out mechanism. Since tax-exempt associations are not commercial by either definition or nature, without such a provision for this regulatory flexibility there is a real likelihood for confusion as to the application of the federal opt-out requirement. This situation is much more clear-cut for a regular business or commercial operation, but not for tax-exempt groups.

NEED FOR CLARIFICATION OF EXISTING LAW IN CERTAIN AREAS

There are several items that, while not included in the bill before the committee, should be clarified in report language or clarifying legislative history. This has to do with the fact that "unsolicited advertisements" do not include charitable fundraising activities or faxes related to a specific or expected transaction.

In discussion with both majority and minority staff of this committee, it appears clear that neither current law nor the proposed legislative changes would classify these types of fax communications as unsolicited advertisements. However, the confusion created by the new FCC regulations causes us great concern. We believe it appropriate and necessary that Congress clarify this situation so that an unintended interpretation of the law does not take place.

ASAE members represent a large number of charitable organizations. These organizations are by definition not commercial, and they rely heavily on volunteers for their good works. It is extremely important for Congress to clarify that neither current law nor the proposed legislative corrections apply to their activities.

Associations also engage in a large number of "transactions" with their members, such as dues payments and registrations for seminars and continuing education programs. It is important to clarify that faxes relating to these activities as well as faxes related to transactions that occur in the business world are outside the scope of both current law and the proposed changes, and that they are not "unsolicited advertisements."

SUMMARY AND CONCLUSION

In summary, we would hope that the committee and the entire Congress approve this corrective legislation as soon as possible. While the new FCC fax rules are delayed until January 1, 2005 to give Congress time to address the necessary statutory changes and hopefully prevent their implementation, it is important that legislation be approved sooner rather than later. Associations and businesses are already planning for the onerous, burdensome and expensive task that will be necessary if the new rules take effect as scheduled. The earlier corrective legislation is passed, the less time and money will be expended in planning for a worse case scenario.

I want to take this opportunity again to thank you all for your leadership on this important issue, and to thank you again for allowing me to come here today to testify on the pending legislation.

Mr. UPTON. Thank you very much. Ms. Kaechele.

STATEMENT OF CHERYL KAECHELE

Ms. KAECHELE. Good morning, Mr. Chairman and members of the subcommittee. With your permission, I will summarize my remarks and submit a longer statement for the record.

My name is Cheryl Kaechele. I publish the Allegan County News and two other weekly newspapers in southwest Michigan. We serve a rural area with total circulation just under 10,000. I am here to testify in favor of the Junk Fax Prevention Act of 2004 and to explain why I believe the FCC's signed consent rule is the wrong solution to unsolicited fax problems.

I am regional director for the National Newspaper Association which was established in 1885 to represent small daily and weekly newspapers such as mine. Our newspapers rely upon the fax to help our small business customers to use our services. The written consent rule surprised us. It was released on June 26, 2003 at first allowing only 60 days to collect the consents. Without a change in the law, we will begin to comply later this summer.

This requirement punishes businesses that respect their customers and use the fax machine responsibly. Without the fax, we would be unable to tell our established customers of advertising opportunities. Even a transaction after a sale would require the consent form. Sending an ad proof would require a signed form. The customer needs another form from us to send it back.

Mr. Chairman, our customers' time is precious. We all have small staffs and the fax is a time saver. Our advertising departments cannot possibly call on every small business in our area. Our county takes at least an hour to traverse, and with gas prices what they are today the cost would be prohibitive. Without the fax, we might never reach the home-based hair salon or the backyard fish and tackle shop.

In my written testimony, I have explained some of the ways we use the fax. Let me highlight three. We alert businesses to special opportunities. Without the fax, they would lose an opportunity to grow their businesses. Some weeklies use the fax as a substitute for a mid-week addition. For example, NNA's member, the semi-weekly Weis County messenger in Decatur, Texas, distributes its daily fax newspaper update to about 1,000 of its subscribers. Finally, some newspapers allow citizens to use their fax machines. That practice would surely have to end.

Some proponents of the rule have said, "Just get the form signed. What is the big deal?" Mr. Chairman, that may be a fair question to a big business with an Information Technology Department, but

we do not collect and massage massive data bases. I cannot think of a single community paper with a data base manager.

Most of my publisher colleagues would have to hire new staff to comply. The new staff and publisher would have to acquire or upgrade a data base program, mail out hundreds of consent forms, explain a hundred times at the post office, at the golf course and while we are having lunch that we must require the forms, irritate customers by saying, "No, we can't fax you the ad rates because you forgot to send your form back," send someone out repeatedly to try to collect the forms. The cost and effort of compliance could wipe out a year's profit for some very small papers.

Mr. Chairman, I believe your bill takes the right approach. It says that if we have an established business relationship with the people and businesses to whom we are sending faxes, the burden of written consent forms is unnecessary. It recognizes good business practices and leaves the FCC free to go after those who od send junk faxes.

