

Calendar No. 741

108TH CONGRESS }
2d Session }

SENATE

{ REPORT
108-381

JUNK FAX PREVENTION ACT OF 2004

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND
TRANSPORTATION

ON

S. 2603



SEPTEMBER 28, 2004.—Ordered to be printed

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

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JUNK FAX PREVENTION ACT OF 2004

SEPTEMBER 28, 2004.—Ordered to be printed

Mr. MCCAIN, from the Committee on Commerce, Science, and
Transportation, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany S. 2603]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 2603) “A Bill to amend section 227 of the Communications Act of 1934 (47 U.S.C. 227) relating to the prohibition on junk fax transmissions.”, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF THE BILL

The purposes of this legislation are the following:

- To create a limited statutory exception to the current prohibition against the faxing of unsolicited advertisements to individuals without their “prior express invitation or permission” by permitting such transmission by senders of commercial faxes to those with whom they have an established business relationship (EBR).
- To require that senders of faxes with unsolicited advertisements (i.e., “junk faxes”) provide notice of a recipient’s ability to opt out of receiving any future faxes containing unsolicited advertisements and a cost-free mechanism for recipients to opt out pursuant to that notice.
- To require the Federal Communications Commission (FCC) and Comptroller General of the United States to provide cer-

tain reports to Congress regarding the enforcement of these provisions.

BACKGROUND AND NEEDS

TELEPHONE CONSUMER PROTECTION ACT OF 1991

Congress first addressed the legality of faxing unsolicited advertisements to residential telephone subscribers in the Telephone Consumer Protection Act of 1991 (TCPA).¹ The law, which is still in effect, generally prohibits anyone from faxing unsolicited advertisements without “prior express invitation or permission” from the recipient. The statute contains no other exceptions for junk faxes, and does not authorize the FCC to create any additional exceptions.

In October 1992, the FCC released its original order interpreting the TCPA and establishing the rules implementing the junk fax prohibition. In response to comments by Mr. Fax and National Faxlist urging the Commission not to ban unsolicited faxes, the FCC in its order noted in a footnote (which remains unpublished in the Code of Federal Regulations) that the TCPA did not give it “discretion to create exemptions from or limit the effects of the prohibition.”² The footnote continued to say, “We note, however, 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.”³ On this basis, many commercial entities considered an “established business relationship” or “EBR” to be a permissible exemption from the general prohibition of sending unsolicited faxes. Additionally, from 1992 through July 2003, the FCC enforced the TCPA junk fax provisions under this original interpretation.

The Commission continued to assess the effectiveness of the TCPA’s provisions over the course of the decade and, in September 2002 sought public comment on a number of issues, including whether the FCC should refine or adopt new rules related to “unsolicited facsimile advertisements.” The FCC explained its purpose for initiating this formal review proceeding as follows: “In the last ten years, telemarketing practices have changed significantly. New technologies have emerged that allow telemarketers to target potential customers better and that make marketing using telephones and facsimile machines more cost-effective. At the same time, the new telemarketing techniques have increased public concern about the impact on consumer privacy.”⁴

On March 11, 2003, the Do-Not-Call Act was signed into law. In addition to authorizing the Federal Trade Commission (FTC) to implement a national registry, it also required the FCC to issue a final rule in its ongoing TCPA proceeding within 180 days. Additionally, it required the FCC to consult and coordinate with the

¹ P.L. 102-243; 47 U.S.C. 227.

² See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Report and Order, 7 FCC Red 8752 (rel. 1992) (hereinafter, “1992 TCPA Order”), at 8779, para. 54, n. 87.

³ *Id.*

⁴ FCC Press Release, September 12, 2002 (<http://hraunfoss.fcc.gov/edocs—public/attachmatch/DOC-226183A1.doc>).

FTC to “maximize consistency” with the rules promulgated by the FTC.⁵

JULY 2003 FEDERAL COMMUNICATIONS COMMISSION TCPA ORDER:
REVISED JUNK FAX RULES

On July 3, 2003, the FCC issued its report and order establishing the Do-Not-Call registry and updating the provisions of the TCPA, including the junk fax provisions. After reviewing the record regarding the use and enforcement of junk faxes as well as the legislative history of the TCPA, the Commission reversed its prior conclusion that the presence of an EBR between a fax sender and recipient establishes the requisite consent necessary to permit businesses to send commercial faxes to their customers, effectively eliminating the EBR exception to the general prohibition on unsolicited fax advertisements.⁶ Instead, the FCC concluded that a recipient’s express invitation or permission must be obtained in writing, include the recipient’s signature, contain a clear indication that he or she consents to receiving such faxed advertisements, and provide the fax number to which faxes are permitted to be sent.⁷

