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S. 714, THE JUNK FAX PREVENTION ACT OF 2005

HEARING

BEFORE THE

SUBCOMMITTEE ON TRADE, TOURISM, AND ECONOMIC DEVELOPMENT

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

APRIL 13, 2005

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ONE HUNDRED NINTH CONGRESS

FIRST SESSION

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CONTENTS

	Page
Hearing held on April 13, 2005	1
Statement of Senator Boxer	2
Statement of Senator Lautenberg	4
Statement of Senator Smith	1

WITNESSES

Bladine, Jon E., President/Publisher, News-Register Publishing Company	5
Prepared statement	7
Feeken, Dave, Broker, RE/MAX; on behalf of the National Association of REALTORS® (NAR)	11
Prepared statement	13
Kirsch, Steven T., Founder/Chairman, Propel Software Corporation	19
Prepared statement	21

S. 714, THE JUNK FAX PREVENTION ACT OF 2005

WEDNESDAY, APRIL 13, 2005

U.S. SENATE,
SUBCOMMITTEE ON TRADE, TOURISM, AND ECONOMIC DEVELOPMENT,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:45 p.m. in room SR–253, Russell Senate Office Building, Hon. Gordon H. Smith, Chairman of the Subcommittee, presiding.

OPENING STATEMENT OF HON. GORDON H. SMITH, U.S. SENATOR FROM OREGON

Senator SMITH. We'll call to order this hearing of the Trade, Tourism, and Economic Development Subcommittee of the full Commerce Committee. The hearing is on S. 714, The Junk Fax Prevention Act of 2005. I apologize to those present that we've had votes get in the way of our starting at 2:30, but let's begin.

I thank the witnesses for being here today. Today's hearing will focus on The Junk Fax Prevention Act of 2005. I thank my colleagues on the Senate Commerce Committee, Senators Inouye, Burns, Stevens, Dorgan, Lautenberg, Snowe, and Sununu, a broad bipartisan coalition, for co-sponsoring this legislation with me.

S. 714 would create a statutory exemption to the current communications law prohibiting the faxing of unsolicited advertisements to individuals without their prior written invitation or permission. This bill would not legalize the sending of junk faxes or blast faxes, which have been prohibited for 13 years and will continue to be prohibited under this bill. This bill is about continuing legitimate fax communications between businesses and customers.

S. 714 will strengthen existing laws by providing consumers the ability to prevent unsolicited fax advertisements and provide greater congressional oversight of enforcement efforts by the Federal Communications Commission. This bill will also help businesses by allowing them to continue to send faxes to their customers in a manner that has proven successful with both businesses and consumers.

In July of 2003, the FCC reconsidered its Telephone Consumer Protection Act rules, and elected to eliminate the ability for businesses to contact their customers even where there exists an established business relationship. The effect of the FCC rule would be to prevent a business from sending a fax, fax solicitation, to any person, whether it is a supplier or a customer, without first obtain-

ing prior written consent. This approach, while seemingly sensible, would impose significant costs on businesses in the form of extensive recordkeeping.

Recognizing the problems created by this rule, the Commission has twice delayed the effective date of its implementation, with the current extension of its stay expiring on June 30, 2005.

The purpose of this legislation is to preserve the established business relationship exemption currently recognized under TCPA. In addition, this bill will allow consumers to opt out of receiving further unsolicited faxes. This is a new consumer protection that does not exist under the TCPA today.

We believe that this bipartisan bill strikes the appropriate balance in providing significant protections to consumers from unwanted, unsolicited fax advertisements, and preserves the many benefits that result from legitimate fax communications.

We have heard from hundreds of associations, representing tens of thousands of large and small businesses, on the importance of swiftly passing this legislation to avoid interfering with legitimate communications. In the 108th Congress, this legislation passed both the Senate and the House, but was not signed into law prior to adjournment of Congress. We hope that both the Senate and the House can pass S. 714 in a timely manner prior to June 30, 2005, when the FCC stay expires.

I want to publicly welcome and thank one of my constituents, Mr. Jeb Bladine, the publisher and editor of the News-Register, in McMinnville, Oregon, who is here to testify about how this bill will affect small businesses like him.

I'm pleased to be joined by my colleague and my neighbor from California, Senator Barbara Boxer, who has a slightly different view of this bill, I think.

STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM CALIFORNIA

Senator BOXER. Thank you, Mr. Chairman, so very much. And, Senator Smith, thank you for the cooperative manner in which we have worked since the last session on this legislation.

I expressed my objections then, and I was able to negotiate greater protections for consumers in the final bill that passed the Senate on December 8, 2004. A lot of it had to do with the fact that you were willing to work with me, and I so appreciate it now. These improvements included important protections for consumers, as well as for small business; however, S. 714, the legislation before us today, includes none of these protections and is a huge step backwards. This is clear to me that, instead of a Junk Fax Prevention Act, which is its title, I think it should be called The Junk Fax Promotion Act, because, at the end of the day, that's what we're doing.

Let me begin by stating the facts. To clarify, if we do nothing here, junk faxes will end on July 1st. This legislation that's before us does not ban junk faxes, it lets them continue. It's important that this fact is on the record and that everyone understands it, because when you read a bill that's called The Junk Fax Prevention Act, you think that you're doing a good thing; but, in essence, you're promoting junk faxes.

Let me explain in more detail. The FCC regulations scheduled to take effect on July 1 says that someone sending a junk fax needs written consent from the recipient. Pretty tough rule. You can't send a fax unless you get permission. On the other hand, the bill before us will allow any business with, "an established business relationship with the consumer to send unrequested faxes to that consumer's machine." Now, I'm sure you've gotten some of those Senator Smith. I certainly have. And it makes me crazy, using up my paper, my electricity, to come into my house, and I don't want another mortgage. You know? I've got a good one. And if I want a better one, I'll take action. And these people are sending me things. I'm getting them every day. And what I should have done is collected them, since December, but I didn't. Maybe I'll start today, and we'll see how many we'll have when we get this to the floor.

Consumers interact with hundreds, if not thousands of businesses, each year. To say that all those businesses should then be allowed to indiscriminately flood individuals with faxes in perpetuity does not put a stop to a lot of our junk faxes. In fact, I believe it will open up the flood gates.

One expert estimates—listen to this—that 2 billion faxes are sent every year, and that this language, the language in this bill, will allow for 4 billion faxes in the near future. Think of it. Under the bill that my colleague supports, which I hope we're going to be able to amend, any restaurant, drug store, or gas station that a consumer has visited will be able to send junk faxes to their home or business fax machines.

Junk faxes tie up machines of individuals and businesses, rendering them unusable to their owners. It is not a trivial matter. It can be quite serious. For example, the University of Washington Medical Center in Seattle had to go to court to stop a sender of junk faxes who was crippling its machines, and, therefore, compromising patient care.

Under this bill, the University of Washington Medical Center, or any other hospital, could be contacted by any drug or medical supply company, janitorial service, cleaning product, telephone system, or courier they had ever used, and have junk faxes sent to them. So we are opening the door to junk faxes wide open. I never thought that's what Senator Smith intended to do. But, in essence, that's what your bill does.

As the *San Jose Mercury News* editorial page stated on August 27, 2004, "Junk faxes rival only spam as the most egregious form of intrusive marketing. They unfairly force recipients to pay, in reams of paper and toner cartridges, for ads they never asked for."

Now, I acknowledge that the Federal Communications rule went too far. I think it's too burdensome to have to get a written consent for a business. And requiring such consent from every fax recipient, it is too burdensome, and it's too expensive for small businesses and others. But I disagree that an established business relationship should constitute consent for businesses to send faxes to homes and business just because I walk into a store and buy a product in that store. Part of the deal was, I gave my money, and I got the product, and that's the end of the deal. The deal doesn't

mean that they can fax me forever. As much as I might love that store, I'm not inviting them into my home.

So here's what I think we should do. Instead of written consent, I would support allowing verbal consent to suffice before a fax is sent. I think that's a pretty fair deal. You want to send a fax? Get verbal consent. That's important. Get consent. There must be consent. Because I buy toothpaste at Wal-Mart or I order pizza from Domino's doesn't mean that Wal-Mart or Domino's should have the right to fax me, at will, with anything they want.

So, in closing, the bill before us cancels the FCC's regulation, and it goes too far in the opposite direction. We shouldn't let it become law without provisions to protect consumers. Surely we can pass more reasonable legislation. We've done it on the Do Not Call List. That's one of our most popular pieces of legislation.