Mr. Chairman, I want to close by expressing urgency. If your bill does not become law, we will have to begin absorbing the cost of compliance in August or September. I would like to pledge NNA's commitment to work with you to help move the bill forward quickly.

Thank you for your time. If any questions come up following the hearing, I would be happy to supply responses for the record, and I am willing to answer anything now. Thank you.

[The prepared statement of Cheryl Kaechele follows:]

PREPARED STATEMENT OF CHERYL KAECHELE, PUBLISHER, ALLEGAN COUNTY NEWS ON BEHALF OF THE NATIONAL NEWSPAPER ASSOCIATION, INC.

Good morning, Mr. Chairman and members of the subcommittee. Thank you for inviting the National Newspaper Association to appear before you today.

My name is Cheryl Kaechele. I am publisher of the *Allegan County News,* the *Commercial Record,* which covers the communities of Saugatuck and Douglas and the *Union Enterprise* which covers the communities of Plainwell and Otsego all in southwest Michigan. Our newspapers cover a fairly rural area, with a combined circulation of a little less than 10,000. I am here to testify in favor of the Junk Fax Preservation Act of 2004, and to explain why I believe the Federal Communications Commission's fax consent rule is the wrong approach to solving unsolicited fax problems.

I have owned my newspapers for more than 22 years. Before I came to the newspaper business, I was a school teacher. The opportunity to serve the communities I live in through newspaper publishing was an exciting opportunity for me after 15 years in the classroom. I believe community newspapers are an important part of American life. We serve a unique niche in the information world.

I am a former president of the Michigan Press Association. I presently serve as regional director for NNA, which was established in 1885 to represent the interests of hometown newspapers. NNA has been prominent in its public policy work for local papers since that time.

Our organization represents about 2,500 newspapers from coast to coast. The typical member is a weekly newspaper in the 2,000-5,000 circulation range or a daily in the 5,000-10,000 circulation range. It includes papers like mine, small dailies like the *Daily Times Chronicle* in Woburn, MA, the *Bradford County Telegraph* in Starke, FL, and the *Archbold Buckeye,* in Archbold, OH. We are primarily in rural areas and small towns, but our membership also contains urban and niche markets like the Intowner, here in Washington, DC. I have provided, as an attachment to my testimony, a map that indicates where our members publish.

The wide majority of our titles are owned by their publishers, mostly small family operations, many of whom are in their third, fourth or fifth generations. I like to think that our segment of the newspaper industry is where hometown journalism is best nurtured, and where civic pride is an asset.

The establishment of a new requirement for written consent for advertising faxes caught our industry completely by surprise.

The FCC order establishing this requirement appeared in revisions of its regulations under the Telephone Consumer Protection Act. The requirement was codified as follows:

We may not:

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

(i) For purposes of paragraph (a)(3) of this section, a facsimile advertisement is not "unsolicited" if the recipient has granted the sender prior express invitation or permission to deliver the advertisement, as evidenced by a signed, written statement that includes the facsimile number to which any advertisements may be sent and clearly indicates the recipient's consent to receive such facsimile advertisements from the sender.

The regulation was released on June 26, 2003, providing a scant 60 days before newspapers would be required to have these written statements on file for hundreds of fax numbers. Needless to say, our advertising people were dismayed. Reports to our NNA offices in Washington about families being required to cancel vacations began to flow in, and calls from newspaper staffs wondering what in the world was going on in Washington became a daily matter.

Plus, the breadth of the interpretation of advertisement, our attorneys tell us, is such that even a transaction carried out after a sale is already completed—such as the transmittal of an ad proof—might well require compliance with this new rule. In fact, if we sent an ad proof to a customer, it appears the customer would have to have a signed consent from us in order to fax it back. In other words, any fax with advertising, or even about advertising, appears to require these written consents.

You can imagine that our newspaper staffs were amazed. The fax is such a common communication tool for us, and for our own customers, that we never dreamed that an agency in Washington might find reason to object.

Very few of us—and I've recently re-posed this question to NNA's leadership—ever receive a request from one of our customers not to use the fax machine. Certainly, if we do, we honor it. Quite the contrary, our customers very often prefer the fax to any other route, but they would be dumbfounded if we told them we could not honor their wishes unless they signed a form.

Prior to last June, we had received no indication that the Federal Communications Commission believed we had a problem, nor that it intended to consider revising the requirements for fax use. If we had realized the Commission intended to pursue this direction, we would certainly have made our case to the commissioners. I have since learned that the Commission continues to receive complaints about junk fax, even though it was illegal under the old rules, and that it concluded that imposing regulations upon the law abiding and the scofflaw alike was the only solution. I have to think that if they saw what we see every day, they would realize that a more targeted approach was needed.

Our typical customers are small businesses. They would far prefer to have us send them information by fax than to spend their precious minutes on the telephone or in personal sales calls. Most of them know who we are, and they know what they want. All they count on us to do is to let them know when there is a new opportunity. And our own newspapers are small. Most newspaper advertising departments comprise only three or four people. They cannot possibly make personal calls on every small business that might need our paper. Nor, with gasoline prices what they are today, would it be a smart use of resources for them to do so. They rely on the fax to reach customers, and all of our customers—particularly the smallest businesses that we would never reach in person—seem to welcome the contact. Without the fax, we probably would never reach the hairdresser with a salon in her home, the shadetree mechanic who repairs cars on the weekend or the fish and tackle shop that operates outside of someone's garage.