Reviewing the record, the FCC found that a majority of consumer advocates disagreed with the Commission’s prior interpretation that an EBR constituted prior express permission, and they urged the Commission to eliminate the EBR exemption. In describing the record they had examined since 2002, the FCC stated that consumers felt “besieged” by unsolicited faxes” and that “advertisers continue to send faxes despite [their] asking to be removed from senders’ fax lists.” The FCC also said consumers indicated they bore the burden of not only paying for the cost of paper and toner, but also the opportunity costs of “time spent reading and disposing of faxes, the time the machine is printing an advertisement and is not operational for other purposes, and the intrusiveness of faxes transmitted at inconvenient times, including in the middle of the night.”⁸

Conversely, the FCC found that the majority of industry commenters on the issue not only supported the Commission’s prior interpretation permitting reliance on an EBR, but also urged the Commission to amend its rules implementing the TCPA to expressly provide for the EBR exemption. Industry comments maintained that “faxing is a cost-effective way to reach customers” particularly for small businesses for whom faxing is a cheaper way to advertise.” They also warned that eliminating an EBR would “interfere with ongoing business relationships, raise business costs, and limit the flow of valuable information to consumers.”⁹

In addition to weighing consumer and industry comments, the FCC’s order analyzed the legislative history of the TCPA. The Commission stated that Congress’s primary purpose in passing the Act was to protect the public from bearing the costs of unwanted advertising, and the FCC maintained that “certain practices were treat-

⁵ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Red 14014 (2003) (hereinafter, “July 2003 TCPA Order”).

⁶ Id.

⁷ Id.

⁸ Id. at para. 186.

⁹ Id.

ed differently because they impose costs on consumers.”¹⁰ The FCC cited other examples where the TCPA prohibits advertising calls without prior express consent, such as calls to wireless phones and other numbers where the called party is charged, viewing that cost-shifting onto consumers as identical in nature with respect to fax advertising where consumers must pay for paper and toner. It also pointed out that, unlike telemarketing, Congress provided no mechanism for opting out of unwanted faxes, arguing that to create such a system would “require the recipient to possibly bear the cost of the initial facsimile and inappropriately place the burden on the recipient to contact the sender and request inclusion on a ‘do-not-fax’ list.”¹¹ For these reasons, the FCC concluded that Congress had made the determination that entities desiring to fax unsolicited advertisements must obtain express permission from the recipient before they do so.

With respect to the other new requirements imposed by the FCC for obtaining prior permission (e.g., written consent, signature, etc.), the Commission justified them on the basis that they believed “the interest in protecting those who would otherwise be forced to bear the burdens of unwanted faxes outweighs the interests of companies that wish to advertise via fax.”¹²

AUGUST 2003 FEDERAL COMMUNICATIONS COMMISSION ORDER ON RECONSIDERATION: STAY OF EFFECTIVE DATE FOR REVISED JUNK FAX RULES

Following the FCC’s release of the amended TCPA rules, numerous petitions for reconsideration were filed with the Commission requesting that the FCC maintain its earlier interpretation of the junk fax rules. Those businesses, associations, and other organizations that had relied on the prior interpretation for over a decade argued that to now require prior, written permission for every fax sent out to an existing customer or client was an overly burdensome regulation that would be expensive to implement and was ultimately unnecessary to protect consumers. Many companies also argued that it would be impossible to change their practices overnight and obtain the necessary consents by August 25th (30 days after the appearance of rules in the Federal Register) in order to comply with the rule’s effective date, leaving them with only the option to immediately litigate.

Finally, many industry petitioners challenged the FCC’s fundamental premise that the new rules were better for consumers, contending instead that the revised interpretation would have significant, unintended consequences that harmed consumers. For example, restaurants pointed out that they would not be able to fax a menu to a customer who called and requested one unless the caller provided them with a written consent (presumably by fax) or had one on file. Additionally, realtors explained that, in their business, potential home buyers often call and request faxes when passing by homes for sale. They argued that the FCC’s new requirement for a written signature would effectively prevent realtors from faxing potential new home buyers the listing information they requested when they made such calls, adding unnecessary hurdles and delays

¹⁰ Id. at para. 190.

¹¹ Id.