So now we have a bill before us. It's misnamed The Junk Fax Prevention Act, when, in fact, it weakens, by miles, an FCC rule that I admit has gone too far. This takes us in the other direction, and it sanctions probably 4 billion faxes a year. We, as policymakers, should protect consumers from junk faxes, and I want to find this middle ground. And I'm hopeful that this panel will help us toward that middle ground.

Thank you, Mr. Chairman.

Senator SMITH. Thank you, Senator Boxer. And there will be a mark-up tomorrow, and we'll certainly consider your ideas for finding that right middle ground. I think that is all of our motives.

We've been joined by Senator Lautenberg, of New Jersey.

STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM NEW JERSEY

Senator LAUTENBERG. Thank you very much, Mr. Chairman. I commend you for holding this hearing.

People are weary of hearing the fax machine beckon your attention and finding out that you got another chance to buy stocks you didn't need. But it is, unfortunately, a good way to curtail the invasion of privacy, as Senator Boxer just said. You know, we did it on telephone calls; why shouldn't we be able to do the same thing concerning the unwanted faxes? The issue of unsolicited fax advertisements dates back to 1991, when we passed the Telephone Consumer Protection Act. Now, that law, still in effect, generally prohibits anyone from faxing unsolicited advertisements without, "prior expression—express invitation or permission from the recipient."

In October 1992, the FCC released its original order interpreting the ban on unsolicited faxes. That order contained a footnote that facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient.

Now, this interpretation was followed for more than a decade, but in July 2003 the Commission reversed its position. As a result, many businesses and nonprofit organizations are confused about what is and is not permissible, and we need to clear up this confusion, while still protecting consumers from faxes that they don't want and allowing them to receive those they do.

I'm an original co-sponsor of the Junk Fax bill. It is a sensible compromise. It balances the need for businesses, nonprofit organizations, and trade groups to continue to communicate with their consumers and members, while recognizing the right of the consumer to say "no thanks" to unsolicited faxes. The bill gives consumers an easy way to opt out of receiving unsolicited faxes, at no cost to themselves. And, finally, it requires the FCC to report annually on the enforcement of the junk fax provision, so we'll know how well these protections are working. And with effective enforcement and oversight, I believe that this bill will serve the public well.

I thank you, again, Mr. Chairman, and I look forward to the testimony of the witnesses and the opportunity to ask questions. And, Mr. Chairman, I have a briefing, a sensitive briefing that I must go to. I assume the record will be kept open so that we can submit questions.

Senator SMITH. We'll keep the record open, Senator, so you can ask, in writing, any questions you like.

Senator LAUTENBERG. Thank you very much.

Senator SMITH. Thank you.

Our witnesses will go in this order: Mr. Jon Bladine, President and Publisher of the News-Register Publishing Company, in McMinnville, Oregon; Mr. Dave Feeken, Broker of RE/MAX of the Peninsula, Kenai, Alaska—you've come a long way, and we thank you for that; and Mr. Steve Kirsch, Founder and Chairman of Propel Software Corporation, in San Jose, California. We thank you for being here.

So, Jon, the mike's yours. We invite your testimony now.

STATEMENT OF JON E. BLADINE, PRESIDENT/PUBLISHER, NEWS–REGISTER PUBLISHING COMPANY

Mr. BLADINE. Thank you, Senator.

Good afternoon, Mr. Chairman, Members of the Committee. My name is Jon Bladine, better known in my community as Jeb Bladine. I'm here to testify in support of S. 714.

I'd like to summarize my testimony and provide a longer statement for the record, if I may.

Senator SMITH. Yes, we'll accept that. And you can shorten your statements, if you want, if you have longer ones, all of you. We will include them in the record.

Mr. BLADINE. Thank you.

I am president and publisher of the News-Register in McMinnville. Our family business spans four generations, since 1928, with business interests that include the newspaper, commercial printing, Internet access, and Internet software development. I'm here today, though, in my role as regional director of the National Newspaper Association, a board on which I represent community newspapers from Alaska, Idaho, Montana, Oregon, and Washington.

The National Newspaper Association has nearly 2,500 members across America, and all of them are alarmed at the prospects of a signed-consent rule for commercial faxes. The FCC order eliminated the exemption for established business relationship, and

would now require that we get written and signed permission before sending any advertising-related fax.

The established business relationship was sufficient before. With this order, we would have to maintain a costly database and compliance system or abandon fax communications altogether. But the true faxers, those whose practices are already illegal, would continue. So, with that order, the guilty would proceed, and this order would punish the innocent.

We were grateful that that deadline was extended. But now we are facing a July 1 compliance date. Unless Congress acts now, the cost of compliance with the FCC order will start to hit our balance sheets in a matter of days.

Junk faxes waste resources at our business, too. But that blitz of anonymous ads does not come from the newspapers that I represent, and they don't come from the small businesses across America. We use the fax machine as an efficient and urgent tool to communicate information to people who want it. S. 714 would allow us to continue that responsible use of fax machines.

I'd like to give a brief sense of how we use the facsimile machine. We send rate cards and market information to people who request it. We send information about advertising, circulation, distribution zones. The signed-consent rule would stop our advertising department in its tracks every day, maybe every hour. That department generates more than 80 percent of our newspaper revenue, so that's a pretty important thing.

My newspaper has more than 5,000 current advertising clients, and many more who call for information. They call from local, regional, and national offices. To comply with the signed-consent rule, we would need a fax approval file that might reach 20,000 numbers.

Many of our customers advertise only in special sections. For example, a wedding shop might miss the announcement about the bridal guide, and miss the single best marketing week of the season. We fax those announcements, because the advertisers prefer it, quickly, with the information that they want to get.

Our clients want to see their ads in advance, and the fax machine often is the only realistic way to deliver them. E-mail has many problems with software and file attachments. In-person delivery is very expensive. So we use the fax machine.

The FCC order would require that we interfere with our customers' lives to get signed consent forms. My colleague, Cheryl Kaechele, of Michigan, described this burden last summer, when she testified before the House of Representatives. She described that, "We would have to deliver thousands of consent forms, try to convince clients that we need them, send staff out again and again to collect them, apologize for bothering them, hire staff to manage the process. Our newspaper members say that they would need the equivalent of a half-time person to comply with that rule."

And, even then, even if we were 99 percent compliant, still fax numbers change, people make mistakes. We worry that people might change their mind overnight about us, because of something we write. An angry reader might spot a fax that falls within that 1 percent margin of error, and, aha, a lawsuit. We would pay, even if the real conflict had nothing to do with the fax.

This bill restores a sensible flow of commerce on fax machines. It recognizes established business relationships. Most importantly, it tells regulators to consider the true problem. Real junk fax doesn't come from newspapers or other business that have solid customer relationships. It comes from people trying to make a buck without building a business around respectable business practices.

The solution is sound enforcement of laws against fax abusers, not punishing innocent small businesses. Congress can improve enforcement, and S. 714 takes a sound step in that direction. Our association, the National Newspaper Association, looks forward to working with this Committee for quick passage of this legislation.

Senator SMITH. Thank you very much.

Mr. BLADINE. Thank you, Senator.

[The prepared statement of Mr. Bladine follows:]

PREPARED STATEMENT OF JON E. BLADINE, PRESIDENT/PUBLISHER, NEWS-REGISTER PUBLISHING COMPANY

Good afternoon. My name is Jon E. (Jeb) Bladine. My purpose here today is to testify in support of S. 714, The Junk Fax Prevention Act of 2005. Junk faxes are the bane of many small businesses, including mine, and I want to congratulate Senator Smith and his co-sponsors for introducing a reasonable way to address them while trying to avoid undue burdens on businesses that use the fax machine responsibly.

1. Introduction and Biography

I am Publisher and Editor of the News-Register Publishing Company in McMinnville, Oregon. I am president of Oregon Lithoprint, Inc., a partner in McMinnville Access Company and Pacific Wave Communications, and chairman of the board of Oregon Interactive Corporation. Those titles are the long version of what I really do, which is to deliver information in print and electronically to my community in Northwest Oregon, and through the Internet, worldwide.

My newspaper, the News-Register, has been in our family since my grandfather purchased it in 1928 and moved to Oregon from Iowa. Our family business spans four generations, and I am the fourth family member to serve as publisher. Our business interests include the newspaper, commercial printing, Internet access and Internet software development.

