

FEDERAL COMMUNICATIONS COMMISSION**47 CFR Part 64**

[CG Docket Nos. 02–278 and 05–338; FCC 06–42]

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission amends its rules on unsolicited facsimile advertisements as required by the Junk Fax Prevention Act of 2005 (the Junk Fax Prevention Act). In addition, the Commission addresses certain issues raised in petitions for reconsideration of the 2003 Report and Order concerning the Telephone Consumer Protection Act's (TCPA) facsimile advertising rules.

DATES: Effective August 1, 2006 except for 47 CFR 64.1200(a)(3)(i), (ii), (iii), (iv), and (vi) which contains information collection requirements that must be approved by the Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of these paragraphs. Written comments on the new information collection(s) must be submitted by the public, Office of Management and Budget (OMB) and other interested parties on or before June 2, 2006. The Commission also lifts the stay in 47 CFR 64.1200(f)(3) effective May 3, 2006.

FOR FURTHER INFORMATION CONTACT: Erica McMahon or Richard Smith, Consumer & Governmental Affairs Bureau, (202) 418–2512.

SUPPLEMENTARY INFORMATION: This document contains modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. These will be submitted to the Office of Management and Budget (OMB) for review under 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding. This is a summary of the Commission's *Report and Order and Third Order on Reconsideration*, CG Docket Nos. 02–278 and 05–338, FCC 06–42, adopted April 5, 2006, and released April 6, 2006 (*Order*). The *Order* amends the Commission's rules on unsolicited facsimile advertisements as required by the Junk Fax Prevention

Act. The *Order* also addresses issues raised in petitions for reconsideration arising from the *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, (2003 TCPA Order), CG Docket No. 02–278, FCC 03–153, released July 3, 2003; published at 68 FR 44144, (July 25, 2003). This document also addresses issues raised in the Junk Fax Prevention Act *Notice of Proposed Rulemaking (JFPA NPRM)*, CG Docket Nos. 02–278 and 05–338, FCC 05–206, released December 9, 2005; published at 70 FR 75070 (December 19, 2005), which proposed modifications to the Commission's rules on unsolicited facsimile advertisements, and sought comment on aspects of those rules. Copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, Room CY–A257, 445 12th Street, SW., Washington, DC 20054. The complete text of this document may be purchased from the Commission's duplicating contractor at Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20054. Customers may contact the Commission's duplicating contractor at its Web site: www.bcpweb.com or call 1–800–378–3160. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice) or (202) 418–0432 (TTY). The document can also be downloaded in Word and Portable Document Format (PDF) at <http://www.fcc.gov/cgb/policy>.

Paperwork Reduction Act of 1995 Analysis

This document contains modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collection requirements contained in the *Order* as required by the PRA of 1995, Public Law 104–13. Public and agency comments are due June 2, 2006. In addition, the Commission notes that, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), the Commission previously sought specific comment on how the Commission might “further reduce the information collection burden for small business concerns with fewer than 25 employees.” In this present document, the Commission has assessed the effect

of rule changes and finds that there likely will be an increased administrative burden on businesses with fewer than 25 employees. The Commission has taken steps to minimize the information collection burden for small business concerns, including those with fewer than 25 employees. The rules adopted in this *Order* do not to require the maintenance of specific records for the sending of facsimile advertisements. The Commission also declines to limit the duration of the Established Business Relationship (EBR), which might have resulted in an increase in recordkeeping burden for entities sending fax advertisements on the basis of an EBR. These measures should substantially alleviate any burdens on businesses with fewer than 25 employees.

Synopsis

In compliance with the requirements of the Junk Fax Prevention Act, the Commission now amends § 64.1200(a)(3) of the Commission's rules to expressly recognize an EBR exemption from the prohibition on sending unsolicited facsimile advertisements. (The Commission correspondingly withdraws § 64.1200(a)(3)(i) of its rules from its existing rules, as facsimile senders will now be permitted to send facsimile advertisements to recipients with whom they have an EBR without first securing the recipient's written permission.)