¹² Id. at para. 191.

even when consumers clearly wanted to receive the faxes as quickly as possible.

In light of these additional claims, on August 18, 2003, the Commission stayed until January 1, 2005, the effective date of both the written consent requirements as well as its July 2003 determination that an EBR would no longer be sufficient to show that an individual or business has given express permission to receive unsolicited fax advertisements. At the time, the FCC justified its adoption of the stay because “the public interest would best be served by allowing senders of such advertisements additional time to obtain such express permission before the new rules become effective.” The order also noted that this extension would give the FCC itself more time to fully consider any more petitions for reconsideration on these or related issues, and that the FCC reserved the right to further extend the effective date if necessary.¹³

OCTOBER 2003 FEDERAL COMMUNICATIONS COMMISSION ORDER: STAY OF “18/3” TIME LIMITS ON EXISTING BUSINESS RELATIONSHIP EXCEPTION FOR JUNK FAXES

In the July 2003 TCPA Order, the FCC had also modified its definition of an EBR in the context of telephone solicitations to limit the duration that a telemarketer could rely on the exception to a maximum of 18 months following a purchase or transaction, or a maximum of three months following an inquiry or application (commonly referred to as the “18/3” time limits). Prior to that ruling, no limitation had been placed on the duration of the EBR as it applied to either telephone or fax solicitations, but the FCC concluded that establishing time limits was “necessary to minimize confusion and frustration for consumers who receive calls from companies they have not contacted or patronized for many years.” Because there was “little consensus” among industry players who had offered various lengths of time, the FCC sought a duration that “strikes an appropriate balance between industry practices and consumer privacy interests,” settling on the 18/3 time frame. Acknowledging that these time limits created burdens on industry (especially small businesses) to monitor the length of their customer relationships, the FCC argued that endorsing a rule consistent with the FTC’s own 18/3 time limit would benefit businesses by creating a “uniform standard with which businesses must comply” regardless of which agency’s jurisdiction the businesses fell under.¹⁴ This also helped fulfill the FCC’s charge from Congress to maximize consistency between the agencies’ telemarketing rules.

Recognizing that the FCC’s August 2003 Order on Reconsideration had reinstated an EBR for junk faxes, but potentially limited its duration to the 18/3 rule for telemarketing, the U.S. Chamber of Commerce and others filed a petition for reconsideration one week later on August 25, 2003, requesting, among other things,

¹³ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02–278, Order on Reconsideration, FCC 03–208 (rel. Aug. 18, 2003) (hereinafter, “August 2003 Order on Reconsideration”).

¹⁴ See July 2003 TCPA Order at para. 34.

that the FCC reconsider the new 18/3 rule.¹⁵ In response, the FCC issued an order on October 3, 2003, that stayed until January 1, 2005, the 18/3 limitations only with respect to their application to unsolicited fax advertisements. Because their modification of the EBR duration in the July 2003 TCPA Order was promulgated in the context of telephone solicitations, the FCC held that there was good cause to stay application of those time limitations to the EBR in the context of junk faxes until they had time to consider the application of the 18/3 time limits in the context of junk faxes.¹⁶ The FCC concluded, however, that nothing in this new order would affect its August 2003 decision to recognize an EBR exception to the general prohibition against unsolicited faxes until January 1, 2005.

EFFECTS OF REVISED RULES AND NEED FOR LEGISLATION

In practice, the revised junk fax rules, as ordered by the FCC would have significant consequences. The cost and effort of compliance could place significant burdens on some businesses, particularly those small businesses that rely heavily on the efficiency and effectiveness of fax machines. In particular, organizations such as trade associations and other non-profits, that have hundreds of thousands of members, would be saddled with a huge burden to collect signatures from each member just to send an unsolicited fax advertisement.

For instance, the National Association of Wholesaler-Distributors claimed that its member companies expected to pay an average of \$22,500 to obtain consent forms and an average of \$20,000 for annual compliance. The National Association of Realtors estimated that it would have to collect over 67 million permissions to sustain the roughly 6 million home sales from last year. Other economic impacts included the costs of training, making multiple contracts to obtain signatures providing consent, and obtaining permission for each fax machine when the recipients change location.

Finally, over the past 10 years, following enactment of the TCPA and issuance of previous FCC orders implementing and interpreting the rules on junk faxes, many legitimate businesses and associations have appropriately relied on the FCC's interpretation and have sent unsolicited faxes to recipients with whom they have an EBR. During this time, the FCC has acknowledged that businesses faxing under EBRs were in compliance with the FCC's existing junk fax rules. If the revised rules go into effect, the previously legitimate practices will be immediately unlawful, and unsuspecting or uninformed businesses may be subject to unforeseen and costly litigation unrelated to legitimate consumer protection aims.