Let me detail some of the ways our members use the fax:

1) We alert businesses to special sections and themed editions that we intend to publish. For example, I have attached a flier from one of our members in Virginia that I would say is pretty typical of the promotion that might go out to a small business. This newspaper was producing a special edition to honor the American troops serving our country, and benefiting the American Red Cross. It wanted its customers to know about it, in case they wanted to participate.

2) We let them know when there is going to be a new discount, or a price break for a certain volume of ads that will save them money and bring them new customers.

3) We send out rate cards—often because of telephone requests.
4) We create ads, and send out proofs for their approval (and we get them back, with edits.)
5) We send invoices and statements so they can keep their bookkeeping up to date.
6) And we have a host of other creative ways that are used in small towns to keep people informed. For example, NNA's member, the semi-weekly *Wise County Messenger* in Decatur, TX, has a daily fax newspaper "Update" that is distributed to about 1,000 of its business and residential subscribers, to carry news and advertising promotions that break between weekly editions.
7) Finally, many of our members provide a public fax service. By that I mean that they may own the only fax machine in town. They permit citizens to come in and use it as needed. This is a practice that would surely come to an end under the FCC rule, because citizens would commonly not possess the signed consent forms, the publishers would not be able to risk the liability of improper use, and the exercise of explaining all of the new rules would take more time and generate more ill will among customers than most newspapers would be able to sustain.

The question we have heard from some of your staffs as we have discussed our difficulty with the consent rule is: "so . . . keep using the fax. Just get the forms signed. What's the big deal?" NNA's Government Relations Chairman, Jerry Reppert, publisher of the Anna (IL) Gazette Democrat, met recently with the Federal Communications Commission staff in charge of this rule, and that was pretty much the question he heard.

I think that question is not meant to be belligerent, although to our ears, it sometimes sounds so. I think it reflects the thinking of people in a big city accustomed to working with big businesses that keep Information Technology departments busy round the clock, collecting, massaging and managing data.

It probably is hard to imagine businesses like ours—although I'm confident there are tens of thousands operating out of office buildings and in small offices and home offices in this very area. I can't speak for a big business on this issue, but I can tell you what I know about community newspapers.

We do not collect, absorb and massage massive amounts of data. We keep simple lists of our subscribers, and our advertisers. We do not, by and large, have sophisticated databases, and I cannot think of a single community paper that has a database manager. What luxury!

Here is what I believe most of my publisher colleagues would have to do, in order to comply with this rule:

1) Acquire or upgrade a database program;
2) Mail out, or hand carry, several thousand consent forms;
3) Explain over and over, at the post office, at the golf course, at church, standing in the school parking lot, that, yes, we really must have these forms back;
4) Send someone out again to get some of them back;
5) Send someone out again to get some of them back;
6) Explain over and over on the phone, "no, we can't fax you the ad rates, because you forgot to send your form back."
7) Apologize to an irate customer, while standing in the post office or in the school parking lot;
8) Send someone out again to get some of them back.
9) Hire someone to file them, make a note of them in the database, and remember to check them periodically to make sure nothing has changed, and then . . .
10) Send someone out again to get new forms back.

You get the picture. It is going to require, in all probability, hiring someone to do this work. Or it will require shifting someone from selling ads or writing stories to take on this new task.

We do very little survey work within NNA, primarily because of the cost. But we did ask some of our leadership earlier this year what they thought of the compliance costs and problems with this rule. I am attaching a talking paper that we produced with some of the responses, for your record.

With many of our papers—particularly in America's struggling small towns, where the newspaper is only as healthy as the dwindling downtown—this extra cost may be the difference between a profitable year and a losing year.

For what reason do we do this? Because someone out there is violating the fax rules that are already in place, blasting out offers for everything from vacation cruises to lower mortgage rates. That's not us. We see no reason why we should pay the price for those antics.

Mr. Chairman, I believe your bill takes the right approach. It basically says that if we have an established business relationship with the people and businesses to whom we are sending our faxes, neither we nor they are required to shoulder the

burden of written consent forms. It recognizes the existing good business practices of those who use the fax machine responsibly, and leaves the Commission free to go after those who do abuse it.

We and our customers do not need a written consent form to understand one another. We work together because we need one another, and we have developed a good working relationship and mutual trust. We would not abuse our customers' fax machines, nor they ours.

We understand the established business relationship rule. Our industry has conducted training in compliance with the Do Not Call rules. It makes sense, for simplicity's sake, to use a similar approach.

I would be remiss if I did not say a word, as well, on behalf of our association, operating as its own business.