To ensure that the EBR exemption is not exploited, the Commission concludes that an entity that sends a facsimile advertisement on the basis of an EBR should be responsible for demonstrating the existence of the EBR. The entity sending the fax is in the best position to have records kept in the ordinary course of business showing an EBR, such as purchase agreements, sales slips, applications and inquiry records. (Digitized documents would be acceptable if kept in the ordinary course of business and if they established the existence of the EBR.) The Commission does emphasize that it is not requiring any specific records be kept by facsimile senders. Should a question arise, however, as to the validity of an EBR, the burden will be on the sender to show that it has a valid EBR with the recipient.

Recipient's Facsimile Number

As set forth in the Junk Fax Prevention Act, an EBR alone does not entitle a sender to fax an advertisement to an individual consumer or business. The telephone facsimile number must also be provided voluntarily by the recipient. Specifically, under the new

rules, any person sending a fax advertisement under the EBR exemption must have obtained the facsimile number directly from the recipient within the context of the EBR, or ensure that the recipient voluntarily agreed to make the number available in a directory, advertisement, or site on the Internet which is accessible to the public. In accordance with the Junk Fax Prevention Act, an exception to this requirement will apply if the EBR was formed prior to July 9, 2005.

Facsimile Number Obtained Directly From Recipient

The provision of a telephone facsimile number to a business or other entity reflects a willingness to receive faxes from that entity. Accordingly, it would be permissible for the sender to fax an advertisement to a recipient that had provided a facsimile number to the sender, for example, on an application, information request, contact information form, or membership renewal form. Similarly, a business card containing a fax number that is provided by the recipient to the sender would permit the sending of a facsimile advertisement. It also would be permissible for the recipient to provide to the sender its facsimile number orally over the telephone or through a Web site maintained by the fax sender. In circumstances such as these, the Commission concludes that the consumer has provided the facsimile number in the context of an established business relationship with the fax sender. In the event a recipient complains that its facsimile number was not provided to the sender, the burden rests with the sender to demonstrate that the number was communicated in the context of the EBR.

Facsimile Number Obtained From Directory, Advertisement or Internet Site

The Junk Fax Prevention Act requires that, if the sender relies on an EBR and obtains the facsimile number from a directory, advertisement or site on the Internet, the sender must ensure that the recipient voluntarily agreed to make the number available for public distribution. Commenters contend that it would be unduly burdensome for senders of facsimile advertisements to verify that a consumer voluntarily agreed to make the facsimile number public in every instance. The Commission agrees. Therefore, the Commission determines that a facsimile number obtained from the recipient's own directory, advertisement, or internet site was voluntarily made available for public distribution, unless the recipient has noted on such

materials that it does not accept unsolicited advertisements at the facsimile number in question. For instance, if the sender obtains the number from the recipient's own advertisement, that advertisement would serve as evidence of the recipient's agreement to make the number available for public distribution. (Another example might be a number obtained from the recipient's own letterhead or fax cover sheet.) On the other hand, if the sender obtains the number from sources of information compiled by third parties—e.g., membership directories, commercial databases, or internet listings—the sender must take reasonable steps to verify that the recipient consented to have the number listed, such as calling or e-mailing the recipient. The Commission agrees that membership directories requiring a fee to use are limited in distribution and, as such, the information included within the directory is made available to subscribers and purchasers, not to the general public. The Commission also reiterates that senders of facsimile advertisements must have an EBR with the recipient in order to send the advertisement to the recipient's facsimile number. The fact that the facsimile number was made available in a directory, advertisement or Web site does not alone entitle a person to send a facsimile advertisement to that number.

Established Business Relationship Formed Prior to July 9, 2005

Finally, as the Commission noted in the *JFPA NPRM*, the Junk Fax Prevention Act provides a third avenue for the sender to obtain the facsimile number. Pursuant to the statute, the amended rules shall provide that if the EBR was in existence prior to July 9, 2005, and the sender also possessed the facsimile number before July 9, 2005, the sender may send facsimile advertisements to that recipient without demonstrating how the number was obtained or verifying it was provided voluntarily by the recipient.