I have served in local and statewide civic organizations, including the McMinnville Jaycees, McMinnville and Oregon downtown development associations, Oregon Children's Services and the Oregon Heritage Commission. I have been a board member, legislative chairman and president of the Oregon Newspaper Publishers Association.

I am here today in my role as a regional director of the National Newspaper Association, a 120-year-old organization of community newspapers. NNA maintains a headquarters co-located with the University of Missouri, Columbia, MO, and a small office in Arlington, Virginia, to carry out our public affairs work. My job on the board, among other things, is to speak for community newspapers in my five states: Alaska, Idaho, Montana, Oregon and Washington.

2. Background of the Junk Fax Issue

The National Newspaper Association has nearly 2,500 members. It is no understatement to say that our members are quite alarmed about the prospect that the Federal Communications Commission signed consent rule for commercial faxes goes into effect July 1.

The Federal Communications Commission delivered quite a jolt to our industry with its Report and Order In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991. That order, adopted June 26, 2003, and released July 3, 2003, turned our world upside down by reversing the Commission's long-standing recognition that faxes from our newspapers to our established business customers are not, in fact, unsolicited faxes in the meaning of the TCPA. In discussion of its Report and Order, the Commission said consumers feel "besieged" by unsolicited faxes, despite the fact that the law prohibited them before 2003 and continues to do so. It announced:

> "The Commission has determined that the TCPA requires a person or entity to obtain the prior express invitation or permission of the recipient before transmitting an 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 to which permission is given, and provide the individual or business's fax number to which faxes may be sent."

The Commission expressly reversed its decision that an established business relationship (EBR) would be sufficient to show that an individual or business had given consent to receive a fax. This new rule was even more draconian than the procedures for compliance with the new Do Not Call rules, which were the principal subject of this Report and Order. At least in those rules, businesses were permitted to maintain relationships with their customers. Here, barring the creation of a costly database and compliance system, we will have to halt our recognized and traditional means of conveying information to people who want to receive faxes.

To add to our consternation, the Commission initially permitted our businesses only about six weeks to come into compliance. I know concerned and agitated business owners and staffers all over the country besieged the Commission and this Committee about that short deadline. I know staffers besieged most of our publishers' offices as our marketing departments envisioned their summer turning into a futile scramble to obtain these consent forms in time. Fortunately, the Commission relented and extended the deadline, and then extended it again.

Now we are staring down the barrel of a July 1 compliance date. And again, unless we set up costly database and compliance systems, we will see our use of the fax come to a halt this summer.

This is why we need Congress to pass S. 714—and to move as urgently as possible. The expense will settle on our balance sheets this spring, within a matter of days, if action is not taken.

3. The Truth About Junk Fax

All of us have seen our paper and ink go to waste from junk fax, for things ranging from cruises to low rate mortgages to health regimens for body parts that we don't all necessarily have. None of us like it. We may differ in our tolerance for other people using our machines to convey their commercial messages. But I hear complaints, and I complain myself from time to time.

However, it is important to remember that the newspapers I represent, and most of America's small businesses, are not producing this blitz of fax ads that so irritate us. We use the fax machine as a convenience and an efficient and urgent tool to communicate information to people who want it. The FCC's signed consent rule trips us up without presenting much of a barrier to those irritating blast faxers.

I assume that most of what we are complaining about already falls into the category of illegal faxes. Certainly, most of what I get comes from places I never heard of, and certainly not from companies with which I have an established business relationship. They were illegal before the FCC acted. They will be illegal after July 1. And they will continue to flow illegally after July 1, while legitimate commerce either abandons fax communication or absorbs a major and wasteful cost. Meanwhile, the junk faxers will continue to pursue their trade.

4. How Newspapers use Faxes

I would like to give this Committee a better sense of how we use the facsimile machine.

A. Rate Cards and Market Information Requests

We send information about the newspaper and website ad rates to those who request them every day. These are business requests for information about our newspaper and website advertising rates, information about upcoming special sections, market information about circulation numbers and distribution zones, and more. The signed consent fax rule would stop our advertising department in its tracks every day. Maybe every hour. Since more than 80 percent of our revenue is generated by that department, it's pretty important.

In the past year we ran advertisements for 5,225 different customers. Some ran only one ad in that year; some ran several each week. Many times that number of potential customers telephone for information because they are considering running ads in our market. Also, many of our customers have multiple decision makers from a local store, regional headquarters, national headquarters, buying service, advertising agency, etc. It is no exaggeration to suggest that our small company would be required to maintain a FAX approval file with nearly 20,000 FAX numbers if we had to comply with this rule.

These requests require the fax machine. Most advertising decisions are very time-sensitive. Since customers and potential customers need information quickly, they routinely ask us to FAX information to them rather than mail it. That information might be a rate card, information on a special edition, market demographics, deadline reminders or credit forms. E-mails sometimes are a nice substitute, but there are many problems with e-mail attachments. Many businesses still don't have e-mail, but they all have fax machines. When people request information, they want a hard copy now, without having to figure out e-mail attachments.

B. Special Sections

The bread and butter of a community newspaper is its special section calendar. In that sense, we may be a little like magazines. We cover the routine city council and school board news, but we also publish special sections that interest particular segments of our advertising clients and our subscribers. Our subjects range from bridal guides to sports reviews, from back-to-school to holiday gifts, from health and fitness to home and gardens, from economic development to community heritage.

Among our 5,000-plus customers, many advertise with us only when one of these sections is available. A bridal shop, for example, could miss the single best marketing week of the season if it misses out on our special section announcement. Why do we fax it? Because the advertisers prefer to receive it that way. They don't have time to scroll through a hundred e-mails a day, and the mailbox contains a similar amount of material they don't want. The fax gets to them quickly and gives them what they need.

C. Advertising Proofs

I know that in Washington, DC, most advertising is created by fancy agencies that do the work for a fee. In McMinnville, the advertising agency for most small businesses is the News-Register. A business may phone and talk out an ad concept by phone, but the owner wants to see it before it is published—to make changes, sign off, have time to prepare point of purchase materials that may be integrated with the newspaper piece.

The fax machine is the only realistic way to get that proof to a small business. The e-mail route creates many problems with applications and attachments. We use a sophisticated design program that few non-advertising businesses keep on their own machines. If we send them the proof in the native application, they can't open it. If we send it in Adobe Acrobat, they usually can't edit it, and sometimes they can't even open it. If they don't have a computer, or their computer is on the blink, or the guy who usually runs it is gone that day, they are sunk. So they want a fax. The other choice is for someone to drive the proof to a customer, but that creates tremendous costs in manpower and fuel, as in pre-FAX days.

D. Invoices and Bookkeeping

We send monthly statements to our advertisers. Those travel by mail. Often, however, advertisers call with questions, requests for adjustments, extra copies and so forth. Those often travel by fax. And since they concern advertising, I would assume the Commission would expect us to have consent forms before we sent them.

E. Other Uses

A host of other creative ways 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, with news and advertising promotions that break between weekly editions.

Finally, many of our members provide a public fax service. By that I mean that they may own the only fax machine in town that is available for public use. That is critical, particularly for senior citizens who may not have an office where a fax machine is available. These newspapers—usually in small towns—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 not commonly possess the signed consent forms. The publishers could not risk the liability of improper use, and they would not want to generate ill will with their customers by trying to explain all the new rules of faxing.

5. The Compliance Cost

The principal concern with the signed consent rule is the Compliance cost. I mentioned the size of database we would need to set up as a tracking system for our group of businesses. While my company is among the larger ones in the community newspaper industry with about 120 employees, many of NNA's members have fewer than 10 employees.

The Commission has asked us to set up an entire system to interfere with our busy customers' lives so we can get these forms, and to repeatedly bother them to keep the forms up to date. I'm going to borrow from my colleague, Cheryl Kaechele, who described the burden of compliance last summer when she testified before the House of Representatives about this rule.

> "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 yet 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 still 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." (Testimony of Cheryl Kaechele, Publisher of Allegan County (MI) News, before the House Subcommittee on Telecommunications and the Internet, June 15, 2004.)

Really, what Cheryl is saying, is that the FCC is requiring us to spend a lot of time and money, and our customers' time and money, getting customers to do what they don't want to do—drop everything to sign yet another form. And for what? To stop junk fax? It won't stop junk fax. But it would hurt a lot of small businesses.