The revised rules are currently set to go into effect in January 2005 following the expiration of the FCC's currently self-imposed stay. Because the Commission may choose not to reverse its new rule removing the EBR exception from the general ban on sending unsolicited facsimile advertisements, S. 2603, the "Junk Fax Prevention Act of 2004" specifically creates a statutory exception from the general prohibition on sending unsolicited advertisements if the

¹⁵ See, e.g., Chamber of Commerce of the United States, Petition for Reconsideration of Facsimile Advertisements Rules, filed August 25, 2003; National Association of Chain Drug Stores, Petition for Clarification and Revision, filed August 25, 2003.

¹⁶ See August 2003 Order on Reconsideration.

fax is sent based on an EBR and certain conditions are met. This legislation is designed to permit legitimate businesses to do business with their established customers and other persons with whom they have an established relationship without the burden of collecting prior written permission to send these recipients commercial faxes. Nonetheless, in reinstating the EBR exception, the Committee determined it was necessary to provide recipients with the ability to stop future unwanted faxes sent pursuant to such relationships. The Committee therefore also added the requirement that every unsolicited facsimile advertisement contain an opt-out notice that gives the recipient the ability to stop future unwanted fax solicitations and that senders of such faxes provide recipients with a cost-free mechanism to stop future unsolicited faxes.

SUMMARY OF PROVISIONS

S. 2603, the “Junk Fax Prevention Act of 2004,” reestablishes an “established business relationship” exception to allow entities to send commercial faxes to their customers and members without first receiving written permission, and establishes new opt-out safeguards to provide additional protections for fax recipients.

LEGISLATIVE HISTORY

Senator Smith, the chairman of the Competition, Foreign Commerce, and Infrastructure Subcommittee, introduced S. 2603 on June 24, 2004, with Senators Hollings, Allen, and Sununu as original cosponsors. The bill is also cosponsored by Senators Breaux, Bunning, Burns, Carper, Craig, Dorgan, Lautenberg, Lott, Nelson of Florida, Snowe, and Stevens.

On July 22, 2004, the Committee held an executive session chaired by Senator McCain at which S. 2603 was considered. The bill was approved unanimously by voice vote and was ordered reported without amendment.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

S. 2603—Junk Fax Prevention Act of 2004

S. 2603 would amend current law and regulations relating to unsolicited advertisements sent via telephone facsimile machine. The bill would direct the Federal Communications Commission (FCC) to issue regulations to control such advertisements and would require the FCC and the Government Accountability Office to issue reports to the Congress on the effectiveness of those regulations. The FCC currently enforces laws relating to unsolicited advertisements, including assessing and collecting civil penalties for violations of such laws. (Civil penalties are recorded in the federal budget as revenues.) Based on information from the FCC, CBO estimates that implementing S. 2603 would not have a significant effect on revenues or spending subject to appropriation. Enacting the bill would not affect direct spending.

S. 2603 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

S. 2603 would impose private-sector mandates, as defined in the UMRA, on senders of unsolicited facsimile advertisements. The bill would require senders to include an opt-out notice that is clear, conspicuous, and on the first page. Such a notice would allow recipients to contact the sender to prevent them from sending unsolicited advertisements in the future. Additionally, the opt-out notice must include “a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and a cost-free mechanism for a recipient to transmit a request.” The cost-free mechanism might include either a toll-free or a local telephone number.

Regulations promulgated by the FCC in July 2003, which are slated to take effect in January 2005, would require written permission from recipients prior to senders’ transmission of any unsolicited fax advertisements. If this bill were enacted, it would eliminate the requirement to obtain written permission from customers but replace this requirement with the opt-out mechanism. Based on information from industry sources, CBO expects that the aggregate direct cost of mandates in the bill would be fully offset by savings from the bill and thus would fall below the annual threshold established by UMRA for private-sector mandates (\$120 million in 2004, adjusted annually for inflation).

On July 7, 2004, CBO transmitted a cost-estimate for H.R. 4600, the Junk Fax Prevention Act of 2004, as ordered reported by the House Committee on Energy and Commerce on June 24, 2004. The two pieces of legislation are similar, and the estimated costs are the same.