The Commission emphasizes that, to fall within this exception, a valid EBR must have been formed between the sender and recipient before July 9, 2005. For example, a business that sold a product to a consumer in 2004 and secured that consumer's facsimile number in 2004, would be permitted to fax an advertisement to the consumer regardless of how the facsimile number was obtained. The Commission agrees with those commenters that contend it would be burdensome for senders to prove a facsimile number was in their

possession prior to July 9, 2005. Therefore, the Commission adopts a presumption that, if a valid EBR existed prior to July 9, 2005, the sender had the facsimile number prior to that date as well. (This presumption could be rebutted, for example, with evidence that the recipient did not use the facsimile number before July 9, 2005.) In the event the recipient alleges a violation of these provisions, the sender will need to provide proof that the EBR existed prior to July 9, 2005.

Definition of Established Business Relationship

As noted in the *JFPA NPRM*, the Junk Fax Prevention Act includes a definition of an EBR to be used in the context of unsolicited facsimile advertisements. The statute provides that “[t]he term ‘established business relationship,’ * * * shall have the meaning given the term in § 64.1200 of Title 47 of the Commission’s rules * * * as in effect on January 1, 2003, except that such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber. * * *” The January 1, 2003 definition did not include any time limitations on the EBR. The Junk Fax Prevention Act, however, authorizes the Commission to limit the duration of the EBR in the context of unsolicited facsimile advertisements after a 3-month period beginning from the date of enactment of the statute. Therefore, the Commission sought comment in the *JFPA NPRM* on whether to limit the EBR. The Commission specifically sought comment on whether it is appropriate to limit the EBR duration for unsolicited facsimile advertisements in the same manner as telephone solicitations.

EBR Definition

Based on the record, and in accordance with the Junk Fax Prevention Act, the Commission adopts as part of the Commission’s rules the following definition of an EBR for purposes of sending unsolicited facsimile advertisements:

For purposes of paragraph (a)(3) of this section, the term established business relationship means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding

products or services offered by such person or entity, which relationship has not been previously terminated by either party.

This definition extends the EBR exemption to faxes sent to both business and residential subscribers. Once established, the EBR will permit an entity to send facsimile advertisements to a business or residential subscriber until the subscriber "terminates" it by making a request not to receive future faxes. (The Commission notes that the act of terminating the EBR exemption will only terminate the relationship for purposes of receiving communications constituting "unsolicited advertisements." A fax regarding collection of a debt that does not contain an advertisement will not be subject to the facsimile advertising rules.) This definition also clearly contemplates that the EBR could be formed by any of the following: An inquiry, application, purchase or transaction by the business or residential subscriber. Consistent with the legislative history of the TCPA, an inquiry by a consumer could form the basis of the EBR. However, the definition makes clear that the inquiry or application must be about products or services offered by the entity. Thus, the Commission concludes that an inquiry about store location or the identity of the fax sender, for instance, would not alone form an EBR for purposes of sending facsimile advertisements. Merely visiting a Web site, without taking additional steps to request information or provide contact information, also does not create an EBR.

In addition, the Commission concludes that the EBR exemption applies only to the entity with which the business or residential subscriber has had a "voluntary two-way communication." It would not extend to affiliates of that entity, including a fax broadcaster which is retained to send facsimile ads on behalf of that entity. While the fax broadcaster may transmit an advertisement on behalf of an entity that has an EBR with the recipient, it is not permitted to use that same EBR to send a fax advertisement on behalf of another client. The Commission finds that, unlike the national do-not-call registry, which allows consumers to avoid most unwanted telemarketing calls by registering a telephone number once every five years, the Junk Fax Prevention Act requires a consumer to opt-out of unwanted fax advertisements from each entity with which the consumer has an EBR. The Commission believes that to permit companies to transfer their EBRs to affiliates would

place an enormous burden on consumers to prevent faxes from companies with which they have no direct business relationship.

Limits on Duration of Established Business Relationship

As required by the Junk Fax Prevention Act, the Commission intends to closely monitor implementation of the new EBR exemption and opt-out policies adopted herein. Within one year of the effective date of this Order, the Commission will evaluate the Commission's complaint data to determine whether the EBR exception has resulted in a significant number of complaints regarding facsimile advertisements, and whether such complaints involve facsimile advertisements sent based on an EBR of a duration that is inconsistent with the reasonable expectations of consumers.

