

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991)	CC Docket No. 02-278
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 05-338

**COMMENTS OF THE
OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION,
ON THE NOTICE OF PROPOSED RULEMAKING
AND INITIAL REGULATORY FLEXIBILITY ANALYSIS**

The Office of Advocacy of the U. S. Small Business Administration (“Advocacy”) submits these Comments to the Federal Communications Commission (“FCC” or “Commission”) regarding the Notice of Proposed Rulemaking (“NPRM” or “proposed rule”) in the above-captioned proceeding.¹ The FCC is seeking comment on a proposed rule implementing the Junk Fax Prevention Act of 2005 (“JFPA”),² which codified the exemption to the FCC’s do-not-fax rules for unsolicited commercial faxes sent to recipients with whom a business has an Established Business Relationship (“EBR”). The proposed rule asks if the EBR should be limited, what criteria the opt-out notice on unsolicited commercial faxes should meet, and whether small business senders should be exempt from providing a cost-free mechanism for receiving do-not-fax requests.

Small business has taken a very active interest in this issue since the FCC first revised its

¹ See *Notice of Proposed Rulemaking*, CC Dkt. No. 02-278, CG Dkt. No. 05-338, FCC 05-206 (rel. December 9, 2005).

² See Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005).

rules governing fax advertising. Accordingly, Advocacy is pleased to note that the FCC has prepared an initial regulatory flexibility analysis (“IRFA”) for the proposed rule which acknowledged that this rule would have far-reaching impacts on small businesses and asked for comment on a number of small business issues surrounding implementation of the JFPA. To assist the FCC in its analysis, Advocacy solicited input from small entities, held a roundtable on January 11, 2006,³ reviewed their recommendations, and prepared these comments in response to the FCC’s regulatory flexibility analysis.

1. Advocacy Background.

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (“SBA”), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. Section 612 of the Regulatory Flexibility Act (“RFA”) requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996.⁴

Congress crafted the RFA to ensure that, while accomplishing their intended purposes, regulations did not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation.⁵ To this end, the RFA requires agencies to analyze the economic impact of draft regulations when there is likely to be a significant economic impact on a substantial number of small entities, and to consider regulatory alternatives that will achieve the agency’s goal while

³ Attendees at Advocacy’s Junk Fax Prevention Act Implementation Roundtable were: Jonathan Eisen, International Foodservice Distributors Association; Amy Healy, Yellow Page Integrated Media Association; Rishi Hingorany, National Newspaper Association; Lynn King, National Association of Realtors; Ruth Osinski, National Federation of Independent Business; Tonda Rush, National Newspaper Association; Jim Rock, American Society of Association Executives.

⁴ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) 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).

⁵ Pub. L. 96-354, Findings and Purposes, Sec. 2 (a)(4)-(5), 126 Cong. Rec. S299 (1980).

minimizing the burden on small entities.⁶

On August 13, 2002, President George W. Bush signed Executive Order 13272 requiring federal agencies to implement policies protecting small entities when writing new rules and regulations.⁷ This Executive Order highlights the President's goal of giving small business owners a voice in the complex and confusing federal regulatory process by directing agencies to work closely with the Office of Advocacy and consider properly the impact of their regulations on small entities. Executive Order 13272 also requires agencies to give every appropriate consideration to any comments provided by Advocacy. Under the Executive Order, the agency must include, in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, the agency's response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁸

2. Appropriate Size Standard for Small Businesses Using Fax Machines.

In the IRFA, the Commission states that the NPRM could potentially apply to any small business that sends an unsolicited fax and asks for comment on whether the approximately 4.44 million small businesses in the United States⁹ will need to comply with this rule. This national small-business estimate is based on 1992 U.S. Census data. However, the U.S. Census Bureau has updated its estimates based upon census information from 2002, which places the total number of small businesses in the United States (which are defined here as firms with fewer than

⁶ See generally, Office of Advocacy, U.S. Small Business Administration, *A Guide for Federal Agencies: How to Comply with the Regulatory Flexibility Act* (2003), available at <http://www.sba.gov/advo/laws/rfaguide.pdf>.

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

⁸ *Id.* at § 3(c).

⁹ NPRM para. 57 (citing U.S. Department of Commerce, Bureau of Census, 1992 Census of Transportation, Communications, and Utilities., UC 92-S-1, Subject Series, Establishment and Firm Size, Table 2D, Employment Size of Firms).

