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January 18, 2006

VIA ELECTRONIC FILING

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

Re: “Notice of Proposed Rulemaking Regarding Rules and Regulations
Implementing the Telephone Consumer Protection Act of 1991,
FCC 05-206, adopted December 9, 2005, and released December 9, 2005
in CG Docket No. 02-278 and CG Docket No. 05-338”

Dear Ms. Dortch:

On behalf of the American Bar Association (“ABA”) and its more than 400,000 members throughout the country, I write in response to the Commission’s request for comments on the above-referenced Notice of Proposed Rulemaking (“NPRM”) concerning proposed amendments to the Commission’s unsolicited facsimile advertising rules under the Junk Fax Prevention Act of 2005 (“JFPA” or the “Act”). In particular, the ABA would like to express its support for proposed rules exempting tax-exempt nonprofit professional and trade associations from the notice requirements of the Act. In addition, the ABA urges the Commission to refrain from adopting any rule imposing a limit on the duration of an established business relationship for facsimile advertisements at least until all conditions precedent established by the JFPA have been met.

The ABA supports the JFPA because it will preserve the ability of associations like the ABA—and the many state and local bars throughout the country—to fax important information to their members and their non-member customers under the Telephone Consumer Protection Act of 1991 (“TCPA”). To accomplish this, the Act codifies the so-called “established business relationship” exception (the “EBR”) to the TCPA’s general prohibition against unsolicited facsimile advertisements. While the ABA supports the underlying Act, we also believe it is critical that the Commission adopt implementing rules that will protect the ability of associations and other tax-exempt nonprofit organizations to communicate effectively with their members and the public.

Now that the JFPA has become law, the ABA urges the Commission to adopt rules that would effectively implement the new statute by (1) exempting tax-exempt nonprofit professional and trade associations from the opt-out notice requirements of the JFPA and (2) deferring any decision on possible time limitations for the EBR at least until all four conditions specified in the JFPA have been met. The ABA's recommendations are discussed under the two general topic headings outlined below that track the organization set forth in the NPRM.

Authority to Establish Nonprofit Exception

Section 2(e) of the JFPA authorizes the Commission to consider exempting nonprofit organizations from the notice requirements of the Act when the entities are acting in furtherance of their tax-exempt purposes if the Commission determines that those notice requirements are not necessary to protect the ability of members to stop their associations from sending any future unsolicited advertisements. Accordingly, in that portion of the NPRM titled "Authority to Establish Nonprofit Exception," the Commission seeks comments on whether it "should allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the associations' tax-exempt purpose that do not contain the 'opt-out' notice required by the Junk Fax Prevention Act." *See* NPRM, 70 Fed. Reg. 75102, 75107. In addition, the Commission requests comments on the related issues of whether such notice is necessary to protect the ability of members to stop future unwanted faxes, how members will obtain the necessary information to opt out if associations are not required to provide that information, and what benefits, if any, nonprofit organizations will receive from such an exemption.

The ABA strongly believes that the Commission should exercise its express authority under Section 2(e) of the JFPA and adopt a rule exempting nonprofit organizations from the opt-out notice requirements of the Act¹ when the entities are sending facsimile advertisements to their members. The ABA, like many other membership-based professional associations, has long sought to accommodate its members' preferences regarding the manner in which it provides—or does not provide—the members with information. To achieve this goal, the ABA has instituted a process in which any of its members who no longer wishes to receive facsimile advertisements (or commercial e-mail messages) can opt out of receiving such future messages. Under this existing system, ABA members receiving facsimile or e-mail advertisements are invited—through a clear notice on the face of each facsimile or e-mail message—to access the ABA's website and then be directed to a separate webpage that allows the member to amend his or her preferences and opt out of receiving future facsimile ads and/or commercial e-mails. The process also allows the member to change various aspects of his or her profile by updating or deleting the member's addresses, telephone numbers, and fax numbers.