I am active in both our national organization and the Michigan Press Association, where I served as president in 2000. Our associations were nearly as shocked as the members to learn that a collection of consent forms might be required before staffs could fax our conference registration forms and the like. All of us had to deal with shrinking resources in our association offices during the recent recession. I can assure you that they have few enough resources to put the conference on, let alone find staff to badger our busy members to remember to return the forms. Surely the payment of dues is an indicator that a business or individual wishes to have contact with the association. Requiring an additional consent, to me, would prove nothing.

Mr. Chairman, I want to close by expressing the urgency of my concern with this requirement. The requirement will go into effect in January if your bill does not become law. To be realistic, most of us will have to begin absorbing the cost of compliance in August or September.

I recognize that the Congress has a very busy season ahead. I fervently hope most of your colleagues recognize this bill to be a very rational and sensible change in the law, to simply have the law reflect what most of us are doing anyway. I would like to pledge the commitment of the National Newspaper Association to work with this committee and its staff to help move the bill forward quickly.

Thank you for your time. If there are any questions that come up following the hearing, I would be happy to supply responses for the record.

Mr. UPTON. Well, thank you, all of you, for your very good testimony. I want to way in at the outset and say that we are intending to move this bill. I don't think it is any secret that Chairman Barton and I are trying to make sure that we remove any roadblock of getting this bill moved with the utmost speed and to the floor of the House as quickly as we can. And it does appear as though we will have very strong bipartisan support as we move forward.

I do have a couple of questions in my time, and I want to say, Mr. McDonald, we welcome your testimony as well. The FCC has indicated that written permission is not difficult. Tell me a little bit—listening to Ms. Kaechele talk about the enormous burden that it would impose on particularly small businesses, I think about myself as I have, I think as almost every American has refinanced their house or bought a house, all the different forms you have got to fill in and checks that you have to write to a whole bunch of different entities along the way, and you want to make sure that that paperwork is clear as you move forward, but tell me about your thoughts about the feasibility of the FCC suggested means of obtaining specific permission for every single one of those transactions.

Mr. MCDONALD. Well, Chairman Upton, the FCC has indicated that they have some alternative methods of obtaining that permission. They start first with the face-to-face meeting, direct mail, email with electronic signatures. All of these are options that do present, I think, a challenge for real estate professionals and the consumers involves in real estate transactions. The face-to-face meeting would seem to be a reasonable alternative, but unlike many businesses, many purchasers have a very close relationship

with the people providing those products. But in the real estate business, while we have close relationships with those clients, they might not be purchasing something but about every 7 years. And so where your permission expires in a much, much shorter period of time, it would be very, very difficult to continue getting those written permissions if you were talking about a face-to-face meeting.

When you are talking about direct mail, well, it is true that permission could be delivered to a recipient by mail or by overnight UPS, Fed Ex, one of those delivery services or a courier. The time and the cost is the issue. As I mentioned earlier in my testimony, in the market that we are in today, that time element could mean the difference between a buyer successfully obtaining a home of their choice or losing that home of their choice, because property does not always stay on the market for very long.

Mr. UPTON. Let me ask this question: Some have suggested that perhaps you put a time limit on, maybe 3, 4, 5 years. What are each of your thoughts on some time limit? What would be reasonable? Would you support any time limit? What might you think is——

Mr. MCDONALD. Well, my first reaction would be that we would not be in a position to support a time limit because we think that the basic problem here is not only time but the cost of implementing the signature request, maintaining those files on those. As I said a while ago, you are looking to support the type of real estate market which we hope will continue. You could be looking at millions and millions of forms being required to meet the requirements.

Mr. UPTON. Mr. Graham, what is your thought on a time limit?

Mr. GRAHAM. I think a time limit is unnecessary. I think particularly if the opt-out clause is put in there, that solves the problem.

Mr. UPTON. Ms. Kaechele?

Ms. KAECHELE. I have to agree with the gentlemen. The time limit in our business, businesses change and requiring the right signature can be a problem as well. For example, the local restaurant may change who owns it. Now I have got to make sure that I know who is the owner now. I am not dealing essentially always with individuals, I am dealing with businesses. And in that kind of an environment, often those people change.

I also have a seasonal nature to my business, and we have a newspaper in the resort town of Saugatuck and those people are difficult to chase down in the winter, so to speak, and often again those businesses change. I just think it is unnecessary. I have never had anyone, Mr. Chairman, complain about getting a fax from me, because we don't send faxes except to people how have required our services.

Mr. UPTON. Well, thank you very much. Mr. Shimkus?

Mr. SHIMKUS. I don't have any questions, Mr. Chairman.

Mr. UPTON. Mr. Walden?

Mr. WALDEN. Thank you, Mr. Chairman. I appreciate this hearing and tackling this issue, although I am a small market radio guy in my other life, so I don't know how much I want to help the small newspapers, of course, our competitors.

Mr. WALDEN. No. I share the frustration that you have expressed in your written testimony and here and would hope that we can get this bill moving and out the door.