NNA doesn't do a lot of survey work. Our association is small, and surveys can be quite costly. But we did ask members to give us a sense in 2003 of the cost they anticipated for compliance. Most of them told us they would be spending the equivalent of a half-time staff position to comply. This is a cost, for many small weeklies, that makes the difference between a profitable year and a loss.

6. The Threat of Litigation

One of the most awesome and harmful aspects of the signed consent rule is the obvious threat that it leaves hanging over every small business. Fax numbers change. We may forget to file a form, or lose it. Someone with apparent authority to sign a form might never tell the boss, and then resign without our knowing the situation has changed. What is probably most worrisome to those of us in the journalism business is that people can change their minds about us overnight because of something we wrote.

Certainly, we comply today with do-not-call and do-not-send requests. We get very few. And 99 percent of the time, we know for a fact that the faxes we send are going to people who want them. But in that troubling 1 percent margin of error may lurk the angry politician or community activist who disagreed with something I wrote in an editorial—and suddenly spies a fax from our marketing department on the table. Aha! Maybe we don't have the signed consent form. And here comes a lawsuit. Will we have the form? Will we find it in time? Will I have to pull Marketing off their campaign of the week to prepare a defense? And if we've messed up that time, will we pay, even though we know—and the recipient in all honesty knows—the issue isn't about the fax at all? If you think that doesn't happen to newspapers, come sit in my office for a day when there is a local zoning dispute or controversial referendum on the table.

7. S. 714 Takes a Sensible Approach.

This bill gives us some breathing room and restores the sensible flow of commerce on the fax machine.

It recognizes the importance of established business relationships.

It requires us to tell customers how to stop future faxes from coming.

It makes us responsible to demonstrate that we had the consent to send, should a dispute arise—as we have that responsibility today.

It tasks the regulators with looking closely at where the real problem comes from. I don't think the FCC will decide, if it looks closely, that most of the junk fax is coming from us, or any other business that expects to maintain a solid relationship with its customers. Like spam, it comes from those who use the new technologies of our age to latch onto the low barriers to entry in business. They are trying to make a buck without going to the trouble of building a respectable business around respectable business practices.

As an Internet company owner, I can assure you that efforts to stop spam by regulating our responsible use haven't made a dent in that practice. The signed consent rule will do no better with faxes. The solutions are found in transparency, sound enforcement, and education of consumers on how to do business with people they can trust. When spam and junk fax cease to be profitable, they will cease to exist.

Congress can do a lot to improve the transparency and sound enforcement. S. 714 takes a solid and sound step in that direction, and I am delighted to declare the support of our organization for it. We look forward to working with this Committee for quick passage of this legislation.

Senator SMITH. Thank you.

I notice that a vote has started, so we can either try and finish with our witnesses——

Senator BOXER. Let's try to finish.

Senator SMITH. OK.

Mr. "Fakeen"—did I pronounce that correctly?

Mr. FEEKEN. "Feeken."

Senator SMITH. "Feeken," I'm sorry.

STATEMENT OF DAVE FEEKEN, BROKER, RE/MAX; ON BEHALF OF THE NATIONAL ASSOCIATION OF REALTORS® (NAR)

Mr. FEEKEN. Thank you.

Senator Smith and Members of the Committee, my name is Dave Feeken. I'm a broker of a RE/MAX real-estate office in Kenai, Alaska. Our office is both a residential and commercial office. I am here representing the National Association of Realtors.

NAR is the Nation's largest trade association, with 1.2 million members. Our members include brokers, sales people, property managers, and other professionals engaged in every aspect of the real-estate industry.

I appreciate the opportunity to share our thoughts regarding The Junk Fax Prevention Act of 2005, and commend the Committee for its leadership in recognizing that the Federal Communications Commission's revised rules governing the use of facsimile transmissions are a radical departure from current practices, and would significantly interfere with day-to-day business activities.

First, let me say that NAR's members understand and strongly support the goals of the Telephone Consumer Protection Act. Realtors, themselves, are the recipient of unsolicited faxes that tie up our business fax machines. We understand the problem this legislation is intending to address. NAR does, however, question the need for the change that the FCC has made to the TCPA rules.

The prior rules, with its established business relationship exception, has worked well over the past 12 years. In reversing its rule, the Commission could not measure the extent to which consumer complaints received were, in fact, the result of faxes sent as the result of the established business relationship, except as opposed to those sent in violation of the underlying ban on faxes sent outside of an EBR. However, it is clear that the Commission's revised rules

to address unsolicited faxes would have the unintended consequences of interfering with solicited faxes.

Despite all the advances in technology, the process of buying and selling real estate is still dependent upon faxes. And while faxes most commonly used today are to facilitate the paperwork associated with a home sale, faxes are also used in ways that could be construed as advertisement or solicitation, and would, therefore, meet the FCC's definition of an unsolicited fax.

Let me give you an example or two. Real-estate professionals use faxes to communicate quickly and inexpensively with consumers who have contacted them. Take the case of a homeowner looking for an agent to help them sell their home. After an initial phone call, an agent could offer to prepare a comparative market analysis for a seller's review. This CMA provides comparative listing data on other homes on the market, describes what the agent will do to market the home, and proactively solicits the listing. These CMAs are most often faxed prior to a face-to-face meeting. Under the revised rules, faxing this presentation would not be permissible without prior signed permission.

Real-estate brokers and agents also use faxes to send home listing information directly to potential buyers who request it. Under the revised rules, the real-estate agent could no longer followup on callers' requests for information on homes on the market with a fax of available properties. In a tight housing market, and those of you who live in this market know what a tight housing market is, the delay caused could have—in obtaining the written permission or mailing the information, could mean the difference between a buyer successfully purchasing a home, or not.

Consider, too, how awkward this scenario would be when a potential customer calls and asks for information on a home for sale. As I've said, under the revised rules the agent would not be able to fax the information requested. Instead, the agent would have to explain why they can't fax the info, direct the consumer to a Website where they can provide there required written consent, or ask for an address so the agent can mail or courier the information, along with the consent form for future use. This will create frustration, suspicion, and, in some cases, ill will. This will be a giant step backwards in a business where good customer service depends on quick turnaround.

And while I was asked to speak to the use of faxes in communications with consumers, I also must point out that organizations like NAR and its state and local associations routinely use faxes to communicate with members. Those faxes inform members about classes, products and services available to them, often at the member's preferred price. 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 to faxes is not difficult. We disagree. Each of the means provided by the FCC for obtaining written permission—face-to-face meetings, direct mail, and e-mail with electronic signature—presents a challenge for the consumers and the real-estate professionals. Interestingly enough, the one technology which is fast, inexpensive, and widely available is not an allowed means of distributing or returning per-

mission forms. That technology is fax. In discussing the FCC, staff has 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 the likely cost of compliance with the revised FCC rule. Unfortunately, though, we are unable to predict how more than 1.2 million Realtors, approximately 12 million home sellers and home buyers, would have interacted if the revised rules had been in place last year. In our written testimony, however, we presented some conservative, simple assumptions. We estimate that a minimum of over 66 million written permissions would have been required to sustain last year's roughly six million home sales, 66 million forms that would have had to have been printed, sent, collected, and stored on the residential side of the real-estate business, alone. Obviously, the dollar costs involved in the preparation, distribution, and management of 66 million forms would be sizable. As a result, NAR believes that it is critical that the established business-relationship exemption, which has functioned well since the FCC first issued rulings to implement the TCPA some 12 years ago, be reestablished, and that alternative means of giving consent be allowed. We believe that narrowly crafted technical-correction language of The Junk Fax Act can rectify the problems created by the new rules and continue protecting consumers from unwanted faxes that are already prohibited by the TCPA.

We look forward to working with you and achieving this end and thank you for the opportunity to testify.

[The prepared statement of Mr. Feeken follows:]

PREPARED STATEMENT OF DAVE FEEKEN, BROKER, RE/MAX; ON BEHALF OF THE NATIONAL ASSOCIATION OF REALTORS® (NAR)

Chairman Stevens, Ranking Member Inouye, Senator Smith and Members of the Committee, the National Association of REALTORS® (NAR) appreciates the opportunity to share its thoughts regarding S. 714, the Junk Fax Prevention Act of 2005. NAR is the Nation's largest professional trade association with over a million members who belong to over 1,500 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 Committee 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 and would significantly interfere with day-to-day businesses' activities and impose a costly new compliance burden on business of all types.