As the largest association of attorneys in the United States, the ABA sends out a substantial number of facsimile advertisements each year to members and nonmembers alike for a variety of

¹ Section 2(e) permits the Commission to exempt nonprofit organizations from the notice requirements of Section 2(c) that direct senders to provide "a domestic contact telephone and facsimile number for the recipient to transmit such a request to the sender...and...a cost-free mechanism for a recipient to transmit a request..." It also requires the telephone and facsimile numbers to permit an individual or business to make an opt-out request at any time on any day of the week.

worthwhile reasons, including as a cost-effective means of identifying upcoming Continuing Legal Education (“CLE”) seminars and programs, as well as marketing books and publications on various legal topics. Since January 2000, the ABA has maintained the efficient Internet-based opt-out system described above for its members that permits them to quickly opt out of receiving future facsimile advertisements. Of the 226,256 ABA members who have provided us with their fax numbers, our specific no-fax restriction has been utilized by only 4,764 of these members. That is, only 2.1% of ABA members who have given us fax numbers have actively chosen not to receive unsolicited faxes from the ABA. Although the vast majority of our members want to continue receiving ABA facsimiles, our existing Internet-based opt-out system allows the remaining small number of members to implement their opt-out preferences quickly and efficiently.

The ABA believes that this system—in which its members log on to its website, edit their member profiles, and indicate what types, if any, of marketing communications they wish to receive—works well and serves its members’ interests. The ABA strives to promptly implement its members’ preferences in a comprehensive way that is tailored to the needs of the individual member, not on a list-by-list basis. The ABA’s member fax lists, unlike the fax lists of many other mass facsimile advertisement senders, are generated by settings and addresses present in its membership system, not by harvesting addresses from lists sold to the ABA. In addition, the ABA’s fax lists are not populated until just prior to being sent, so that the ABA can include the most accurate fax numbers and restrictions that are present in its membership database.

Although this process provides clear benefits to the ABA’s members, the system will only be feasible if the ABA is permitted to continue to enable its members to edit their member profiles and preferences online as part of the opt-out process, rather than being forced to follow the generic notice procedures of Section 2(c) of the JFPA that do not differentiate between opt-out procedures for member and non-member recipients. For these reasons, the ABA urges the Commission to adopt a rule exempting tax-exempt nonprofit professional and trade associations like the ABA from the opt-out notice requirements of the Act when the entities are sending facsimile advertisements to their own members.

Definition of Established Business Relationship

Section 2(b) of the JFPA states that the term “established business relationship” as related to unsolicited facsimile advertisements shall have the same meaning given the term in Section 64.1200 of Title 47, Code of Federal Regulations, as in effect on January 1, 2003, except the term shall also include relationships between a person or entity and both a business subscriber and a residential subscriber. In addition, Sections 2(b) and 2(f) of the JFPA authorize the Commission to limit the duration of the EBR three months after enactment of the JFPA *if* it first finds that the following four conditions have been met: (1) the new EBR rule has resulted in a “significant number of complaints” to the Commission, (2) a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an EBR that was longer in duration than the Commission believes is consistent with the reasonable expectation of consumers, (3) the Commission evaluates the costs to senders of demonstrating the existence of an EBR within a specified period of time and the benefits to recipients of establishing a

limitation on such an EBR, and (4) the Commission determines that costs would not be "unduly burdensome" to small businesses.

In the section of the NPRM titled "Definition of Established Business Relationship," the Commission seeks comments on various issues, including "whether to limit the EBR as applied to unsolicited facsimile advertisements." NPRM at 75106. More specifically, the Commission seeks comments on "whether it is appropriate to limit the EBR duration to unsolicited facsimile advertisements in the same manner as telephone solicitations...[i.e.] 18 months following a purchase or transaction and three months after an application or inquiry." *Id.*

The ABA believes that the Commission should refrain from adopting *any* rule imposing a limit on the duration of the EBR for facsimile advertisements at the present time because the Commission has not yet met any of the four conditions precedent contained in Sections 2(b) and 2(f) of the JFPA and outlined above. Until these express conditions outlined by the statute have been met, the ABA believes that any rule setting the duration of the EBR—whether for 18 months, three months, or otherwise—would be both premature and inappropriate. Accordingly, the ABA urges the Commission to defer any decision on possible time limitations for the EBR under the JFPA at least until all four conditions specified in the Act have been met.

Thank you for your consideration of our comments. If you would like to discuss the ABA's views on these important matters in greater detail, please contact our senior legislative counsel for business and administrative law issues, Larson Frisby, at (202) 662-1098.

Sincerely,

A handwritten signature in cursive script that reads "Robert D. Evans".

Robert D. Evans