



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

September 7, 2004

The Honorable Michael K. Powell  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Room 8-B201  
Washington D.C. 20554

**RE: *Ex Parte* Presentation in a Non-Restricted Proceeding  
Petition for Extension of Stay for Rules and Regulations Implementing the  
Telephone Consumer Protection Act of 1991 (CG Docket No. 02-278, FCC 03-153)**

Dear Mr. Chairman:

The Office of Advocacy of the U.S. Small Business Administration submits this letter in support of the Fax Ban Coalition's Petition for Extension of Stay<sup>1</sup> and the National Association of Realtors' Petition for Extension of Stay<sup>2</sup> (collectively, "the Petitions") in the above-captioned proceeding. The Office of Advocacy strongly encourages the Federal Communications Commission ("FCC" or "Commission") to grant a six-month extension of the stay of the unsolicited facsimile advertisement rules ("fax rules") adopted by the June 26, 2003 Report and Order<sup>3</sup> and stayed pursuant to the August 18, 2003 Order.<sup>4</sup>

**1. Advocacy Background**

Congress established the Office of Advocacy in 1976 under Pub. L. No. 94-305 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.<sup>5</sup> Advocacy also has a statutory duty to monitor and report to Congress on Federal agency compliance with the Regulatory Flexibility Act of 1980 ("RFA"), as amended by the Small Business Regulatory Enforcement

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<sup>1</sup> Petition of the Fax Ban Coalition to the *Order*, CG Dkt. No. 02-278, FCC 03-230 (Aug. 10, 2004).

<sup>2</sup> Petition of the National Association of Realtors to the *Order*, CG Dkt. No. 02-278, FCC 03-230 (Aug. 10, 2004).

<sup>3</sup> *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. June 26, 2003).

<sup>4</sup> *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Order*, CG Dkt. No. 02-278, FCC 03-230 (rel. August 18, 2003).

<sup>5</sup> 15 U.S.C. § 634(c)(1)-(4).

Fairness Act of 1996 (“SBREFA”).<sup>6</sup> The Office of Advocacy (“Advocacy”) is an independent office within the U.S. Small Business Administration (“SBA”), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

## **2. The FCC Should Grant the Petitions to Extend the Stay for Six Months**

The Office of Advocacy believes the Petitions meet the FCC’s requirements for a stay and that it is in the public interest for the FCC to grant the six-month extension. Congress is currently considering legislation to amend the Telephone Consumer Protection Act of 1991 (“TCPA”) to reinstate the Established Business Relationship exemption. A six-month extension would provide additional time for Congress to act and present legislation to the President to resolve this important issue.

Advocacy filed a letter in August 2003 in response to the Report and Order that recommended the Commission grant a stay of the enforcement of the fax rules.<sup>7</sup> Advocacy’s reasoned that the original stay was in the public interest, in part, because it allowed time for Congress to act.

Indeed, Congress has taken action on legislation that directly relates to the Established Business Relationship exemption which is at issue in the fax rules. H.R. 4600, the Junk Fax Prevention Act, passed the House of Representatives on June 16, 2004. The companion bill, S. 2603, passed the Senate Commerce Committee on July 22, 2004, and is awaiting consideration by the full Senate. Advocacy’s letters to Congress supporting passage of these bills are attached to this letter.<sup>8</sup>

Without an extension of the stay, small businesses would need to take steps to obtain written consents from fax recipients with whom they have an existing business relationship in anticipation of the current January 1, 2005, deadline. The economic impact of this requirement on small businesses will be significant, as shown by the U.S. Chamber of Commerce’s survey.<sup>9</sup> Furthermore, the fax rules included several provisions that need clarifying, including the types of parties that are covered by fax rules as well as the definition of advertisement. These clarifications would be made through an Order on Reconsideration from the FCC, which has not been released yet, giving the small businesses less than four months before the end of the current stay.

Because the Junk Fax Prevention Act would provide meaningful regulatory relief to small businesses by reinstating the Established Business Relationship exemption, Advocacy believes that it is in the public interest for the FCC to stay enforcement of the fax rules for an additional six months. Similarly, because the Commission has not issued an Order on Reconsideration clarifying several key points in the fax rules, Advocacy believes that a stay is in the public interest. Therefore, Advocacy recommends that the FCC adopt the six-month stay, minimize

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<sup>6</sup> 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).

<sup>7</sup> Letter from Thomas M. Sullivan to Chairman Michael J. Powell, in CG Dkt. No. 02-278 (Aug. 14, 2003).

<sup>8</sup> Letter from Thomas M. Sullivan to Senator McCain (July 19, 2004); Letter from Thomas M. Sullivan to Congressman Joe Barton (June 6, 2004).

<sup>9</sup> Letter from the R. Bruce Josten, Chamber of Commerce of the United States of America, to Chairman Michael Powell, CG Dkt. No. 02-278 (April 28, 2004).

confusion and regulatory burdens on small businesses and allow Congress additional time to act or time for the small businesses to comply with an Order on Reconsideration.

### **3. Conclusion**

Again, Advocacy encourages the FCC to grant the six-month extension of the stay, as requested by the Fax Ban Coalition and the National Association of Realtors. The Office of Advocacy is available to assist the Commission in these efforts. For additional information or assistance, please contact me or Eric Menge of my staff at (202) 205-6533 or eric.menge@sba.gov.

Sincerely,

/s/ \_\_\_\_\_  
Thomas M. Sullivan  
Chief Counsel for Advocacy

/s/ \_\_\_\_\_  
Eric E. Menge  
Assistant Chief Counsel for Telecommunications

#### Attachments

Letter to Chairman John McCain, Committee on Commerce, Science and Transportation,  
U.S. Senate (July 19, 2004)

Letter to Chairman Joe Barton, Committee on Energy and Commerce, U.S. House of  
Representatives (June 23, 2004)

cc: FCC Commissioner Kathleen Q. Abernathy  
FCC Commissioner Michael J. Copps  
FCC Commissioner Kevin J. Martin  
FCC Commissioner Jonathan Adelstein  
Dr. John D. Graham, Administrator, Office of Information and Regulatory Affairs