NAR understands the goal of Congress in enacting the Telephone Consumer Protection Act (TCPA) was 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. We strongly support, therefore, the goals of the TCPA and believe that the law's provisions banning unsolicited faxes are appropriate. We also appreciate the FCC's efforts to craft rules to effectively implement the law and the Commission's willingness to meet with NAR leaders 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 12 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 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. In addition, these new rules will also interfere with the NAR's and its state and local associations' abilities to satisfy members' expectations regarding communications and service.

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 12 years ago be reestablished and (2) alternative means of giving consent be allowed. These two actions 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 Prevention Act of 2005, can rectify the problems created by the new FCC 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 advertisement" 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 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 the individual within the company to which permission is given. Furthermore, the consent form must specify the individual and the fax number to which faxes may be sent. The permission form cannot be faxed to the recipient or submitted via fax to the entity 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 home 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 survey of members of 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.

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[1] 47 CFR § 64.1200(f)(10).

[2] 2003 Report and Order, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02–278 ¶191 (rel. July 3, 2003) ("2003 Report and Order").

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.

When selling their home, most homeowners contact a real estate professional or a number of agents about listing the house. In response to the inquiry, an agent will typically prepare a comparative market analysis which (1) describes what the agent would do to market the home, (2) provides comparable listing data on homes currently on the market so as to begin discussion about a possible listing price and (3) proactively solicits the listing.

In those situations where time is of the essence, this comparative analysis is faxed to the seller 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 a 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 representation agreement. 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.

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 obtain a form to 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 quickly and efficiently with members. These faxes inform members about upcoming continuing education 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 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 methods proposed by the FCC for business to obtain consent—*"direct mail, websites and interaction with their customers in their stores"*—points out the hurdles unanticipated by the FCC that will be encountered by the real estate professional.

Face-to-Face Meetings. As our previous examples indicate, face-to-face meetings are not the norm and are sometimes impracticable prior to the need/desire to fax. Unlike the corner grocery or neighborhood restaurant, consumers do not regularly visit their local real estate firms' offices. (Most consumers engage in a real estate transaction every 7 years.) Consequently, most real estate practitioners will not have a consumer's permission to fax on file when a request for information is received.

A face-to-face meeting will require a special trip that takes time and incurs some travel expenses. At a minimum, these costs will increase the cost of a transaction that will be absorbed by the agent, real estate firm or consumer. At its worst, a face-to-face meeting will be 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 or messenger service. This is an expensive 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. Real estate professionals

commonly respond to large numbers of customer requests for information—only one in twelve contacts eventually results in a home sale and compensation. Delivering and collecting permission via courier or messenger would be cost prohibitive for most real estate practitioners.

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 inherent delayed delivery of materials would make this a very unattractive approach.

Internet/E-Mail/Electronic Signature. Despite the rapid adoption of the Internet and e-mail, 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 sign, an electronic document. Additionally, not all states have enacted legislation that allows for the electronic signature of documents. Electronic delivery, therefore, is seriously limited in those markets where real estate professionals serve a population with limited access to this means of access or without the appropriate state enabling 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 a 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 considered a valid, original signature in some jurisdictions.

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 delivery 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, increased costs and the very real possibility that the window of opportunity to purchase a given property will be lost. 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 a real estate transaction.

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 to obtain written permission and the cost of delivery (e.g. courier, overnight, or mail) required by the new rules are sizable. For example, if the new rules had been in place for 2004, NAR estimates that roughly 66 million permission forms would have to be printed, circulated, processed and stored in the first year by the real estate sales industry in order to comply with the new written permission requirements. This total breaks down as follows:

Agent to a Consumer. Last year, approximately 6 million homes changed hands. If we make a conservative assumption that each seller requested information from two potential listing agents that would typically be faxed today and each buyer received two faxes from two different agents during their home search that were subject to the new rules, then approximately 24 million faxes would have been sent and 24 million signed permission forms would have been 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 account for the fact that many families shop for a new home each year without purchasing a home. Consequently, the 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 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 1.2 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

[3] 2003 Report and Order, ¶ 191.

offices, five settlement service providers and five general business service providers. Thirty million six hundred thousand 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 30.6 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 93,000 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 7,440,000. 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 1.2 million members, an additional 3,600,000 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 3.6 million separate permission forms to be circulated, complied, maintained and checked prior to any communications via fax would be created. 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. This new burden is created 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 permission to fax, there is evidence of over 10 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. The faxes sent by and received by real estate agents are faxes which facilitate a business transaction. 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 other 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 pru-

[4] 1992 Report and Order, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 7 FCC Rcd 8752, ¶34 (rel. Oct. 16, 1992)(CC Docket No. 92–90) ("1992 Report")

dently 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 that 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 requirement 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 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.

Senator SMITH. Thank you, Mr. Feeken.
Steven Kirsch?

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[5] H.R. 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.
[6] S.R. 102–178, at 5 (1991).
[7] 2003 Report and Order ¶ 114.

STATEMENT OF STEVEN T. KIRSCH, FOUNDER/CHAIRMAN, PROPEL SOFTWARE CORPORATION

Mr. KIRSCH. Thank you, Mr. Chairman, for allowing me to speak with the Committee on my perspective on this very important piece of legislation.

I'm here representing the people who hate junk faxes, and there are over 200 million of us. There's only one real point of contention here, and that's whether to add an EBR exemption to the junk fax statute. The other witnesses have testified on the written consent issues, and we totally agree, that's not a problem, we should do that. But I'm here to talk about that EBR. And I'd like to give you compelling evidence, contrary to what you've heard from others, that adding an EBR exemption for junk faxes is something that should not, and must not, be done; not for my sake, but for everyone's sake, including the sponsors and including the gentlemen here.

For example, I get a ton of unwanted junk mail in my mailbox every day from companies I've done business with in the past. You probably do, too. You know, suppose you write a law that forced me to pay both postage and printing costs for this advertising until such time as I notified each one of these businesses to stop? That way, all of these businesses could send me stuff that I don't want at virtually no cost to them, and force me to pay for it until such time as I got mad enough to write them each a letter to stop. How many of you would vote for such a bill? Well, I hope that nobody would, but that's exactly what you're being asked to do here today.

Never before in the history of this country has it been legal to use another man's printing press and ink to print your advertising at the other man's expense and without his permission. But that is exactly what this bill proposes to do.

The sponsors have proposed putting the EBR exception, "back into the TCPA" in order to, "restore the status quo," and, "avoid a harsh impact on business communication without providing any tangible benefit to consumers." That's plain nonsense. It's utterly false. And the facts unambiguously show that exactly the opposite is true. An EBR exemption is completely unnecessary. And if you do put an EBR exemption in, you will impose a harsh impact without any benefit.

The facts and the record show the following. Number 1, there never was, and there never has been, an EBR exemption for junk faxes. The EBR was deliberately removed from the TCPA before its passage in 1991. Number 2, there are no court cases that I'm aware of that have determined that there ever was a legal EBR exemption. Number 3, it's an undisputed fact that there never was, and never has been, an FCC regulation authorizing EBR for junk faxes. It's simply ain't there, folks. It's a matter of public record.

There is no evidence that the TCPA, which never had an EBR, is not working well. This was admitted by the Fax Ban Coalition and in the testimony of NAR given today. For example, NAR has over one million members. They admit that they fax their members all the time. Their members fax other members. Their members fax their clients. Yet there are no known cases of the NAR or a real-estate agent having been sued for any legitimate business-related faxes.

So your primary witnesses, the country's leading trade organization, which extensively uses faxes, is telling you it hasn't been a problem. It's only the written part that's been a problem. So if it hasn't been a problem, why do we need to fix it? In fact, we know the EBR exemption has never been necessary for the smooth functioning of business, because it's been there for 14 years, and nobody ever complained. In fact, hardly anybody even noticed. Furthermore, there's not a single company in the world that requires an EBR exemption to do legitimate business. Can you name one?