Notice of Opt-Out Opportunity

Section 2(c) of the Junk Fax Prevention Act adds language to the TCPA that requires senders to include a notice on the first page of the unsolicited advertisement that instructs the recipient how to request that they not receive future unsolicited facsimile advertisements from the sender. In accordance with the Junk Fax Prevention Act, the Commission amends its rules to require that all unsolicited facsimile advertisements contain a notice on the first page of the advertisement stating that the recipient is entitled to request that the sender not send any future unsolicited advertisements. This notice must include a domestic contact telephone number and a facsimile machine number for the recipient to transmit such a request to the sender and, as discussed below, at least one cost-free mechanism for transmitting an opt-out request. The Commission emphasizes that including an opt-out notice on a facsimile advertisement alone is not sufficient to permit the transmission of the fax; an EBR with the recipient must also exist.

Clear and Conspicuous

In the *JFPA NPRM*, the Commission sought comment on whether it was necessary to set forth in our rules the circumstances under which the opt-out notice will be considered "clear and conspicuous." The Commission is persuaded that rules specifying the font type, size and wording of the notice might interfere with fax senders' ability to design notices that serve their customers. However, the Commission makes some additional determinations about the opt-out notice so that

facsimile recipients have the information necessary to avoid future unwanted faxes.

Consistent with the definition in our truth-in-billing rules, "clear and conspicuous" for purposes of the opt-out notice means a notice that would be apparent to a reasonable consumer. The Commission also concludes that the notice must be separate from the advertising copy or other disclosures and placed at either the top or bottom of the fax. Many facsimile advertisements today contain text covering the entire sheet of paper, making it difficult to see an opt-out notice that is placed among the advertising material. Thus, the notice must be distinguishable from the advertising material through, for example, use of bolding, italics, different font, or the like. The Commission clarifies that, in accordance with the Junk Fax Prevention Act, if there are several pages to the fax, the first page of the advertisement must contain the opt-out notice. (If a cover page accompanies the advertisement, the Commission encourages senders to include the notice on the cover page as well.)

Cost-Free Opt-Out Mechanism

The Junk Fax Prevention Act requires that the notice identify "a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement[.]" In accordance with the statute, the Commission amends the rules to require senders to identify a cost-free mechanism in their notices.

In an effort to balance the needs of consumers who wish to opt-out of faxes with the interests of business, the Commission finds that a Web site address, e-mail address, toll-free telephone number, or toll-free facsimile machine number will constitute "cost-free mechanisms" for purposes of our rules. The Commission also concludes that a local telephone number may be considered a cost-free mechanism so long as the advertisements are sent to local consumers for whom a call to that number would not result in long distance or other separate charges. Senders of facsimile advertisements need make available only one of these mechanisms to comply with this requirement. A Web site or e-mail address will allow businesses, particularly small businesses, to avoid excessive costs associated with maintaining a toll-free telephone number. (Given that the Commission is not mandating that senders offer a toll-free telephone number for consumers to make opt-out requests, the Commission

finds no reason to exempt small business from the cost-free mechanism requirement. As discussed above, businesses can use a Web site address, local telephone number, or e-mail address for receiving such requests. The record contains little empirical evidence that the costs associated with setting up such processes would be unduly burdensome to a small business given their revenues. The Commission also notes that a third party could be retained to maintain any of these opt-out mechanisms, although the sender remains liable for ensuring that opt-out requests are honored timely.) If a sender uses a Web site for receiving opt-out requests, it must describe the opt-out mechanism and procedures clearly and conspicuously on the first page of the Web site.

As noted above, apart from the cost-free mechanism required by the statute, the opt-out notice must contain a domestic contact telephone number and facsimile machine number. If the cost-free mechanism offered by the sender is either a domestic toll-free telephone number or toll-free facsimile machine number, the sender will be in compliance with both sets of requirements. The facsimile number should be a number that is separate and distinct from the telephone number to ensure consumers are less likely to find a busy line and can make opt-out requests without delay. It is the responsibility of the sender to ensure that the number(s) are available to accept opt-out requests. In accordance with the statute, the new rules will require the sender to accept opt-out requests 24 hours, 7 days a week at the number(s), Web site or e-mail address identified in the opt-out notice.

