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January 18, 2006

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: CG Docket No. 05-338
"Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991," 70 Fed. Reg. 75102-75110 (Dec. 19, 2005)

Dear Ms. Dortch:

The American Bankers Association ("ABA") appreciates the opportunity to comment on the Federal Communications Commission's ("FCC") proposed rule implementing the Junk Fax Prevention Act of 2005 ("Act") provisions that expressly establish an exception from the unsolicited facsimile advertising rules for those sent to individuals and businesses with whom there is an established business relationship ("EBR"). ABA is an early supporter of the legislation and a member of the Fax Ban Coalition.

The ABA, on behalf of the more than two million men and women who work in the nation's banks, represents all types of financial institutions in this rapidly changing industry. The ABA's membership includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks (collectively referred to herein as "banks"), making it the largest banking trade association in the country.

ABA offers these comments on behalf of the banking industry and for its own purposes as a nonprofit trade association providing educational and professional products, conferences, and services. ABA, like its members, offers its products and services via the internet, the U.S. mail, facsimile, and a variety of print and other media.

General Comments

At the outset, the proposal appears to exhibit a fundamental assumption that every fax number serves one individual much in the same way that an email address is most often personal and unique to an individual. The reality is far from a one-to-one relationship. Fax numbers are most often shared in the business environment, serving groups, divisions, or even whole floors. This shared nature makes

compliance with most of the FCC's proposed rule logistically impossible. For instance, if one individual out of ten decides to opt-out of a fax distribution, is that a valid opt-out for the other nine? And, if one of the nine then gives express permission, does the one who opted out have a cause of action against the fax sender for violating his or her opt out request? How does a fax sender know who works with whom and who has the authority to opt out or in?

The question of multiple users of a single fax number is not addressed by the proposed rulemaking in any meaningful manner, nor is this potential recordkeeping nightmare raised in any of the paperwork calculations. Communications sent to businesses are intended to be used and considered by more than one employee. For example, banks often send weekly mortgage rate sheets to real estate offices, developers, and newspapers. Many hands touch and use this type of information. Yet the proposed rule with its personal focus would require the community banker to maintain records to protect the bank against the potential of a lawsuit based on one disgruntled employee. Or to put it in the trade association context, the ABA would have to have records from each and every employee of each and every member bank in order to withstand a challenge that ABA did not have an existing business relationship with the institution.

The issue of potential lawsuits is not theoretical to the ABA. We have been sued by a fax claim aggregator under Colorado law who paid a $25 "bounty" to anyone who would assign their unsolicited fax claim to the law firm. While we have the records to demonstrate the existing business relationship, we nonetheless have had to defend ourselves in Colorado. It is clear from our interaction with the plaintiff group that they did not expect ABA to contest their allegations. Rather, the expectation was that the ABA would pay a percentage of the claim in order to make the plaintiffs dismiss their action. Upon closer inspection of the assigned claims, we found that the plaintiff group had occasionally confused the American Bankers Association with the American Bar Association in the assigned fax claims and that the rest of the assigned faxes involved just one company that had been an exhibitor at an ABA conference. Obviously the employees who assigned the fax claims did not know that there was an existing business relationship with the ABA. While the litigation is without merit, the time and expense of defending the action is real.

With these general and fundamental concerns over multiple user fax numbers and the need to discourage predatory lawsuits, ABA offers its comments on the more specific questions raised in the proposed rulemaking.

<u>Specific Questions Raised</u>

<u>Existing Business Relationship Questions</u>:

1. Whether the FCC should define what it means for a person to provide a facsimile number "within the context of [an] established business

relationship" including the circumstances the FCC should recognize as evidencing that the individual has given permission for the fax number to be listed publicly? Relatedly, should the sender using the public numbers be required to make reasonable efforts to confirm with the list compiler that the numbers were voluntarily given for public use?

ABA appreciates the flexibility present in the statutory language to adjust to new forms of communication and interaction. Who knew even 10 years ago of the ubiquity of the internet for reaching members and customers alike? Who knows how long facsimile transmissions will remain an active tool of communication? If the FCC makes the rules using fax transmissions pursuant to an EBR exceedingly difficult, it may find itself impacting a smaller and smaller market with a concentration of small businesses for which the recordkeeping requirements are truly a burden that only adds cost and compliance headaches. ABA urges the FCC to find a middle ground that allows the establishment of an EBR simply and easily.

Further, ABA does not support requiring senders to verify list compiler's data as voluntary. This shifts the burden from the compiler to entities hiring the compiler – all without recognizing the limited ability of users to impact compliance or independently verify the numbers listed. In essence this eliminates the ability to work with list compilers as any warranties that list compilers may give as a matter of contract would be without ability to enforce. This punishes the user, not the entity peddling the list. If the FCC wants to regulate the behavior of list compilers, it is more efficient to regulate the compilers directly.

2. Should the FCC verify that a sender had an EBR and the recipient's facsimile number prior to July 9, 2005?

Logistically, verification of every EBR for every business that faxes is extremely difficult and burdensome for both the FCC and the industry with little or nothing to gain as a result of the exercise. Rulemakings by their nature are forward looking and allow businesses to put processes in place for compliance. To go back in time to prove the existence of an EBR using new rules and new statutory authority places industry in a difficult, and expensive, compliance quandary.