500 employees) at 5.68 million¹⁰ and is a more accurate accounting of the current number of small businesses.

Ordinarily, the SBA defines small business on an industry-by-industry basis.¹¹ However, this is not practicable for the proposed rule because of its broad applicability across industry lines which would create confusion on the part of small businesses as to whether or not they are covered by the exemptions discussed below. Accordingly, the FCC should consider adopting a new small business size standard for this rule. The Small Business Act allows agencies to propose and use alternative size standards if it affords an opportunity for public notice and comment and the alternative size standard is approved by the SBA Administrator.¹²

The most common SBA size standard for retail and service industries is \$6.5 million in gross revenue.¹³ At Advocacy's roundtable, small businesses in these industries recommended using an employee standard rather than a revenue-based one, as it is simpler and more predictable. Small businesses with \$6.5 million in gross revenue commonly have between 75 and 100 employees. Drawing from the input from small business groups at our roundtable, Advocacy recommends that the FCC adopt a size standard of 100 employees for this rulemaking. Based on the U.S. Census 2002 numbers, 5.6 million firms would then qualify as small businesses.¹⁴

In a 2004 survey by the U.S. Chamber of Commerce 99.4 percent of the respondents said that they send and receive faxes in the course of doing business.¹⁵ Advocacy believes that a

¹⁰ U.S. Census Bureau, *Statistics of U.S. Businesses, Tabulations by Enterprise Size 2002* <<http://www.census.gov/csd/susb/usalli02.xls>>.

¹¹ Congress granted authority to the SBA to determine size standards in the Small Business Act. 15 U.S.C. § 632(a)(2).

¹² 15 U.S.C. § 632(a)(2)(C).

¹³ U.S. Small Businesses Administration, *Small Business Size Standards Matched to North American Industry Classification System, NAICS Sectors 44-81* <<http://www.sba.gov/size/sizetable2002.html>>.

¹⁴ *Supra*, note 11.

¹⁵ U.S. Chamber of Commerce, *Economic Costs of the No Fax Rule on Small Businesses*

substantial majority of small businesses use fax communications in their daily businesses. Since what can be considered a commercial fax is so broad, it is appropriate for the FCC to consider that its rule could potentially impact almost all small businesses.

3. Regulatory Impacts and Alternatives of the JFPA Implementation.

The NPRM includes several proposals on how the Commission could implement the Junk Fax Prevention Act of 2005. The FCC discussed these proposals in the IRFA and gave the compliance costs serious consideration.

a. Time Limitation of the EBR.

The Commission notes that the JFPA allows the FCC to consider limits to the Established Business Exemption as it applies to unsolicited fax advertisements after three months from the date of enactment of the Act.¹⁶ In addition to a general call for comment on whether it should limit the EBR, the FCC proposes to limit the EBR duration to 18 months following a purchase or transaction and three months after an inquiry.¹⁷ Under the JFPA, the Commission may limit the EBR if it has:

- (1) determined that the EBR exemption results in significant number of complaints;
- (2) determined that a significant number of complaints involved unsolicited faxes sent under an EBR that is older than what the FCC believes is consistent with the reasonable expectations of consumers;
- (3) evaluated the costs to senders of demonstrating the existence of an EBR and the benefits of establishing a limitation on an EBR; and
- (4) determined that small businesses would not be unduly burdened.¹⁸

<http://63.240.226.82/issues/index/technology/04fax_survey_results.htm>.

¹⁶ NPRM para. 16.

¹⁷ NPRM para. 17.

¹⁸ Junk Fax Prevention Act, Sec. 2(f).

The proposed rule does not include an analysis or a determination that the EBR has resulted in a significant number of complaints. Before the FCC can propose limitations on the EBR it must make the determinations required by the JFPA. Advocacy and the small businesses at our roundtable do not believe that the FCC has gathered the necessary information to make this determination.

At Advocacy's roundtable, small business representatives said that the 18/3 requirement¹⁹ proposed by the FCC is burdensome. While small businesses track their transactions, the small business representatives at Advocacy's roundtable said many small businesses do not keep track of inquiries by customers. To do so would require a considerable increase in the amount of record-keeping and would impede the ability of small businesses to respond to inquiries.

b. Clear and Conspicuous Notice of the Opt Out.