Timeframe for Honoring Opt-Out Requests

In accordance with the Junk Fax Prevention Act, the Commission concludes that senders must comply with an opt-out request within the shortest reasonable time of such request. Taking into consideration both large databases of facsimile numbers and the limitations on certain small businesses to remove numbers for individuals that opt-out, the Commission concludes that a reasonable time to honor such requests must not exceed 30 days from the date such a request is made. The record demonstrates that 30 days will provide a reasonable opportunity for persons, including small businesses, to process requests and remove the facsimile numbers from their lists or databases. Consistent with our rules for company-specific do-not-call requests, facsimile senders with the capability to honor do-

not-fax requests in less than 30 days must do so. The Commission believes that any period greater than 30 days will likely impose additional costs and burdens on consumers and businesses that have taken steps to avoid facsimile messages by making opt-out requests. The Commission also concludes that the sender must remove the facsimile number from its fax lists within the 30-day period, regardless of whether it believes the number may be used by more than one individual. The Commission believes it is reasonable to presume that persons making opt-out requests on behalf of a business's facsimile machine are authorized to do so. Senders must honor such opt-out requests made by the business, even if doing so restricts faxes sent to all employees of that business. This determination is consistent with the Commission's findings in the do-not-call context in which a do-not-call request applies to all persons at the residence associated with that telephone number.

The Commission declines to limit the time period during which an opt-out request remains in effect. The Commission recognizes that, like telephone numbers, facsimile numbers change hands over time. However, as noted above, the national do-not-call registry requires consumers to re-register just once every five years to avoid most telemarketing calls. In the absence of a similar do-not-fax list, a consumer would need to make numerous—perhaps hundreds—of opt-out requests every five years to avoid receiving unwanted faxes. Instead, the Commission concludes that a consumer who wishes to receive faxes at a new number or resume receiving faxes after previously opting out should notify the sender of such changes by giving prior express permission to the sender. The Commission also encourages facsimile senders to update their facsimile number databases, when consumers subsequently transact business, file applications or make inquiries.

Identification Requirements and Opt-Out Notice

As noted in the *JFPA NPRM*, the Commission's existing rules require senders of facsimile messages to identify themselves on the message, along with the telephone number of the sending machine or the business, other entity, or individual sending the message. (The Commission notes that the "sender" of the facsimile advertisement is the person on whose behalf the advertisement is sent. Under the Commission's rules, the fax broadcaster must also identify itself if it

demonstrates a high degree of involvement in the sender's facsimile messages, such as supplying the numbers to which a message is sent.) The TCPA also requires facsimile messages to include the date and time they are sent. The Commission sought comment on the interplay between this identification requirement and the opt-out notice requirement under the Junk Fax Prevention Act. A few commenters identified additional burdens associated with complying separately with both requirements. The Commission concludes that senders that provide their telephone number and facsimile number as part of the opt-out notice will satisfy the Commission's identification rule so long as they also identify themselves by name on the facsimile advertisement.

Request To Opt-Out of Future Unsolicited Advertisements

The Junk Fax Prevention Act requires that a request not to send future unsolicited facsimile advertisements meet certain requirements. In accordance with the statutory provisions, the Commission adopts rules requiring that an opt-out request identify the telephone number or numbers of the facsimile machines or machines to which the request relates. In addition, the request must be made using the telephone number, facsimile number, Web site address or e-mail address provided by the sender in its opt-out notice. Most commenters argue that permitting opt-out requests to be made through other avenues not identified in the notice will impair an entity's ability to account for all requests and process them in a timely manner. (The Commission encourages senders that are on actual notice of a recipient's opt-out request to honor the request even if not sent by the methods identified in the sender's opt-out notice.) As discussed above, the sender is required to include a telephone number and facsimile number on the advertisement, and if neither numbers are cost-free (*i.e.*, they are not 800 toll-free numbers or local numbers for local recipients), then the sender must have a Web site or e-mail address to permit recipients to opt-out of future facsimile messages. Requiring recipients to use one of the methods identified on the facsimile should reasonably permit any consumer to avoid future facsimile messages from the sender. Under the new rules, the sender will be prohibited from sending facsimile advertisements to a person that has submitted a request that complies with these requirements.