The only use of an EBR exemption is to allow advertisers to send junk mail that people don't ask for. For example, NFIB has never been sued for sending legislative updates to their members by fax. That's why their members joined. But then NFIB faxed a five-page unsolicited ad to sell insurance to their members, they were sued, and they had to pay a whole $575 fee. The court said, in no uncertain terms, that there was no EBR for faxes. NFIB broke the law, because they broke their covenant with their members, who wanted legislative updates and not advertising. They can still fax their legislative updates to their members. That has never been regulated under the TCPA. Mr. Bladine's communications have not been regulated. Mr. Feeken, his—faxing of his presentation would not be permitted? That's not true. It's not even regulated under the TCPA. The point is—I mean, they just can't send ads by fax without asking first. It's simply good business practice. And it's also something that's very easy to do.

Let me give you another scenario. I can call a RE/MAX realty office and ask for information on listings and other services. That creates an EBR with me and RE/MAX. If this bill passes, I would legally be able to send junk faxes to every RE/MAX fax machine in the country advertising my anti-spam products, or anything else, for that matter. And I'd do so until each individual RE/MAX office tells me to stop. That's not cost free. That's not opt out at no cost. There's a lot of effort involved in opting out. That is what this EBR exemption in this bill will permit.

In addition, if you institute an EBR you're going to cause everyone a lot of work for no benefit, and you're going to open the flood gates for adverse consequences. I've surveyed many people, and every single one of them would opt out of virtually all unsolicited advertising sent to them by fax, whether it is from businesses they know or don't know. And I would encourage you all to go do the survey yourself. Why force everyone to jump through a hoop to get rid of something that they never wanted in the first place? I mean, why force businesses to have to create 800-numbers and data bases and all those opt-outs that they don't have to do today? What's the point of that?

In conclusion, everyone agrees that TCPA has generally been an extremely fine piece of legislation, because it succeeded in striking a reasonable balance between the wanted content and allowing that, or restricting the unwanted content. We all recognize the need to relax the in-writing requirement that the FCC has attempted to add to the regulations, and I agree with my fellow witnesses here, but there is no need for a new EBR exemption to be added. Any changes that you do to the TCPA should be done very carefully, and only if they're absolutely necessary. No company in

the world needs an EBR exemption to send legitimate faxes to do business; however, it is reasonable, but it is not required, to add a special opt-out for membership organizations to send faxes to their members. And I have suggested suitable language in my written comments.

Thank you, and I would be delighted to take any questions.

[The prepared statement of Mr. Kirsch follows:]

PREPARED STATEMENT OF STEVEN T. KIRSCH, FOUNDER/CHAIRMAN, PROPEL SOFTWARE CORPORATION

Thank you Mr. Chairman for allowing me to speak with the Committee on my perspective on this very important piece of legislation.

Everyone recognizes the need for legitimate businesses to send legitimate business communications to their customers without fear of being sued. With recent contemplated rule changes by the FCC, this ability has been placed in jeopardy and needs to be fixed.

This bill seeks to solve that problem by doing two things: (1) clarifying that permission to send unsolicited advertisements can be granted verbally and (2) adding a new exemption to the law to allow businesses that I have an Established Business Relationship (EBR) with to send me junk faxes without my consent until I tell them to stop.

The first thing is an excellent solution. The second is not.

Unfortunately, adding an EBR exemption, while well intentioned and while solving one aspect of the problem, is completely unnecessary. It will actually hurt legitimate use of the fax machine for businesses because as written, the bill is so broad that it permits fax advertising practices that legitimate businesses don't use and thus permits abuses that will make legitimate faxes less useful the way spam e-mail makes legitimate e-mail less attractive. It creates a whole host of new problems and adds new burdens and costs. It's like "whack-a-mole". . . solve one problem, create 10 or 20 more. Congress has better things to do than solve the same problem over and over and over again.

A better approach is simply to clarify the terms in the TCPA to reflect the original intent and current business practice. This solves the problem and restores the status quo without imposing new burdens or introducing any unintended consequences.

Adding a new EBR Exemption Solves one Problem but Creates Many More

Contrary to popular belief, there has never been an EBR exemption to the TCPA.

Although the FCC did erroneously interpret the law this way, the courts have never adopted this interpretation and Congress never intended such an exemption. Since the enactment of the TCPA, I have not been able to locate a single court case where such an exemption has been upheld. In addition, businesses have been acting consistent with Congress' intent and the court's interpretation as well. For example, there is not a single public company that I am aware of that sends junk faxes to their customer base. And there is certainly no company in the United States that needs to have an EBR exemption to send junk faxes in order to conduct business.

Therefore, adding a new EBR exemption to the TCPA as currently proposed in this bill, is not only completely unnecessary, but it is also counterproductive for the following reasons:

- It would dramatically increase the amount of junk faxes I get by an unpredictable amount. NOBODY I know wants to get more junk faxes.
- It would increase my costs since I would bear the cost having to opt out of each and every junk fax and keep records and receipts of each request. In short, Congress would be imposing a huge, unwanted cost burden on all recipients of this advertising. All the recipients would be forced to incur costs for something that they never wanted in the first place.
- It would also increase the burden on every sender who would then be responsible for setting up a toll free opt out number and keeping track of all opt out requests. The record keeping burden of the advertiser would actually increase under this proposal as the sender would now have to track both opt in and opt out requests.
- It would increase the legal liability of the sender since the database of opt out numbers would be close to 100 times larger than having to maintain an opt in database. Any typo, omission, or mistake in the opt out database required by this law could generate a lawsuit. So lawsuits against businesses are 100 times

more likely under the opt out rules required by this legislation. That's not a guess; it's a mathematical certainty.

- It opens up the door for legalized abuse via the "unintentional EBR" that I describe below creating an unpredictable torrent of junk faxes that would then be legal but completely unexpected and unwanted.
- I've surveyed many people chosen at random and every single one of them would opt-out of virtually all unsolicited advertising, whether it is from businesses they know or do not know.

The bottom line is this: adding a new EBR exemption to the TCPA would create needless amounts of work for both sender and recipient, impose new costs on the recipients without their consent, and accomplish NOTHING of any economic value.

Huge burden on everyone, no value. What's the point of that?

But there is a better way.

A Better Approach: Clarify the Original Intent

I spoke with Jeb Bladine who is testifying here today. In the 30 years he's been in business, his firm has never been sued for the business communications he's sent via fax. Nor is he aware of anyone in his local community that has been sued for sending junk faxes. They all use faxes responsibly and **the existing law has worked for them as written and interpreted by the courts.**

Because the law has been working to everyone's satisfaction until the recent rule changes, it is clear that the best way to fix the problem without introducing new ones is to clarify the existing law as it has been interpreted by the courts over the last 14 years since the TCPA was enacted.

The best way to restore the status quo is by doing two simple things:

- Clarify that permission does not need to be in writing.
- Modify the definition of "unsolicited advertisement" so that all requested business communications are clearly permitted.

Normal request-response business communication then works as expected without fear of litigation. All such communication, such as asking your favorite restaurant to fax a menu or asking your real estate agent to send you house information, a purchase contract, or counter-offer, etc., would be exempt. These are normal business communications where the recipient has requested the material being transmitted and should not be considered "unsolicited advertisements" that should be regulated by the TCPA.

Even if no records of the request whatsoever are kept by the sender, the very nature of the material being sent and the number of telephone calls made to fax machines by the sender are evidence that would provide an affirmative defense available to any business that might be sued by an unscrupulous recipient. For example, a restaurant that faxes an occasional menu to people who call in requesting it is a legitimate purpose. It is far different than a restaurant who blindly sends out their menu to every fax number in the local Chamber of Commerce directory.

In short, judges determine whether the material in question constitutes an unsolicited advertisement or legitimate business communication by looking at a number of factors in order to determine whether express consent was given or not:

- examination of the material being faxed,
- the past behavior of the sender (including phone records),
- the nature of the relationship between the sender and the recipient.

Non-profit membership organizations such as the National Federation of Independent Businesses (NFIB) or the local Chamber of Commerce can still communicate by fax with their members under this proposal. They should just include a statement in their membership forms that by joining and providing your fax number, that you are allowing broadcast communications related to the organization to be sent to you via fax. Or even better, they could have a check box as to whether the member wants to receive official communications by fax, e-mail, etc. This is simply good business practice and any legitimate business already does this.

Further Protections

If Congress wishes to further protect the fax communications of non-profit business to communicate with their membership, then it is reasonable to authorize the FCC to add a special carve out for non-profit membership organizations communicating to their membership based on subjects that are consistent with the mission of the organization, e.g., the Chamber of Commerce could fax a notice about a small business seminar the Chamber is putting on, but could not fax discount coupons to the local cash wash to members without their consent.