I found that opt-out provision is pretty useful. I get back to my apartment here in Washington and usually have a few solicitations on the phone and a few faxes on the machine, and you can dial in the number and get off the list. And this issue of the established business relationship, I mean I understand exactly what you are saying. Businesses do change ownerships and then who is the right signature, and it is just, to me, a bit overkill.

And so I guess the question I would have for the panel is, and especially the FCC, I suppose, is in terms of complaints about faxes, how many of them really are business-to-business complaints that you see? How much of this is business-to-consumers and not where there is an established business relationship?

Mr. SNOWDEN. Out of the complaints that we have received, Congressman, the majority of business-to-business complaints that we receive are from small businesses.

Mr. WALDEN. Right.

Mr. SNOWDEN. Most of them for the record that we compiled for this particular proceeding, the small business community said they were being inundated with these business-to-business. So that is the majority of where we are getting the complaints from in terms of the——

Mr. WALDEN. And of those, how many, though, were you able to differentiate were business-to-business—existing business-to-business relationships?

Mr. SNOWDEN. I don't have those numbers, but we can do some research and get that for you. But to give you an example, last year, from March to April of last year, we received about 1,500 complaints a month on faxes in terms of the TCPA.

Mr. WALDEN. Okay. All right. Thank you, Mr. Chairman. That is all I have.

Mr. UPTON. Mr. Markey?

Mr. MARKEY. So it is 1,500 per month total?

Mr. SNOWDEN. Each month for that year.

Mr. MARKEY. Now, you said that there was a $5.4 million forfeiture order against fax.com?

Mr. SNOWDEN. That is correct.

Mr. MARKEY. Have you collected that money?

Mr. SNOWDEN. Right now it is over at the Department of Justice, and they are looking at it and working with us.

Mr. MARKEY. What is the process to ensure that that $5.4 million gets into the government's pockets?

Mr. SNOWDEN. To the U.S. Treasury? The process is twofold. According by statute, under Section 503, what we are required to do, if you are a licensee of the FCC, there is one process, and for those that are not, there is another. For example, if you are a licensee, we can automatically go to a Notice of Apparent Liability. If you are not, we must first issue a citation, then——

Mr. MARKEY. Have you issued a citation?

Mr. SNOWDEN. We have issued a citation, we have issued a NAL, and that is how we got to the over $5 million forfeiture amount that we got to.

Mr. MARKEY. So what is the Justice Department saying to you? Are they going to be the collection agency?

Mr. SNOWDEN. Well, they are our collection agency, that is correct.

Mr. MARKEY. And so where are we in the process? Because as soon as that is finalized, that will really send a chilling effect out to anyone who is abusing consumers. So what is the timeframe on that?

Mr. SNOWDEN. The timeframe is up to the Department of Justice, and we are working with them now to get some more information from them as to when they are going to go after and what they are going to do as next steps for this particular violator of the rules.

Mr. MARKEY. Now, how many cases do you bring a year on those 1,500 complaints, 1,500 per month?

Mr. SNOWDEN. I will need to check with my colleagues in the Enforcement Bureau. As you know, I represent the Consumer and Government Affairs Bureau. We have issued over 233 citations in the past years.

Mr. MARKEY. Past years.

Mr. SNOWDEN. Yes. That——

Mr. MARKEY. But it is 1,500 per month. The complaints are 1,500 per month, so how many per year—how many per month do you, on average——

Mr. SNOWDEN. One of the challenges that we have with enforcing these rules is that it is hard to find who these faxers are. As the panel said earlier, some of these faxers are offshore, some of them go bankrupt, some are out of business.

Mr. MARKEY. So, on average, do you bring ten cases per month?

Mr. SNOWDEN. I don't have the information at my fingertips, but——

Mr. MARKEY. Are you talking in the range of 100 to 150 a month or 5 to 10 per month? Which is the closer?

Mr. SNOWDEN. Again, sir, I will have to check with our enforcement—I don't want to give you any false information.

Mr. MARKEY. But you said it is only 200 per year.

Mr. SNOWDEN. No, we have issued 233 citations so far.

Mr. MARKEY. Two hundred and thirty-three citations over how many years?

Mr. SNOWDEN. And that is starting, I would say, back from 1999 to now.

Mr. MARKEY. So over the last 5 years 200, so that is about 40 a year that you actually—the citations that you bring, but at 1,500 per month, you are looking at like 18,000 complaints a year.

Mr. SNOWDEN. Correct.

Mr. MARKEY. Over a 5-year period. That brings you up close to 100,000 complaints, 90,000 to 100,000 complaints if that average stayed in tact. So if you only brought action against a handful, then it is—a driver on the road, 100,000 drivers on the road, if only a small handful ever get stopped or if you are able not to put the money in the parking meter, then you are not really providing a real deterrent. So is there any effort to increase the frequency with which there is a prosecution or there is an action taken? It does seem like a low level.

Mr. SNOWDEN. One of the things that we are trying to do put in place or we have put in place, our Enforcement Bureau has increased their enforcement activity regarding the TCPA. We announced that when we announced the new rules back in 2003.

