



**OFFICE OF ADVOCACY
U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416**

August 14, 2003

Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201
Washington, DC 20554

RE: Ex Parte Presentation in a Non-Restricted Proceeding
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991
(CG Dkt No. 02-278)

Dear Mr. Chairman:

The Office of Advocacy (“Advocacy”) of the U.S. Small Business Administration (“SBA”) hereby submits this letter in support of Requests for Stay filed with the Federal Communications Commission’s (“FCC” or “Commission”) for the Report and Order (“Order”) in the above-captioned proceeding.¹ The Office of Advocacy is an independent office within the SBA, so the views expressed by the Office of Advocacy do not necessarily reflect the views of the SBA or the Administration.

On July 3, 2003, the FCC released its new “do-not-call” rule designed to regulate telemarketing and promote consumer privacy. The FCC intended the Order to maximize consistency with the recent amendments made by the Federal Trade Commission (“FTC”) to its Telemarketing Sales Rule. The FCC went further than the FTC and adopted a “do-not-fax” provision in its Order, which required any person to obtain prior express permission in writing with a signature, from the recipient before sending an unsolicited fax advertisement.² Unlike the general “do-not-call” provisions of the Order, the Commission removed the established business relationship exemption and did not grant an exception to trade associations or non-profit organizations when communicating through a facsimile device to their members.

This rule will have an enormous impact on small businesses, small trade associations, and small non-profit organizations. Advocacy recommends that the FCC grant the requests for stay until

¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, CG Dkt. No. 02-278, FCC 03-153 (rel. July 3, 2003).

² Order at paras. 185-93.

the Commission can evaluate the economic impacts on small businesses, small trade associations, and non-profit organizations and adopt rules that minimize those impacts.³

1. Advocacy Background.

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305⁴ to represent the views and interests of small business within the Federal government. Advocacy's statutory duties include serving as a focal point for the receipt of complaints concerning the government's policies as they affect small business, developing proposals for changes in Federal agencies' policies, and communicating these proposals to the agencies.⁵ Advocacy also has a statutory duty to monitor and report to Congress on agencies' compliance with the Regulatory Flexibility Act of 1980 ("RFA"), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").⁶ Additionally, Executive Order 13272 ("E.O. 13272") authorizes Advocacy to provide comment on draft and proposed rules to the agency, and requires agencies to give every appropriate consideration to Advocacy's comments.⁷ For more information about Advocacy, the RFA, and E.O. 13272, please visit our Web page.⁸

2. The FCC Should Grant the Requests for Stay of the Order.

The FCC should grant the requests for stay of the enforcement of the Order as it is in the public interest. Many business associations and trade organizations have filed requests for stay. Together, these parties represent millions of small businesses throughout the United States and across many industry sectors, the vast majority of which will be impacted by the Order.

The four-part test that the FCC traditionally uses for determining whether or not a stay should be granted is: (a) the petitioners will suffer irreparable harm if emergency relief is not granted, (b) the petitioners are likely to prevail on the merits, (c) any other interested parties will not be substantially harmed if the relief is granted, and (d) the public interest favors the relief.⁹ Advocacy believes that the facts addressed in this letter satisfy the test and urges the FCC to stay the effective date of the Order.

³ Requesting parties include: the American Teleservices Association, the Chamber of Commerce of the United States, the Community Association Institute, the National Association of Manufacturers, the National Association of Wholesaler-Distributors, the National Restaurant Association, the National Federation of Independent Business, the American Business Media, the American Society of Association Executives, and the National Association of Realtors.

⁴ Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§ 634 a-g, 637).

⁵ 15 U.S.C. § 634(c)(1)-(4).

⁶ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 et seq.) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

⁷ Exec. Order. No. 13272 § 1, 67 Fed. Reg. 53,461 (2002).

⁸ <http://www.sba.gov/advo>.

⁹ *Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them*, 15 FCC Rcd 7051, ¶7 (1999) (citing *Biennial Regulatory Review*, FCC 99-129, ¶4 (1999) (citing *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir 1958))).

a. Petitioners Will Suffer Irreparable Harm.

Advocacy agrees with requesters that they would suffer irreparable harm if emergency relief is not granted. Many small businesses rely upon telephone solicitation as part of their business plans; trade associations and membership organizations rely upon faxes to communicate with members. The restrictions adopted in the Order would greatly reduce their ability to use this form of communication with potential customers or with their members. One requester has stated that its industry sector stands to lose 2 million jobs and that many of them would be forced out of business¹⁰ and many trade associations have filed letters with the FCC describing the enormous cost to comply with the Order.

Furthermore, the “do-not-fax” provision of the rules as currently written change the status quo and remove the existing business relationship exemption which many small businesses and organizations rely upon. The thirty-day period to come into compliance with the “do-not-fax” provision is too short for small businesses and small trade associations to physically collect the written consents from every party with whom they have dealings that could be construed as an advertisement. If the FCC does not grant the emergency relief, small businesses, trade associations, and membership organizations may be forced to curtail all faxing to their customers or members to avoid liability. Both the Order as a whole and the “do-not-fax” provisions have the potential to cost millions of dollars in lost business opportunities, as well as disrupting the communications of trade associations and membership organizations.

b. Petitioners Are Likely to Prevail on the Merits.