Another important change to protect recipients would be to require that professional "fax broadcasting" companies **always** identify themselves on the fax **regardless** of whether they have a high level of involvement or not in the sending of the fax. This would expose the identity of a small handful of illegal fax broadcasters who are responsible for a large portion of the junk faxes sent today.

Summary

Because the recipient bears the brunt of the costs on a fax transmission, fax machines always have to be a request/response mechanism for business communications, not a low-cost mass advertising medium for businesses. We need to keep it that way.

The proposed clarifications to the definitions would maintain the status quo; ensuring that legitimate communications are protected without opening the door to abuse. That benefits everyone: consumers, big business, and small business, whether they are recipients or senders.

If these clarifications are not acceptable, a widely accepted alternative is for Congress to remove the written permission requirements and order the GAO study. That way, any additional changes can be reviewed with the benefit of the GAO study results for guidance.

The following sections provide more detail to the concepts presented above.

Adding a New EBR Exemption to the TCPA Would Be Unprecedented

When the original TCPA was debated in 1989, unsolicited faxes were recognized as the equivalent of "getting junk mail with the postage due"—except that you have no chance to decline the charges. *Telemarketing Practices: Hearings on H.R. 628, 2131, and 2184 Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce*, 101st Congress, 1st Session (1989) Sup. Docs. No. Y4.En2/3:101–43 (U.S. Government Printing Office). Unsolicited faxes are no different that using another man's printing press and ink to print your advertising, at the other man's expense and without his permission. This conduct has never been legal—even before the TCPA was enacted, common law cases recognized this as trespass to chattels and some brave souls actually brought junk faxers to court and won. See *Fax Weighed, 22 Cents Won in "Junk Mail" Suit, L.A. Times,* July 4, 1991, p. 4.

Let me give you an example. I get a ton of unwanted mail every day from companies I've done business with in the past. How about you?

Suppose we create a law that **forced** recipients to pay both postage and printing costs for this advertising until such time as they notified each business to stop sending the ads? That way, all of these businesses could send me stuff that I don't want at virtually no cost to them and force me to pay for it. How many of you would vote for such a bill?

I hope no one would.

And ironically, the same business that would love to do that to their customers would oppose having their customers do it back to them! In short, it'd be great if I could do it to others, but I'd sure hate it if someone did it to me.

Let me ask you another question. How about we pass a law that would permit these same business to send me all this stuff that I now get in the mail to my fax machine?

Businesses would LOVE that because it would reduce their advertising costs. Virtually every single one of these pieces could be sent via fax at a much lower cost than mailing it because faxing shifts virtually all of the costs of the advertising on to the recipient.

Should we do that? Should we legalize it so advertisers can send you ads you never asked for at your expense until you tell them to stop?

I don't think you should. But that's exactly what you're being asked to do here!

It would be like telling Mr. Bladine that anyone who calls his newspaper is entitled to a full page ad in his paper for free, until he explicitly asks them to stop.

Some people dismiss junk faxes as a *de minimus* part of owning a fax machine. But ask yourself who is more harmful to society—a man who steals one dollar from a million people, or a man who steals a million dollars from one person? In both cases a million dollars is stolen. But the former miscreant is more harmful because he can fly under the radar and the million dollars is never recovered because it isn't worth it to any single victim. That's true with junk faxes. According to experts and published reports, there are over 2 billion junk faxes sent each year and that number is growing. That practice steals hundreds of millions of dollars from American's pockets—a few cents at a time.

In 1991, Congress considered and explicitly rejected allowing a business to send faxes to someone with whom it had an "established business relationship." The FCC

admits that it was in error in 1995 to pencil back in what Congress took out, and now has taken steps to correct that error.

Before rushing to do this however, we must remember—you are creating a legal right for one person to use another person's property and to take the other person's paper and ink for their own use, all without consent. No one would argue that a merchant has the right to come into my house or office (at any time of the day or night), drop off an advertisement, and take three to forty cents off of my night stand in order to offset his advertising costs. Yet that is precisely what you will do if you create any exemptions to the junk fax prohibitions in the TCPA.

So even if we disagree in the details or scope of any exemptions to be added to the TCPA, we all have to agree that because we are shifting the costs for billions of unsolicited faxes onto recipients, we must craft such exemptions carefully and conservatively.

Several portions of this bill are not controversial. The annual report and GAO study are certainly in that category. Relaxing the FCC's proposed new rule requiring express consent for junk faxes to be in writing is also not controversial. The sticking point is whether or not to create an exemption in the statute for anyone you have an "established business relationship" with to send you junk faxes until you tell them to stop.

There is only one major point of contention on this bill: whether or not to add new language to the TCPA to allow any business that you have a relationship with to send advertising to your fax machine without your consent until you tell them to stop.

I'd like to explain why this is a bad idea and suggest a more appropriate alternative that accomplishes all the stated objectives of the author and sponsors of this bill and does so without any unintended consequences.

The "Unintentional EBR"

I'd like to give you two examples. Suppose Joe's Office Supply decides to take it's in-house customer list, and for those customers who have provided Joe a fax number and bought something in the last year Joe wants to send them an advertising flyer by fax. Now suppose Bill's Office Supply wants to send advertising faxes, so he buys the list of local fax numbers from the Chamber of Commerce and sends out fax ads.

In this example, I have received both faxes, and in the past, I have bought something from both Bill and Joe. But I gave Joe my fax numbers, and intentionally withheld it from Bill since I suspected he might misuse it. What Joe did, was what I think most people think of when they talk about sending fax ads within an "established business relationship" exemption. That is an example of a "legitimate" established business relationship fax. But Bill's example is not. No one thinks that indiscriminate junk faxing should be permitted or rewarded. Yet in the above example, using the language of the bill as it stands today, the indiscriminate junk fax I received from Bill, at a fax number I did not give to Bill, will be exempted from the statute. How do we create an "established business relationship" exemption for "legitimate" fax uses, but not create a loophole for exploiting by illegitimate uses?

This problem is exacerbated by how broadly the term "established business relationship" is defined. Merely making an inquiry of a business, such as calling and asking the price of an item or if they carry a particular brand will create an "established business relationship" as that term is defined. Using that definition, who does not have an "established business relationship" with large retailers like Wal-Mart or Staples? And before you think that "legitimate" businesses such as these would not do junk faxing in violation of the TCPA, both of them have in recent years.

In the last session of Congress, this problem was addressed with compromise language that stated the "established business relationship" exemption only was available as a defense if the faxes were sent "based on" an existing "established business relationship." In the example above, this would permit Joe's faxes, but prohibit Bill's faxes. This way, faxes sent when a business was legitimately trying to send faxes to people it knew were its bona fide customers would qualify for the exemption, but faxes "blasted" out indiscriminately would not be permitted, even if they "accidentally" were received by someone who had done business with the sender.

I share the same goals as the author and sponsors of this bill: we all want to allow legitimate faxes and stop the junk faxes.

I also share the same approach to address some unintended consequences of recent FCC rule changes. We certainly do not want to turn back the clock on a wholesale basis.

Many of the rule changes were clearly needed due to continued evasions of illegitimate telemarketers and fax advertisers. Reasonable businesses who send legitimate faxes do not want to create loopholes that will be exploited by other businesses that are not so legitimate. Those businesses who want to make legitimate use of fax as

a communications medium are certainly in favor of protecting that medium from abuse. If they don't their legitimate use of faxes gets tarred and feathered with the illegitimate uses.

The current bill attempts to do two things:

- that express consent may be given in any manner;
- that an EBR should be interpreted as providing express consent.

The first change is not controversial. While many people still believe that in some circumstances requiring written permission is an appropriate safeguard, there is also a consensus that there are many situations where verbal permission is acceptable. However, we know the use of alleged "verbal" permission has been abused by miscreants in the past, so future abuses in this are a need to be closely watched.

But I disagree with the second change because **there never has been an EBR for fax advertisements**, not legally and not in reality. I have reviewed literally hundreds of TCPA cases, particularly those reported by the TCPA slip service TCPALaw.com, and I have not located a single court decision where the court agreed with the FCC's original interpretation.

Adding an EBR Would Change the Status Quo, Not Restore It

Therefore, restoring what was never there in the first place, is not restoring the status quo. It is changing the status quo!!! In this particular case, it creates a large number of very bad, unintended consequences that I've documented in my written materials.