Mr. MARKEY. Increasing it to what?

Mr. SNOWDEN. Enforcement activity.

Mr. MARKEY. Right. Increasing it to what level?

Mr. SNOWDEN. Well, we have not articulated a particular number goal, because the challenge that we have before us is that we have to find them.

Mr. MARKEY. No, I am saying but out of 90,000 complaints, potentially, say in that range over the last 5 years, you must be able to find more than 10 a month.

Mr. SNOWDEN. Believe it or not, Congressman, it is very, very difficult to find these individuals who are violating the rules. There are a lot of ways that they escaped us. We do everything we can. Out of the 233, we have had to go through a lot of work to be able to even track them down to get to the point where we are right now. This is a very arduous task to get to the—they obfuscate the law, and they obfuscate us as well.

Mr. MARKEY. Thank you, Mr. Chairman.

Mr. UPTON. I have an additional question. Ms. Kaechele, you indicated that without a change you would see your paper beginning to try to focus on this as early as August. Mr. McDonald and Mr. Graham, what is your sense in terms of when you would actually have to start making changes if you don't see legislation begin to move in a proper direction? How quickly will you have to begin to really address that, knowing that the deadline is, what, the very end of December, December 31, January 1?

Mr. MCDONALD. If your bill were not introduced and successful within a reasonably short period of time, we would have to anticipate the implementation of those rules and start our members' activity on making sure they were in compliance with the rules that had been issued by the FCC. I can't give you an exact date, but I would say it would be a relatively short period of time.

Mr. UPTON. Mr. Graham?

Mr. GRAHAM. We are monitoring it very closely, and if we don't have some action I think by August, the August recess, we are going to have to go into September with some guidance to our members and associations on how this will affect them and how to implement it.

Mr. UPTON. You know, again, as I indicated, we are going to try to put this on the fast track. We have been working and I commend my colleague Mr. Markey and Mr. Dingell and others on both sides of the aisle. Let's say that we get a bill moving, let's say that we get to full committee markup as early as next week, we get it on the floor under suspension. I would like to think if we continue the bipartisan cooperation, we pass it with only Mr. Paul voting against it in July.

And let's say the Senate just doesn't move, molasses continues. Mr. Snowden, if you saw a bill introduced in the Senate with bipartisan support, a bill that actually has passed the House because of the actions of Mr. Tauzin and myself and other members that contacted the FCC you were able to put a stay, in essence, in terms

of when the regulations were going to take place, would the FCC, would they look at Congress' intent and perhaps give us another stay until we could actually get this bill done, maybe in lame duck session or something like that, at least give a signal to the many businesses out there that are looking for some help? Do you think that would——

Mr. SNOWDEN. Well, as you noted, sir, when we first learned of the challenges that were facing the business community with your urging and their urging, we quickly put a stay in place to allow businesses to get up to speed, because our goal, of course, is to be pro-consumer and to also ensure that consumers and businesses alike can have some control over the messages they receive.

In terms of a future stay, it will be up to the five members of the Commission to vote on that. That is something that is not done at the Bureau level, that is done at the Commission level, and I would urge the committee, whatever you all are going to do to bring clarity to this issue——

Mr. UPTON. So you would be on our side?

Mr. SNOWDEN. I would be on the side——

Mr. UPTON. A letter may come to you before it goes upstairs.

Mr. SNOWDEN. For the record, sir, I will be on the side——

Mr. UPTON. And we may not fax it either. We will have to call to see if I can send it down there.

Mr. SNOWDEN. If I may, Chairman Upton, I would like to go back to a point to Mr. Markey for a second. One of the questions, I think, where you were going to in terms of our enforcement activity that could help the Commission, for example, our forfeiture amounts are $11,000 per violation right now. And for many of these companies, that is peanuts. For the fax.com case, they had over 480 different violations, and we fined them $11,000 each, and that is what got to that amount. Raising that amount would be helpful.

Mr. MARKEY. What would you like it at?

Mr. SNOWDEN. I think I will leave that to the Chairman. I think Chairman Powell will get back to the committee on that particular matter, but right now it is not where it needs to be to have a dent. In addition to the citation—right now we have to issue a citation to the non-licensees. Eliminating that phase would be helpful as well.

Mr. UPTON. In some of these cases, does the faxer often hide their own identity, their own fax number in terms of trying to respond back to them?

Mr. SNOWDEN. They sure do. In fact, what we have found is, and it seems counterintuitive when you first think about it, if I am trying to sell a product, why am I hiding my identity because I need to be able to call you to sell that product, but when a consumer begins to call that number, it is very difficult for them to get off a list. It is very difficult for us to find out who actually owns this, who do we actually put this forfeiture or this citation against? And so that is a challenge, and as you all point out, it appears you all are addressing that issue with the domestic call.

Mr. UPTON. Mr. Markey?

Mr. MARKEY. Mr. Snowden, should we have a requirement on the opt-out notice requiring the legal name of the sender?