Interplay Between Established Business Relationship Exemption and Opt-Out Request

The Commission agrees with the majority of commenters that an opt-out request should be honored irrespective of whether the recipient continues to do business with the sender. Therefore, its rules will reflect that a do-not-fax request will terminate the EBR exemption from the prohibition on sending facsimile advertisements. This determination is consistent with the Commission's rules on telephone solicitations, whereby a telephone subscriber's seller-specific do-not-call request terminates any EBR exemption with that company even if the subscriber continues to do business with the seller.

As set forth in the statute, a sender may resume sending facsimile advertisements to a consumer that has opted-out of such communications if that consumer subsequently provides his express invitation or permission to the sender. Of the comments received on this issue, most agree that when a consumer has made an opt-out request of the sender, it should be up to the sender to demonstrate that the consumer subsequently gave his express permission to receive faxes. The Commission's rules will permit such permission to be granted in writing or orally. Senders that claim their facsimile advertisements are delivered based on the recipient's prior express permission must be prepared to provide clear and convincing evidence of the existence of such permission.

Third Parties and Fax Broadcasters

The record reveals that fax broadcasters, which transmit other entities' advertisements to telephone facsimile machines for a fee, are responsible for a significant portion of the facsimile messages sent today. The Commission sought comment in the *JFPA NPRM* on whether to specify that if the entity transmitting the facsimile advertisement is a third party agent or fax broadcaster, that any do-not-fax request sent to that agent will extend to the underlying business on whose behalf the fax is transmitted. The Commission concludes that the sender—the business on whose behalf the fax advertisement is transmitted—is responsible for complying with the opt-out notice requirements and for honoring opt-out requests. Regardless of whether the sender includes its own contact information in the opt-out notice or the contact information of a third party retained to accept opt-out requests, the sender is liable for any

violations of the rules. This determination is consistent with the Commission's telemarketing rules. Third parties, including fax broadcasters, need only accept and forward do-not-fax requests to the extent the underlying business contracts out such responsibilities to them.

The Commission takes this opportunity to emphasize that under the Commission's interpretation of the facsimile advertising rules, the sender is the person or entity on whose behalf the advertisement is sent. In most instances, this will be the entity whose product or service is advertised or promoted in the message. As discussed above, the sender is liable for violations of the facsimile advertising rules, including failure to honor opt-out requests. Accordingly, the Commission adopts a definition of sender for purposes of the facsimile advertising rules.

Under the current rules, a fax broadcaster also will be liable for an unsolicited fax if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile advertisements, and the Commission will continue to apply this standard under our revised rules. If the fax broadcaster supplies the fax numbers used to transmit the advertisement, for example, the fax broadcaster will be liable for any unsolicited advertisements faxed to consumers and businesses without their prior express invitation or permission. The Commission finds that a fax broadcaster that provides a source of fax numbers, makes representations about the legality of faxing to those numbers or advises a client about how to comply with the fax advertising rules, also demonstrates a high degree of involvement in the transmission of those facsimile advertisements. In addition, the Commission concludes that a highly involved fax broadcaster will be liable for an unsolicited fax that does not contain the required notice and contact information. In such circumstances, the sender and fax broadcaster may be held jointly and severally liable for violations of the opt-out notice requirements. Based on its own enforcement experience, and the fact that highly involved fax broadcasters will have firsthand knowledge of the inclusion of the opt-out notice, the Commission determines that such a fax broadcaster must, at a minimum, ensure that the faxes it transmits on behalf of each sender contain the necessary information to allow a consumer to opt out of a particular sender's faxes in the future. Otherwise, the consumer may have no means of stopping unwanted

faxes transmitted by the fax broadcaster on behalf of various advertisers.

Professional or Trade Organizations

The Junk Fax Prevention Act authorizes the Commission to consider exempting nonprofit organizations from the opt-out notice requirements discussed above. Specifically, the statute provides that the Commission may, after receiving public comment, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the opt-out notice. The statute requires that the Commission first determine that such notice is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements.

Most commenters that are themselves trade associations or professional organizations argue that they exist to serve their members, and that members of an association know how to contact those associations should they no longer wish to receive fax messages. They contend that most trade associations have a membership or customer service department that can assist the member with an opt-out request. Other commenters oppose an exemption for nonprofits, arguing that such organizations should have no difficulty including an opt-out notice on their facsimile advertisements.