Legitimate fax advertising is sending what someone requested to be sent to them, and sending it to them at the phone number they have provided to you. It does not include "mining" for fax numbers or sending a fax to any indiscriminate fax number you can buy or find. It does not include sending 5 pages of ads for life insurance to someone who merely asked for a quote on car insurance and nothing else. It does not mean giving carte blanche to any business you have made an inquiry to, for them to send you junk mail that you have to pay for.

Changing the Definitions of the Terms Solves the Problem Without Unintended Consequences

The right way to restore balance and permit legitimate fax advertisements without burdening legitimate senders, is simple: just replace Section 2a of this bill so that instead of creating a new Established Business Relationship (EBR) exemption we simply redefine the meaning of "unsolicited advertisement" so that all legitimate faxed communications are exempted from regulation.

That is easy:

> The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services, but does not include material which is: (a) expressly requested, in writing or otherwise, by the recipient; and (b) transmitted to a telephone number voluntarily provided to the sender by the recipient.

Other Improvements

There is one simple improvement to the law that affects only companies that send faxes for others (such as Vision Lab, Protus IP Solutions, etc.):

> Require that these professional "fax broadcasting" companies ALWAYS identify themselves on the fax REGARDLESS of whether they have a high level of involvement or not in the sending of the fax.

Currently, they are only required to do this if they have a "high level of involvement" in the transmission. Of course, all the illegal broadcasters I know of claim in court they do not have a high level of involvement. This makes suing the illegal junk fax broadcaster difficult since it is virtually impossible to tell where the fax was sent from.

Conclusion

Junk faxes are a major problem for businesses and consumers. Everyone hates junk faxes.

The FCC rulemaking has caused a great deal of consternation in the business community. We all agree that we need to turn the clock back.

I'd urge this Committee not to overreact to the problem by creating a new EBR exemption which would generate a host of new, unanticipated problems.

I'd encourage each and every one of you to poll your constituents and ask them how many businesses that they would like to receive unsolicited advertisements from via fax. I've done it and the answer is the same for consumers, big business,

and small business: none want advertisements from businesses they do business with unless they expressly ask for it. That is consistent with the FCC findings and precisely why the FCC attempted to strengthen the junk fax protections.

The good news is that there is a simple solution: clarify the definition of an unsolicited advertisement. This will keep the junk faxes at bay while permitting legitimate business communication.

I hope that you will adopt this approach. It's the right thing to do as it benefits both senders and recipients without the danger of imposing new burdens and new legal liabilities.

Thank you and I would be delighted to take any questions you have.

Senator SMITH. Thank you very much, Steve.

Let me indicate, they're barely going to hold this vote open for Senator Boxer and myself. But, Steve, my understanding of the law—and I want to do this right, but—that it's already prohibited by law to send all the things we're talking about. I still get them. They're unlawful. I've got to take action, I guess, to stop them. I worry about the verbal consent, whether it will work for companies, that they'll want a legal defense to claims against them. And I believe our bill allows for an opt-out provision that is, in fact, new. So I just want to put that on the record.

And, Senator Boxer, if you have a comment or a question——

Senator BOXER. Yes, and I know we are rushing through this, but I think the importance was to hear from the three of you, and I just want to thank the three of you very much.

Senator SMITH. I join in those thanks.

Senator BOXER. Yes, because you all presented the best case. And so, I want to sum up the way I feel about this. And since we're marking up this bill tomorrow, it's tough as we have to work quickly.

But, Mr. Kirsch, my understanding is, if I were to ask you today, What does your business do?

Mr. KIRSCH. We make software for speeding up Internet access and also eliminating spam.

Senator BOXER. OK. I think, under the Smith bill—and I have a lot of friends who are on it—we now have a business relationship.

Mr. KIRSCH. That's——

Senator BOXER. Is that correct?

Mr. KIRSCH.—that's correct, Senator.

Senator BOXER. So now you have the right to go to the Hill, to all the offices in the Hill, and get all of our fax numbers, and fax us.

Mr. KIRSCH. Well, actually, Senator, it goes beyond that. You've just given—thank you very much for asking me that question, because you've just given me the right to send my advertising for any product—not only my own products, but for someone else's product—to every single fax machine in the Federal Government.

Senator BOXER. OK.

Mr. KIRSCH. Until they opt out.

Senator BOXER. Right, exactly.

Mr. KIRSCH. But——

Senator BOXER. I understand.

Mr. KIRSCH.—they'll probably have to opt out one fax machine at a time.

Senator BOXER. I understand.

Mr. KIRSCH. Because if they opt out—if they just send me a list of all the fax machines, and say, "Hey, opt me out," I'm going to take—you know, some—I wouldn't do this, but someone is going to take that list of all of the fax machines that the Federal Government has just given me——

Senator BOXER. And sell them.

Mr. KIRSCH.—and sell it.

Senator BOXER. Sure.

Mr. KIRSCH. Sell it to a fax broadcaster, who will then add—you know, get into a conversation with you and——

Senator BOXER. Right.

Mr. KIRSCH.—they'll fax every machine——

Senator BOXER. Right.

Mr. KIRSCH.—until each individual machine opts out.

Senator BOXER. I understand. My point is made. This bill, just leans too far in the other direction. I don't like what the FCC did, and I want to say, as I did today—if I'm doing business with someone, Mr. Feeken, you or Mr. Bladine or Mr. Kirsch, and you say, "Barbara, I think if I faxed you something, you'll get a better picture of it," and I say, "Absolutely fax it, fine," and then I get it and I'm a happy person. I've given you my verbal consent, and we're done. And you make a quick note, "She gave a verbal consent," and that's the bottom line.

I'll even go a little further than that, if we have to. But the way this bill is set up—it has serious unintended consequence. I mean, Senator Smith wants to cure the problem of junk faxes, I just think the consumer groups that are working with me on this thing, the people who drafted this bill missed the mark. And the scenario, Mr. Kirsch, that you laid out here is a nightmare scenario. And I don't think that it's that easy to opt out. I get these faxes sometimes, Gordon, and they say, "Call 1–800 yadda-dadda-dah if you don't want any more faxes." And I do it, and I can't get anyone. They say, "Do not call now." And matter of fact, in your bill it says, "during business hours." It's not like you're requiring a 24-hour hotline. That would be better. So I think there are ways we can work together.

Now, the last point I'd make is, in your bill you say to the FCC—FTC?

Senator SMITH. FCC.

Senator BOXER. FCC. I've got FTC on the brain, with oil prices. You say to the FCC, "You have 18 months to establish what the business relationship is." In the meantime, if I did business with someone 40 years ago, that's an established business relationship, under the way the bill is written now. So people who did business with me in another world, still will be able to fax me. So I think the FCC went too far, and I think we've got to rein them in. I think a verbal consent would be my preference, because I think what Steve Kirsch points out is the current situation has been working OK. You, yourself, said that, Mr. Feeken. You, yourself, were nodding. It works OK. What do we need this bill for, that goes so far the other way that we're going to take 2 billion faxes and turn them into 4 billion faxes?

So we've got a lot of work to do, because, unfortunately, we have the mark-up tomorrow. It's only because Senator Smith is such a

dear friend and a fair person that we got a chance to hear from you today.

Our time is short. I don't have any other questions. I just think there are a few things we could fix. I hope, maybe over the course of these next 12 hours——

Senator SMITH. Well——

Senator BOXER.—you and I can come to some agreements here and——

Senator SMITH.—we've got some time, and, obviously, even after tomorrow on the floor——

Senator BOXER. Right.

Senator SMITH.—we can keep working this——

Senator BOXER. Good.

Senator SMITH. We want to get it right. It's a bedeviling problem to manage all of the consequences. When we grab here, it blows up over there. But we'll keep trying, because we really do need, and we will get ahead of the expiration of this FCC deadline.

So, thank you all. We apologize for the truncated schedule, but, unfortunately, the Majority Leader does not schedule the Senate business around this Subcommittee.

[Laughter.]

Senator BOXER. Which is not fair.

Senator SMITH. Which is not right. But, anyway, that's what it is.

Senator BOXER. But I think this hearing did what it had to do.

Senator SMITH. It did.

Senator BOXER. We got out every point of view, and we so appreciate it.

Senator SMITH. You've contributed to the public record. We're grateful to each of you. We're adjourned.

[Whereupon, at 3:25 p.m., the hearing was adjourned.]

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