

Statement Of

THE NATIONAL ASSOCIATION OF REALTORS®

Before The United States Senate

Commerce, Science and Transportation Committee

**Subcommittee on Trade, Tourism, and Economic
Development Hearing**

Regarding

S. 714, The Junk Fax Prevention Act of 2005

April 13, 2005

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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 1500 REALTOR® associations and boards at the state and local levels. NAR membership includes brokers, salespeople, property managers, appraisers and counselors as well as others engaged in every aspect of the real estate industry.

NAR commends the 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 would significantly interfere with day-to-day businesses activities and impose 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 twelve years since implementation. The prior ruling created settled expectations among consumers and businesses alike.

Now, however, it is also very clear to us that the Commission's new rules 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 twelve 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

¹ 47 C.F.R. § 64.1200(f)(10).

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

²2003 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”).

newly listed homes. Such faxes communicate valuable market information that benefits recipients and their clients in a manner that is both timely and cost-effective.

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

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 seven 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 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 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 66,000,000 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 six 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

³ 2003 Report and Order, ¶ 191.

two faxes from two different agents during their home search that were subject to the new rules, then approximately 24,000,000 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 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 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 sheer 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 ten years of business expectations in reliance on that exception. NAR, real estate professionals, and entities in countless other industries implemented a practice of routinely faxing information regarding products and services to other entities with which they have an established business relationship.

Accordingly, while the compliance costs of the new rule in the aggregate would be quite high, the benefits would be minimal. 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 prudently found that the standards for a telephone solicitation and faxed advertisement should be the same and thus exempted established business relationships from both sets of rules.

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

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

Written signed consent is unnecessary and imposes a requirement far out of proportion to the harm it seeks to address, and thus contradicts the intent of Congress in adopting the TCPA. The legislative history shows that Congress considered imposing a written requirement and decided against that high threshold of consent. The House Report accompanying the TCPA states that Congress “did not see a compelling need for

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

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 phrase "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

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

⁶ S. Rep. 102-178, at 5 (1991).

⁷ 2003 Report and Order ¶ 114.

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.