Additionally, the question has to be asked what the FCC would do with all of the information. If the data sits with no enforcement, it is expense with no purpose. Even if the data is examined, the resources required to cull possible enforcement actions is enormous. ABA suggests that a better allocation of FCC resources would be to focus on compliance with the new statute and new regulations.

3. How long should an EBR exist? Use the telemarketing lengths (18/3 months depending on the type of relationship)? No limit?

ABA opposes adoption of the telemarketing time lines and urges the FCC to recognize that ongoing relationships serve to "evergreen" the EBR. No one wants to annoy existing customers with a periodic request to verify the EBR. Businesses do not want to be in the position of denying information or service because the EBR form/verification has not been returned. The expense of obtaining the verification with existing members or customers does not provide a significant benefit that justifies the requirement. Further, as the recipient always has the choice to opt out of receipt at any time, there is a clear remedy for recipients who no longer want to do business with a facsimile sender.

4. Describe the costs to senders of maintaining evidence of the existence of an EBR particularly for small businesses.

Depending on the nature and type of business, the costs could be enormous. This is because most businesses have multiple fax numbers and many users. If information must be maintained for every employee who uses a particular facsimile machine – then the cost is not possible to calculate because the recordkeeping is duplicative of every personnel department of every business or entity that receives faxes. If the one person is empowered to verify the EBR, then the cost is maintaining the hard copy records and database – a not insignificant cost; however, it will require file space and staffing resources. ABA suggests that businesses be allowed to digitize documents and use the digital version as qualified evidence of an EBR.

<u>Notice of Opt-Out Questions</u>:

1. Is it necessary to set forth what qualifies as "clear and conspicuous"?

ABA suggests that the FCC take the lessons learned on this question from the Board of Governors of the Federal Reserve System. In an effort to simplify compliance, the Board issued an advanced notice of proposed rulemaking suggesting a single, highly specific definition of "clear and conspicuous" for all consumer compliance regulations. The industry opposed the proposal vehemently because of the potential for lawsuits and liability based on subjective interpretations of the proposal, the enormous cost of changing existing forms and systems, the cost of re-litigating interpretations of "clear and conspicuous" in the courts, and the static nature of the proposal rather than an approach that allowed for evolution and change. The outcry was such that the Board of Governors declined to go forward with the rulemaking.

2. Is 30 days the shortest time to process an opt-out request?

In some cases, the answer may be "yes" because of the need to investigate whether the opt-out request is for a fax number used by only one individual or if others use the number and whether the opt-out is valid for all users. Simple situations may be handled relatively quickly, but few businesses will fit into a simple category because of the multiple users. For this reason, 30 days may be an extremely short timeframe to accomplish the investigation and adjust systems.

3. Is there a small business classification that the FCC can use to base an exception from the proscribed rules?

ABA notes that few, if any, financial institutions will qualify under the Small Business Administration definitions of small business because of federal and state capital requirements. We suggest that in the area of financial institutions the FCC follow the lead of the federal banking regulators and, for example, use the asset size levels for outside auditors requirements.

4. Does the FCC need to enumerate specific "cost-free" mechanisms for the opt-out request?

No. Mandating certain types of mechanisms adds costs without flexibility.

5. Should the FCC require opt-out notices sent to broadcast fax companies apply to all companies that use the broadcast faxer?

No. The question attempts to deputize broadcast fax companies as surrogates for a type of national "Do Not Call" list maintained by the FTC. This is an imperfect solution because the result will be to prohibit the sending of any faxes, even those where the individual opting out wants the fax, because the risk of faxing will be too great. The opt-out should go only to the entity for which the broadcaster faxes.

6. Methods/requirements for opt-out notifications? Should methods other than that specified in the fax be allowed?

No. The method specified is the method that the business has chosen to process the opt-out request. If the request comes in through a different avenue, the business is at risk to promptly recognize what the point of the request is, and to get the request to the proper departments for handling. Failing to use the listed method adds time and risk to compliance. As noted by one of our members, financial institutions, like other companies, have many points of contact with both business and individual customers. Not every point is equipped to handle the requests. Prompt compliance requires

the notification to be sent as specified. As the FCC's goal is compliance with the rules, then the FCC should not encourage requests to be filed any other way than the method listed.

Nonprofit Exception Questions:

1. Should the FCC allow nonprofit trade or professional organizations to send unsolicited advertisements to their members without the opt-out notice?

Yes. Trade associations exist to serve their members. If a member does not want a particular facsimile number used, most associations have a membership or customer service department that can assist the member and eliminate the use of the number. A trade association that abuses members by sending unwanted items will not have many members for long. It is simply not in the best interests of the members or the trade association to do so.

2. How should the FCC determine whether an unsolicited advertisement is sent "in furtherance of the association's tax-exempt purpose?"

ABA suggests that the FCC recognize that the Internal Revenue Service is the expert in this area and defer to the determinations, rulings, and court cases that exist over tax-exempt status. There is no need to duplicate the efforts or expertise of the IRS. To do so would create greater confusion in the tax-exempt world and not encourage accurate compliance.

Conclusion:

In sum, ABA respectfully submits that the FCC should structure the EBR in a way that recognizes multiple users of single facsimile numbers and the difficulties inherent in recordkeeping that tracks all of those users. Additionally, ABA urges the FCC to craft the rule simply to encourage compliance. Overly detailed or technical rules will frustrate everyone – those receiving facsimiles, and those trying to send useful and wanted information.

Sincerely,

C. Dawn Causey
General Counsel