The CBO staff contacts for this estimate are Melissa E. Zimmerman (for federal costs), Sarah Puro (for the state and local impact), and Karen Raupp (for the private-sector impact). The estimate was approved by Robert A. Sunshine, Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

NUMBER OF PERSONS COVERED

S. 2603 would provide all individuals with fax machines certain protections from unsolicited senders of unsolicited faxes, and an opportunity to opt out of receiving future unsolicited faxes from them. Additionally, the legislation would require all persons who send commercial faxes to meet certain requirements, including proper identification, and to provide phone numbers or another mechanism for recipients so they may opt out of future commercial faxes sent by that sender. Therefore, S. 2603 would cover all consumers who receive faxes, and all senders of commercial faxes.

ECONOMIC IMPACT

The legislation would result in new or incremental costs for senders of commercial faxes to comply with the legislation’s requirements, to the extent that those senders have not already made provisions to ensure proper identification of the sender, and provide

mechanisms that allow recipients to choose whether to receive future commercial faxes.

PRIVACY

S. 2603 would increase the personal privacy of all users of fax machines by providing them with the ability to decline to receive future unsolicited commercial faxes from the same sender. S. 2603 also would require senders of unsolicited commercial faxes to identify themselves to the recipients with truthful facsimile and telephone numbers where a recipient can contact the sender, thereby better informing the recipient of the identity of the sender.

PAPERWORK

S. 2603 would require the Comptroller General to conduct a study on junk fax enforcement and make recommendations to Congress on whether additional enforcement measures are necessary to protect consumers. S. 2603 would also require the FCC to submit an annual report to Congress on enforcement of the junk fax provisions of this legislation over the previous year. The legislation is expected to generate similar amounts of administrative paperwork as other legislation requiring agency enforcement, recommendations for enhancing enforcement, and reports to Congress.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 establishes the short title as the “Junk Fax Prevention Act of 2004.”

Section 2. Prohibition on fax transmissions containing unsolicited advertisements.

Section 2(a) amends section 227(b)(1)(C) of the Communications Act of 1934 by creating an exception to the general prohibition against sending unsolicited commercial advertisements to fax machines. This provision would permit the sending of unsolicited commercial advertisements if the fax is sent based on an “established business relationship” and if the fax contains an opt-out notice and a cost-free mechanism for the recipient to respond to the notice. In the event a recipient opts out of receiving future unsolicited advertisements, it is unlawful for a sender to fax any additional unsolicited advertisements to such recipients.

Section 2(b) defines the term “established business relationship” by incorporating the definition of “established business relationship” in 47 C.F.R. 64.1200 as those regulations were in effect as of January 1, 2003, except that the definition now applies to both residential and commercial entities. Additionally, section 2(b) allows the Commission to limit the duration of the EBR pursuant to section 2(f).

Section 2(c) adds a new subparagraph (D) to section 227(b)(2) of the Communications Act of 1934 by setting forth the necessary elements of an opt-out notice. The opt-out notice must be clear and conspicuous and on the first page of the unsolicited advertisement. The Committee used the phrase “first page of the unsolicited advertisement” as opposed to the “first page of the facsimile” to ensure that senders of unsolicited fax advertisements inadvertently would

not be liable if such faxes were sent and the clear and conspicuous notice was not on the first page received by the recipient because pages were faxed or received in the wrong order. The Committee believes an opt-out notice should comply with this section if it clearly and conspicuously appears on the first page of a fax, such as a fax cover page, or on the first page of the faxed unsolicited advertisement if no fax cover page has been provided.

The opt-out notice must inform the recipient of his or her ability to opt-out of future unsolicited advertisements to any fax machine or machines, and that request must be complied with in the shortest reasonable time. The notice must include a domestic telephone and facsimile number that will receive an opt-out request, and a cost-free mechanism for the recipient to send such a request to the sender. This provision should not be interpreted as a mandate for such businesses to establish any particular cost-free mechanism to receive opt-out requests, but should allow businesses to exercise some flexibility and creativity in providing cost-free options that all fax recipients could use to submit opt-out requests. In order to minimize the possible financial consequences of this provision, section 2(c) gives the Commission the authority to, by rule, exempt certain classes of small business senders from the requirement to provide the additional cost-free mechanism if the Commission determines that the costs to those businesses is unduly burdensome given the revenues generated by that class of small business.

Section 2(c) also requires that the telephone and facsimile machine numbers and the cost-free mechanism provided to a recipient must permit an individual or business to make an opt-out request during regular business hours. Finally, the opt-out notice must comply with the current provisions of section 227(d), which require that any fax being sent contain in the margins at the top or bottom of each page the date and time it is sent, the identification of the sender of the message, and the telephone number of the sending machine.