Advocacy believes that the Order may be vulnerable to having the courts overturn the rule on Administrative Procedure Act or Constitutional grounds. The Order treats different types of speech differently based upon the content, which raises First Amendment concerns. The “do-not-fax” portion of the rule is vulnerable to an RFA challenge, which we explain in further detail below. Both of these challenges raise a likelihood that a challenge could succeed.

c. Other Interested Parties Will Not Be Substantially Harmed if the Relief is Granted.

As requesters state in their requests for a stay, a stay would not substantially harm other parties. A stay would only maintain the status quo, which still requires businesses to maintain company-specific “do-not-call” lists. These requirements have been on the books for more than ten years without undue harm to consumers, so a stay’s harm to consumers will be minimal.

d. Public Interest Favors the Relief.

As the requesters state, the public interest favors relief. The scope of the Order touches millions of small businesses throughout the nation and in almost every sector of industry. The regulation that the FCC has adopted could lead to enormous economic loss, as the Order could greatly restrict business-to-business and business-to-consumer communications. This would hurt the economy, slow business transactions, and likely depress growth. Furthermore, the regulation

¹⁰ Request for Expedited Stay of the American Teleservices Association, CG 02-278 (July 25, 2003).

would restrict the ability of trade associations and membership organizations to communicate with their members, which chills their activities, such as representation of small business interests before the government.

Because of the legal complications of the Order, the court challenges should be resolved before it is enforced. Similarly, because of the public interest concerns, Congress should be given an opportunity to act. For these reasons, Advocacy agrees with parties who are requesting a stay of the Order and encourages the Commission to grant a stay.

3. The FCC's Report and Order Does Not Comply with the RFA.

Upon reviewing the Order, Advocacy believes that the “do-not-fax” portion of the rulemaking does not comply with the RFA. Both the initial regulatory flexibility analysis (“IRFA”) and the final regulatory flexibility analysis (“FRFA”) do not satisfy the requirements of the RFA as they failed to address the costs that the rule would impose upon small business, small trade associations, membership organizations, and small non-profit organizations.

The IRFA does not describe the requirement to obtain signed written permission from all fax recipients and it does not adequately estimate the costs on small businesses or small organizations.¹¹ Furthermore, the FCC did not consider alternatives to minimize the significant economic impact on small businesses and small organizations as required by the RFA.¹² Instead, the Commission asks commenters to propose alternatives, which shifts the burden off the FCC and onto small business commenters. Asking for proposed alternatives from small businesses does not satisfy the RFA, as the law requires the agency to consider and discuss alternatives.

Finally, the FRFA does not meet the requirements of the RFA, as it does not contain an analysis of the compliance costs of the Order.¹³ In the FRFA, the Commission does mention that small businesses will be required to maintain records of permission forms, but the Commission does not estimate the costs, time required, or professional skills necessary to comply with the Order. In addition, the Order requires that all small businesses and organizations to collect the signed written permission forms from each of the recipients of fax advertising. The FCC does not address this cost in its FRFA, which will be substantial. The small business or organization must draft the permission form, mail it to all current and prospective customers, clients, association members, or other business partners, and finally provide a means for the recipient to communicate permission back to the small business or organization. Additional reminders may need to be sent out if customers, trade organizations, or membership organizations members do not respond to the first request. Soliciting permission will be an time-consuming and expensive proposition which should have been addressed in the FRFA.

The Order violates both the RFA as the IRFA and the FRFA did not describe the impact on small businesses and organizations or consider alternatives to minimize that impact. Because of these

¹¹ 5 U.S.C. §603(b)(4) (1996).

¹² 5 U.S.C. at §603(b)(5). Small non-profit organizations, small trade associations, and small governmental entities are also covered by the RFA as per §601(3)-(6).

¹³ 5 U.S.C. at §604(a)(4).

deficiencies, the Commission should grant the requests for stay of the Order until such time as the needs and concerns of small businesses and small organizations can be addressed by the Commission on reconsideration or by the courts or Congress.

4. Conclusion

Advocacy supports the parties' request for stay of the FCC's Order pending the resolution of petitions for reconsideration, action by Congress, or the courts. Small businesses are heavily affected by the "do-not-call" rule. In particular, the "do-not-fax" provisions of the Order are overly burdensome on small business, small trade associations, small membership organizations, and small non-profit organizations. Finally, the Commission did not comply with the RFA as it did not adequately describe the impact of these compliance requirements nor consider alternatives to minimize the impact.

Thank you for your consideration of these matters, and please do not hesitate to contact me or Eric Menge of my staff at (202) 205-6533 or eric.menge@sba.gov if you have questions, comments, or concerns.

Sincerely,

/s/ _____
Thomas M. Sullivan
Chief Counsel for Advocacy

/s/ _____
Eric E. Menge
Assistant Chief Counsel for Telecommunications

cc:

Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan Adelstein
K. Dane Snowden, Chief, Consumer and Governmental Affairs Bureau
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