The Commission is not persuaded that consumers will have the necessary tools to easily opt-out of unwanted faxes from trade associations if the faxes received do not contain information on how to opt out. Moreover, the Commission believes the benefits to consumers of having opt-out information readily available outweigh any burden in including such notices. (The Commission notes that the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.) Facsimile advertisements impose direct costs on consumers for paper, toner, and time spent sorting and discarding unwanted faxes. Should consumers not have access to opt-out contact information, they may be forced to incur unacceptable costs associated with faxes sent from nonprofit organizations. In addition, the record reveals that trade associations already have mechanisms in place through which members communicate with the organization. Therefore, inclusion of an opt-out notice on their fax messages should not be burdensome.

While neither the TCPA nor its amendments carve out an exemption for nonprofits from the facsimile advertising rules, the Commission agrees with those petitioners that argue that messages that are not commercial in nature—which many nonprofits send—do not constitute “unsolicited advertisements” and are therefore not covered by the facsimile advertising prohibition. (The Commission also emphasizes that it is not carving out an exemption for tax-exempt nonprofits. Rather, consistent with the language of the TCPA, the Commission does not intend for the clarifications in this Order to result in the regulation of noncommercial speech as commercial facsimile messages under the TCPA regulatory scheme.) The Commission clarifies that messages that do not promote a commercial product or service, including all messages involving political or religious discourse, such as a request for a donation to a political campaign, political action committee or charitable organization, are not unsolicited advertisements under the TCPA. (Under the Federal Election Commission’s rules, when a person pays a political committee for a commercially available product or service, such as a dinner sponsored by a political campaign, the full purchase price of the item or service is considered a contribution to the campaign. Therefore, the fact that a political message contains an offer to attend a fundraising dinner or to purchase some other product or service in connection with a political campaign or committee fundraiser does not turn the message into an advertisement for purposes of the TCPA’s facsimile advertising rules.) The Commission emphasizes that, under the Junk Fax Prevention Act, even unsolicited advertisements transmitted by tax-exempt nonprofit organizations may be sent to persons with whom the senders have an established business relationship, subject to the other statutory requirements.

Unsolicited Advertisement

Definition

The facsimile advertising rules apply to a fax communication that constitutes an “unsolicited advertisement” as defined in the TCPA. The Junk Fax Prevention Act amends the term “unsolicited advertisement” by adding “in writing or otherwise” before the period at the end of that section. The Commission proposed amending its rules to reflect the change in the statutory language. No commenter opposed the modification. Accordingly,

the Commission amends § 64.1200(f)(10) of its rules so that the definition reads as follows:

The term unsolicited advertisement means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without the person’s prior express invitation or permission, in writing or otherwise.

Prior Express Invitation or Permission

The Commission clarifies that, as an initial matter, a sender that has an EBR with a consumer may send a facsimile advertisement to that consumer without obtaining separate permission from him. (A sender that has received an opt-out request from a consumer must cease sending facsimile advertisements regardless of whether there exists a business relationship between them.) In the absence of an EBR, the sender must obtain the prior express invitation or permission from the consumer before sending the facsimile advertisement. Prior express invitation or permission may be given by oral or written means, including electronic methods. The Commission expects that written permission will take many forms, including e-mail, facsimile, and internet form. Whether given orally or in writing, prior express invitation or permission must be express, must be given prior to the sending of any facsimile advertisements, and must include the facsimile number to which such advertisements may be sent. It cannot be in the form of a “negative option.” (A facsimile advertisement containing a telephone number and an instruction to call if the recipient no longer wishes to receive such faxes, would constitute a “negative option” as the sender presumes consent unless advised otherwise. However, a company that requests a fax number on an application form could include a clear statement indicating that, by providing such fax number, the individual or business agrees to receive facsimile advertisements from that company or organization.) (Trade and membership organizations could do so on their membership renewal statements.)