Mr. SNOWDEN. Well, the——

Mr. MARKEY. Would that help your enforcement if legally in the law they actually had to put their legal name?

Mr. SNOWDEN. Any clarity that we can have in terms of knowing who the individuals are would help our enforcement activity.

Mr. MARKEY. So you would have us make it a requirement that they have to put their legal name?

Mr. SNOWDEN. I would ask for any clarity that you all could provide for this matter.

Mr. MARKEY. So you would support that.

Mr. SNOWDEN. I would ask for clarity, sir, yes. We offer technical advice to the Congress. Since we have many of these issues before us right now on reconsideration, it would be inappropriate for me to voice the opinion of the Commission since some of these issues are before us right now.

Mr. MARKEY. Would a requirement that they have to use their legal name be more useful to you than they use a bogus name?

Mr. SNOWDEN. Absolutely.

Mr. MARKEY. So maybe we can make that a requirement. Thank you, Mr. Chairman.

Mr. UPTON. Mr. Shimkus?

Mr. SHIMKUS. Mr. Chairman, along this line of questioning, who is the legal name of an association? Who would that be? Would that be the executive director?

Mr. GRAHAM. The legal name of an association is in the case of ASAE would be the American Society of Association Executives is the legal name. That is the name that would appear. That is the registered business name.

Mr. SHIMKUS. So who is, in essence—I guess the confusion is if we are going after bad guys and the idea is get a legal name so we know who to go to, if it is an association, it is still—well, it is—I mean it would be protection under corporations.

Mr. GRAHAM. Most associations are incorporated, so the legal responsible party would be the incorporated entity.

Mr. SHIMKUS. I mean so if it is a nefarious, sinister intentional organization that uses an association name, that you still can't—you still wouldn't be able to track them, you would still have the same problem.

Mr. SNOWDEN. You are identifying the challenges that we have in our enforcement capabilities, absolutely.

Mr. SHIMKUS. I just thought I would ask. I didn't know how that would work. Thank you.

Mr. UPTON. Mr. Graham?

Mr. GRAHAM. I mean the unintended consequence here, of course, as I am hearing this testimony, is that we are very easy to spot. You can find the realtors, you can find us, you can find newspapers. We are easy to find. The people who are violating the law, it sounds like, in large part, are people who you can't find. And so we are putting in place perhaps a law that—we are not putting in place a law but we have a law in place now that penalizes the honest and the other ones are going off scott-free.

Mr. SHIMKUS. Welcome to Washington.

Mr. GRAHAM. Right. Just thought I would point that out. Thank you.

Mr. SHIMKUS. I think other people have mentioned that to us.

Mr. SNOWDEN. To us as well, sir.

Mr. UPTON. Mr. Walden, do you have additional questions? Any comments, remaining comments from the panel?

Mr. MCDONALD. Mr. Chairman, I really wanted to add that from my perspective after hearing the testimony from everybody this morning, if you allow the OCC rules to go in effect the way they were proposed—I am sorry, not OCC, the FCC rules, what you are doing——

Mr. UPTON. We do like banking jurisdiction.

Mr. Oxley used to be a favored member of the committee and no longer is.

Mr. MCDONALD. There you go. What you are doing by taking away the existing business relationship exception that has been in place is you are penalizing the good guys that they can find and doing nothing to curtail the bad, unsolicited fax that are out there. So our point to you today is that your bill is important to get that exception back in place so that the good guys aren't the ones that are being penalized and that somehow or another they find the bad guys and eliminate those that are doing the unsolicited faxing.

Mr. UPTON. Mr. Snowden?

Mr. SNOWDEN. Chairman Upton, I would offer as well that since we have issued these rules, I have personally met with each of the individuals on the—excuse me, each of the associations on this panel here.

Mr. UPTON. We would like to know if you have gotten a subscription to the Allegan County News?

Mr. SNOWDEN. I have not purchased that, but I know the Chairman is very supportive of making sure that we have a voice in small communities, so I will look into that. But the issue I wanted to bring forward is that no matter what happens the FCC's doors are always open to each of these panelists and others who want to come and talk to us about these rules and our records as we go forward.

Mr. UPTON. Well, again, we appreciate your testimony, your help with us as we move forward. Again, I want to announce it as early as tomorrow. I intend to introduce this legislation with strong bipartisan support, and we intend to move it as quickly as we can through the legislative process, hoping that the other body begins to take action as well, and we appreciate your thoughts, we look forward to working with you in the days ahead, and we now stand adjourned. Thank you.

[Whereupon, at 11:21 a.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:]

PREPARED STATEMENT OF PHILLIP D. BRADY, PRESIDENT, NATIONAL AUTOMOBILE DEALERS ASSOCIATION

The National Automobile Dealers Association (NADA), which represents 20,000 franchised automobile and truck dealers who sell both domestic and import vehicles and employ more than one million people nationwide, strongly supports legislative efforts to remedy the Federal Communication Commission's (FCC) rule to require written permission prior to sending any commercial fax. Without remedial legislative action before January 1, 2005, when the FCC's rule will take effect, there will be a severe disruption to trade associations in communications with their members and businesses responding to their customers' needs.