The FCC also asks if it is necessary for the Commission to set forth rules on what is clear and conspicuous notice, as required by the JFPA, and what those rules should be.²⁰ Upon consultation with small businesses, Advocacy believes that the clear and conspicuous notice should be held to a reasonable standard. Any further attempts by the FCC to define the notice requirement would likely become mired in minutia and would likely cause more confusion than guidance.

c. Time Permitted to Respond to a Do-Not-Fax Request.

The FCC asks what is the shortest reasonable time to comply with a do-not-fax request and proposes 30 days.²¹ After discussing this issue with small business representatives, Advocacy believes that 30 days to respond to a do-not-fax request is reasonable.

¹⁹ 18 months from a purchase or transaction; 3 months from an inquiry.

²⁰ NPRM para. 20.

²¹ *Id.* para. 30.

d. Cost-Free Mechanism for Opt-Out Requests.

The FCC asks if it should exempt small businesses from the requirement to provide a cost-free mechanism for recipients to opt-out as required by the JFPA and asks what alternative means are available for requests sent to small businesses.²² Based upon input from small businesses, Advocacy recommends that the Commission exempt small businesses from the cost-free mechanism as provided in the JFPA, as it would be unduly burdensome.²³ The most common cost-free mechanism is a toll-free number which costs from 5 cents to 25 cents a minute, depending on the number of minutes bought ahead of time. According to the representatives at Advocacy's roundtable, many small businesses (particularly very small businesses) do not have a toll-free number. Due to the shortness of the comment period, Advocacy and the participants of the roundtable had not had the opportunity to research the full scope of the economic impact of a toll-free number requirement on small businesses. Advocacy recommends that the FCC analyze this cost in the process of creating its final regulatory flexibility analysis ("FRFA").²⁴

If the FCC decides that small businesses should not be exempt, Advocacy recommends that the FCC allow them to use alternatives to toll-free numbers because of the great expense associated with maintaining toll-free numbers. Small businesses at Advocacy's roundtable recommended e-mail, Web-based systems, or the designation of a third party as viable alternatives.

Participants at our roundtable also said that once a small business has chosen a means of

²² *Id.* para. 22.

²³ Which small businesses should be exempted is discussed earlier in the letter where Advocacy recommend a definition of 100 employees or less.

²⁴ 5 U.S.C. § 604(a)(1)-(5) (which requires an agency to state the need for and objective of the rule, a summary of significant issues raised by public comment, a description of the small entities affected by the rule, a description of the compliance requirements, and a description the steps the agency has taken to minimize the significant economic impact on small entities, including why other significant alternatives were rejected).

receiving do-not-fax requests, then opt-out requests should only be enforceable if they are received that manner. Small business groups stated that it is impossible to guarantee that the opt-out will properly be processed if the requests are not received in the manner chosen by the small business.

e. Exemption for Non-Profit Associations.

The FCC asks if non-profit associations be allowed to send faxes to their members in furtherance of their purpose that do not contain an opt-out notice as per the JFPA.²⁵ The small businesses represented at Advocacy's roundtable believed that this would be appropriate.

6. Conclusion.

Advocacy urges the FCC to consider the comments from small entities and the regulatory impact on small carriers when it prepares its FRFA. The implementation of the JFPA has far-reaching implications as so many small businesses make use of this communication tool. Advocacy urges the FCC not to limit the duration of the EBR at this time and to exempt small businesses from the cost-free mechanism requirement.

The Office of Advocacy is available to assist the Commission in its outreach to small business or in its analysis of small business impact. We urge the Commission to consult with us in developing the FRFA, as we can assist the Commission in developing its regulatory flexibility analyses. Questions or observations on this comment are properly referred to Eric Menge of my staff at (202) 205-6533 or eric.menge@sba.gov.

²⁵ NPRM para. 27.

Respectfully submitted,

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January 18, 2006

cc:
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Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Dr. John D. Graham, Administrator, Office
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via electronic filing

Certificate of Service

I, Eric E. Menge, an attorney with the Office of Advocacy, U.S. Small Business Administration, certify that I have, on this 18th day of January 2006, caused to be mailed, first-class, postage prepaid, a copy of the foregoing Comments to the following:

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