Section 2(d) adds a new subparagraph (E) to section 227(b)(1) of the Communications Act of 1934 by setting forth what a recipient must do to opt-out of future unsolicited advertisements. The Commission, by rule, shall provide that an opt-out request is valid if it (1) identifies the telephone number or numbers of the fax machine or machines subject to the request; (2) is made to the telephone or fax number of the sender that is provided under subparagraph (D)(iv), or by any other method as determined by the Commission; and (3) is made by a person who has not subsequently provided express invitation or permission to receive unsolicited advertisements. Although the "established business relationship" has been defined on the basis of a commercial transaction or inquiry, with or without the exchange of consideration, the Commission should take precautions to ensure that if a recipient opts out of receiving unsolicited facsimile advertisements, that any subsequent purchases or inquiries do not create or renew the "established business relationship" exemption without some affirmative opt-in by the recipient.

Section 2(e) adds a new subparagraph (F) to 227(b)(1) of the Communications Act of 1934 by giving the Commission the authority to establish an exemption from the opt-out notice requirements for tax-exempt, nonprofit trade or professional associations if those

faxes are in furtherance of the group's tax-exempt purpose. Section 2(e) is designed to apply to certain entities classified under the Internal Revenue Service's definition of section 501(c)(6) organizations, which include such groups as business leagues, chambers of commerce, real estate boards, and boards of trade which are not organized for profit and no part of the net earnings inures to the benefit of any private shareholder or individual. This section is not designed to apply to charities. This provision is discretionary, and the Commission may create a rule only if the Commission finds that such opt-out notices are not necessary to protect the ability of association members to stop future unsolicited facsimile advertisements sent by the association. The Committee provided the Commission with this authority because members of tax-exempt, nonprofit trade and professional associations have chosen to affirmatively join a particular organization, which typically requires the payment of annual dues. Arguably, these members may have an expectation of communications, including faxes, as part of their membership and have a greater degree of control in effectuating their preferences with respect to how their association communicates with them.

Although under section 2(e), the Commission may decide to exempt tax-exempt, nonprofit trade and professional associations from the opt-out notice requirements, nothing in S. 2603 is designed to exempt these organizations from the requirement to honor a request to opt-out of future unsolicited facsimile advertisements from their members.

Section 2(f) adds a new subparagraph (G)(i) to section 227(b)(2) of the Communications Act of 1934 by giving the Commission the authority to establish a time limit on the "established business relationship" exemption. Under the TCPA junk fax rules as interpreted prior to January 1, 2003, there was no specific time limit on the length of the EBR.

The Committee is mindful that the financial and administrative costs incurred by senders to implement a specific time limit on the EBR could be burdensome. On the other hand, the costs of not implementing a specific time limit could also harm fax recipients. Accordingly, the Committee has given the Commission the authority to create such a specific time limit. Three years after enactment of S. 2603, the Commission may by rule create a time limit for the EBR exemption for junk faxes that may be no less than 5 years and no more than 7 years. The Commission may only create a rule if it (1) determines that the existence of the EBR exception has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines; (2) upon review of such complaints, the Commission has reason to believe that a significant number of such complaints involve unsolicited advertisements that were sent based on an EBR that was longer than the Commission believes is consistent with the reasonable expectations of consumers; (3) determines that the costs to senders of demonstrating the existence of an EBR within a specified period of time do not outweigh the benefits to recipients of establishing a limitation on the EBR; and (4) determines that for small businesses, the costs are not unduly burdensome given the revenues generated by small businesses and taking into consideration the number of specific complaints to the Commission involving faxes sent by small businesses.

Section 2(g) amends section 227(a)(4) of the Communications Act of 1934 by clarifying that “express invitation or permission” may be secured in writing or otherwise, as determined by the Commission.

Section 2(h) requires the Commission to issue its regulations no later than 270 days after enactment of this Act.