BACKGROUND

In 1991 Congress enacted the Telephone Consumer Protection Act (TCPA) to prohibit sending unsolicited fax advertisements to any person or entity, including businesses. The statute defines an unsolicited advertisement as any commercial material transmitted to any person without that person's *prior express* invitation or permission.[1]. In 1992, the Federal Communications Commission (FCC) determined that an "established business relationship" with a recipient serves as prior invitation or permission for a commercial fax.[2]

Despite years of reliance on an "established business relationship" that allowed tax-exempt trade associations to communicate with their members and businesses to respond to customer requests for faxed material without restriction, the FCC on July 25, 2003 reversed its prior fax rules to remove the "established business relationship" exemption on the grounds that it did not have a basis in law. This part of the new FCC regulation, scheduled to take effect January 1, 2005, will require all senders, including tax exempt trade associations and businesses, to obtain *prior written consent* from their members and customers before sending faxes of a commercial nature. This written permission must include the recipient's signature, the fax number to which the material may be sent, and the recipient's clear consent to receive such faxes from the sender.

IMPACT OF FCC'S FAX RULE

While these new fax regulations issued by the FCC are intended to stop abusive faxing of unsolicited materials, a goal fully supported by NADA and its members, we believe the regulations are overly broad and impose significant and unnecessary burdens on businesses and trade associations. The fax regulation as currently structured would also impose substantial burdens on consumers and their ability to obtain information they seek in a timely and expeditious manner.

Under the new FCC rules for example, major trade associations with thousands of members would need to undertake substantial efforts, in both time and resources, to obtain the written permission of their members to send any faxes that may be of a commercial nature. Because these members are individuals and entities who have voluntarily sought the benefit of the association's services, we do not believe there should be government-imposed restrictions on a tax-exempt trade association's ability to communicate with its members. This particularly applies since under the TCPA fax recipients can terminate the established business relationship at any time simply by notifying the sender.

If the new FCC rules applied to our members' businesses, they would not be able to respond to oral requests from consumers, existing customers, or other commercial enterprises for faxed information. For example, a fax of product or service information (such as a price quote), even if specifically requested, could not be carried out unless there was prior written permission to do so. There should not be any doubt that such a rule would result in tremendous cost, burdensome record keeping, and divert time and resources away from the active conduct of the business. Automobile retailers are already struggling to keep up with all the other regulatory burdens imposed on them by government at all levels. There is no public policy rationale to subject them to the costs and difficulty associated with obtaining and tracking such written consent forms where a business relationship already exists or the fax is specifically requested.

LEGISLATIVE REMEDY

Any legislative remedy to the FCC's impending fax rules should amend the Telephone Consumer Protection Act (TCPA) to specifically create a statutory "established business relationship" exemption to the ban on unsolicited commercial faxes. This would codify the "established business relationship" exemption for commercial faxes that has worked well for more than ten years while also preserving protections currently in law to prohibit and punish truly unsolicited commercial advertisements.

We understand that any legislative action to restore an "established business relationship" may also include an "opt-out" option on future faxes for those with existing relationships. While we do not oppose such a step, we believe, if that step is taken, the definition of "unsolicited advertisement" should also be amended to specifically

[1] P.L. 102-243

[2] The FCC regulations implementing the TCPA define an "established business relationship" as "a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of 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." 47 CFR § 64.1200(f)(4).

exclude fax communications that: respond to a specific inquiry; complete a transaction requested by the recipient; and are sent by a tax-exempt trade association to its members and affiliates. We believe that there is no public policy rationale to treat such communications as unsolicited, and the application of the opt-out mechanism to such communications may impose some of the same unjustifiable burdens as the FCC's new written permission rule. It is especially important that there is no ambiguity on these points since the TCPA establishes substantial penalties including a *private cause of action* and the Federal Communications Act separately authorizes the FCC to issue fines that can be up to $11,000 per violation.

CONCLUSION

In conclusion, NADA believes that unless the current "established business relationship" exemption to unsolicited commercial faxes is preserved, there will be substantial and unnecessary disruption to ongoing communications between trade associations and their members and businesses responding to their customers. Such legislation is only a technical change and would preserve the FCC's previous determination that a prior business relationship between a fax sender and recipient establishes the proper consent to receive fax advertisements. The FCC's recent change requiring prior written permission for such faxes must not be the final word on this issue. By remedying the FCC's fax rule, Congress can alleviate a serious and adverse impact on trade associations and small businesses such as automobile dealerships and continue to allow the unburdened use of a fax transmission to convey valuable information among those with a prior business relationship.

With the new fax regulations scheduled to take effect January 2005, trade associations and businesses are in flux and will have to undertake extraordinary and costly compliance measures unless there is prompt legislative action. There is an urgent need to enact this straightforward legislation before Congress adjourns this fall, and NADA urges this committee and the Congress to work expeditiously on this matter. Thank you for your consideration.