Section 3. FCC annual report regarding junk fax enforcement

Section 3 adds a new section (g) to section 227 of the Communications Act of 1934 that requires the Commission to report annually to the Congress on the enforcement of the junk fax provisions of the TCPA. Specifically, the report must include the following: (1) The number of complaints received by the Commission annually alleging a violation of the general ban on sending unsolicited advertisements; (2) the number of such complaints received during the year on which the Commission has taken action; (3) the number of such complaints that remain pending at the end of the year; (4) the number of citations issued for sending unsolicited advertisements; (5) the number of notices of apparent liability issued for sending unsolicited advertisements; (6) for each such notice (a) the amount of the proposed forfeiture; (b) the person to whom the notice was issued; (c) the length of time between the date on which the complaint was filed and the date the notice was issued; (d) the status of the proceeding; (7) the number of final orders imposing forfeiture penalties for sending unsolicited advertisements; (8) for each such forfeiture order (a) the amount of the penalty; (b) the person to whom the order was issued; (c) whether the penalty was paid; and (d) the amount paid; and (9) for each case that was referred for recovery (a) the number of days from the date the Commission issues such order to the date of referral; (b) whether an action has been commenced to recover the penalty; and (c) whether the recovery action resulted in any amount collected.

Section 4. GAO study on junk fax enforcement

Section 4(a) requires the Comptroller General of the United States (GAO) to conduct a study regarding complaints received by the Commission dealing with unsolicited advertisements that shall determine the following: (1) The mechanisms established by the Commission to receive, investigate and respond to such complaints; (2) the level of enforcement success by the Commission; (3) whether complainants are adequately informed by the Commission regarding their complaints; (4) whether additional enforcement measures are necessary to protect consumers, including recommendations for additional enforcement measures.

Section 4(b) requires the Comptroller General to specifically examine (1) the adequacy of existing statutory enforcement actions available to the Commission; (2) the adequacy of existing statutory enforcement actions and remedies available to consumers; (3) the impact of existing statutory enforcement remedies on senders of facsimiles; (4) whether increasing the amount of financial penalties is warranted to achieve greater deterrent effect; and (5) whether establishing penalties and enforcement actions for repeat violators similar to those established in section 1037 of title 18, United States Code, would have a greater deterrent effect.

Section 4(c) states that the Comptroller General shall submit a report to Congress no later than 270 days after enactment of this Act.

ADDITIONAL VIEWS OF SENATOR BOXER

I strongly support preventing junk faxes, as the title of this bill purports to do.

However, what the bill actually does falls far short and does not adequately protect consumers.

S. 2603 would allow any business with an “established business relationship” with a customer to send unrequested faxes to that customer’s machine for up to seven years. The bill sets a customer inquiry as the very low threshold necessary for businesses to claim an established business relationship with a customer.

In a seven year time frame individuals interact with dozens, if not hundreds, of businesses. To say that all those businesses should then be allowed to indiscriminately inundate individuals with faxes does not put a stop to a lot of junk faxes.

Now that computers have made it dramatically easier to send faxes, many businesses have deemed it their right to drown consumers in junk faxes at their homes and places of business. One expert estimates that 2 billion faxes are sent every year and that the loose language in this bill will allow for twice that number in the near future.

And, 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 did not ask for.”

The Commerce Committee approved this bill without ever holding a hearing on it and without considering a single amendment in Committee. As a result, consumers never had a say, and Senators were never given an opportunity to improve the legislation through the amendment process.

A new Federal Communications Commission rule is scheduled to go into effect in January 2005. Some have argued that it places an onerous burden on business by requiring prior written permission before sending any fax. But, this bill goes much too far in the opposite direction, and we should not let this bill become law without additional provisions to protect consumers.

I believe that we should amend this bill to allow consumers to place their fax numbers on a Do-Not-Fax list that trumps the “established business relationship” rule in the legislation. Others have suggested that we limit the right of sending faxes to consumers with which a business has an established business relationship to those consumers from whom the business received the fax number directly. And, others have said that at a very minimum, we should place a firm 18-month limit on the duration of an established business relationship after a sale or 3 months after an inquiry.

All three ideas would be improvements upon the bill as reported. To date, there has been no opportunity to consider them. Before the bill passes the Senate, we must have that opportunity.

Policymakers must protect consumers from junk faxes. It is disingenuous to name this bill the Junk Fax Prevention Act when in fact we are doing exactly the opposite. We must find a middle ground solution between the FCC rule and this legislation.

BARBARA BOXER.

ADDITIONAL VIEWS OF SENATOR McCAIN, SENATOR
HOLLINGS, SENATOR SMITH, AND SENATOR SNOWE

During our consideration of S. 2603, the Junk Fax Protection Act of 2004, we had hoped to have an amendment adopted by unanimous consent that had been filed by Senators Smith, Hollings, and Snowe. The amendment would have struck language currently in the bill that restricts the FCC's ability to establish a durational limit on an "existing business relationship" to a period "not shorter than 5 years and not longer than 7 years." In our view, this language unwisely limits the discretion of the FCC in this area. The amendment would have also deleted certain reporting requirements tasked to the FCC under the original bill. Due to the invocation of a Senate rule which prevented the consideration of amendments to this bill, this amendment could not be considered by the committee. It is our expectation and hope, however, that these changes will be agreed to and accepted as this legislation receives further consideration before the full Senate.

JOHN McCAIN.
ERNEST F. HOLLINGS.
GORDON SMITH.
OLYMPIA J. SNOWE.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 227 OF THE COMMUNICATIONS ACT OF 1934

SEC. 227. RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT.

(a) DEFINITIONS.—As used in this section—

(1) * * *

(2) *The term “established business relationship”, for purposes only of subsection (b)(1)(C)(i), shall have the meaning given the term in section 64.1200 of the Commission’s regulations, as in effect on January 1, 2003, except that—*

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G).

[(2)] (3) The term “telephone facsimile machine” means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

[(3)] (4) The term “telephone solicitation” means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person’s prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

[(4)] (5) The term “unsolicited advertisement” means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, *in writing or otherwise.*

(b) RESTRICTIONS ON THE USE OF AUTOMATED TELEPHONE EQUIPMENT.—

(1) PROHIBITIONS.—It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) * * *

* * * * *

[(C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine; or]

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—

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

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

* * * * *

(2) REGULATIONS; EXEMPTIONS AND OTHER PROVISIONS.—The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

(A) * * *

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—

(i) * * *

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) * * *

(II) do not include the transmission of any unsolicited advertisement; [and]

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect[.];

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request

meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes—

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request during regular business hours; and

(vi) the notice complies with the requirements of subsection (d);

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt non-profit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(ii), except that the Commission may take action under this subparagraph only by regulation issued after public notice and opportunity for public comment and only if the Commission determines that such notice required by paragraph (1)(C)(ii) is not necessary to protect the ability of the members of such associations to stop such

associations from sending any future unsolicited advertisements; and

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship to a period not shorter than 5 years and not longer than 7 years after the last occurrence of an action sufficient to establish such a relationship, but only if—

(I) the Commission determines that the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) upon review of such complaints referred to in subclause (I), the Commission has reason to believe that a significant number of such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) the Commission determines that the costs to senders of demonstrating the existence of an established business relationship within a specified period of time do not outweigh the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) the Commission determines that, with respect to small businesses, the costs are not unduly burdensome, given the revenues generated by small businesses, and taking into account the number of specific complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines by small businesses; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-year period that begins on the date of the enactment of the Junk Fax Prevention Act of 2004.

* * * * *

(g) **JUNK FAX ENFORCEMENT REPORT.**—The Commission shall submit a report to the Congress for each year regarding the enforcement of the provisions of this section relating to sending of unsolicited advertisements to telephone facsimile machines, which shall include the following information:

(1) The number of complaints received by the Commission during such year alleging that a consumer received an unsolicited advertisement via telephone facsimile machine in violation of the Commission's rules.

(2) The number of such complaints received during the year on which the Commission has taken action.

(3) The number of such complaints that remain pending at the end of the year.

(4) *The number of citations issued by the Commission pursuant to section 503 during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines.*

(5) *The number of notices of apparent liability issued by the Commission pursuant to section 503 during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines.*

(6) *For each such notice—*

(A) the amount of the proposed forfeiture penalty involved;

(B) the person to whom the notice was issued;

(C) the length of time between the date on which the complaint was filed and the date on which the notice was issued; and

(D) the status of the proceeding.

(7) *The number of final orders imposing forfeiture penalties issued pursuant to section 503 during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines.*

(8) *For each such forfeiture order—*

(A) the amount of the penalty imposed by the order;

(B) the person to whom the order was issued;

(C) whether the forfeiture penalty has been paid; and

(D) the amount paid.

(9) *For each case in which a person has failed to pay a forfeiture penalty imposed by such a final order, whether the Commission referred such matter for recovery of the penalty.*

(10) *For each case in which the Commission referred such an order for recovery—*

(A) the number of days from the date the Commission issued such order to the date of such referral;

(B) whether an action has been commenced to recover the penalty, and if so, the number of days from the date the Commission referred such order for recovery to the date of such commencement; and

(C) whether the recovery action resulted in collection of any amount, and if so, the amount collected.