The Commission is concerned that permission not provided in writing may result in some senders erroneously claiming they had the recipient’s permission to send facsimile advertisements. Commenters that discussed this issue agree that a sender should have the obligation to demonstrate that it complied with the rules, including that it had the recipient’s prior express invitation or permission. Senders who choose to obtain permission orally are expected to

take reasonable steps to ensure that such permission can be verified. In the event a complaint is filed, the burden of proof rests on the sender to demonstrate that permission was given. The Commission strongly suggests that senders take steps to promptly document that they received such permission. (An example of such documentation could be the recording of the oral authorization. Other methods might include established business practices or contact forms used by the sender’s personnel.) Express permission need only be secured once from the consumer in order to send facsimile advertisements to that recipient until the consumer revokes such permission by sending an opt-out request to the sender.

The Commission concludes that, in the absence of an EBR, facsimile requests for permission to transmit faxed advertisements would not be permissible, as they would impose costs on consumers who had not yet consented to receive such communications.

Senders who claim they obtained a consumer’s prior express invitation or permission to send them facsimile advertisements prior to the effective date of these rules will not be in compliance unless they can demonstrate that such authorization met all the requirements adopted herein. In addition, entities that send facsimile advertisements to consumers from whom they obtained permission must include on the advertisements their opt-out notice and contact information to allow consumers to stop unwanted faxes in the future.

“Transactional” Communications

The Commission agrees with those petitioners who argue that messages whose purpose is to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender are not advertisements for purposes of the TCPA’s facsimile advertising rules. For example, a receipt or invoice, the primary purpose of which is to confirm the purchase of certain items by the facsimile recipient, is not an advertisement of the commercial availability of such items. Similarly, messages containing account balance information or other type of account statement which, for instance, notify the recipient of a change in terms or features regarding an account, subscription, membership, loan or comparable ongoing relationship, in which the recipient has already purchased or is currently using the facsimile sender’s product or service, is not an advertisement. Communications

sent to facilitate a loan transaction, such as property appraisals, summary of closing costs, disclosures (such as the Good Faith Estimate) and other similar documents are not advertisements when their purpose is to complete the financial transaction. A travel itinerary for a trip a customer has agreed to take or is in the process of negotiating is not an unsolicited advertisement. Similarly, a contract to be signed and returned by the agent or traveler that is for the purpose of closing a travel deal is not an advertisement for purposes of the prohibition. (However, the Commission finds that messages regarding travel deals, bonus commission offers and other promotional information are advertisements and would require the recipient's express permission in the absence of an established business relationship.) A communication from a trade show organizer to an exhibitor regarding the show and her appearance will not be considered an unsolicited advertisement, provided the exhibitor has already agreed to appear. The Commission also concludes that a mortgage rate sheet sent to a broker or other intermediary or a price list sent from a wholesaler to a distributor (e.g., food wholesaler to a grocery store) for the purpose of communicating the terms on which a transaction has already occurred are not advertisements. (Commercial facsimile messages that advertise the commercial availability or quality of property, goods, or services, but purport to be "price sheets" or "rate sheets" in order to evade the TCPA rules, are nevertheless unsolicited advertisements, if not sent for the purpose of facilitating, completing, or confirming an ongoing transaction.)

A subscription renewal notice would be considered "transactional" in nature, provided the recipient is a current subscriber and had affirmatively subscribed to the publication. Finally, a notice soliciting bid proposals on a construction project would not be subject to the facsimile advertising prohibition, provided the notice does not otherwise contain offers for products, goods, and services. Similarly, bids in response to specific solicitations would not be covered by the rules, as such communications are presumably to facilitate a commercial transaction that the recipient has agreed to enter into by soliciting the bids.

In order for such messages to fall outside the definition of "unsolicited advertisement," they must relate specifically to existing accounts and ongoing transactions. Messages regarding new or additional business would advertise "the commercial availability or quality of any property,

goods, or services * * *" and therefore would be covered by the prohibition. Thus, applications and materials regarding educational opportunities and conferences sent to persons who are not yet participating or enrolled in such programs are unsolicited advertisements and require the recipient's permission or the existence of an established business relationship before faxing the recipient such information. Similarly, a rate sheet on financial products transmitted to a potential borrower or potential brokers would not be considered merely "transactional" in nature and would require the sender to either have an established business relationship with the recipient or first obtain express permission from the recipient.

In response to arguments that a *de minimis* amount of advertising information should not convert a communication into an "unsolicited advertisement," the Commission concludes that a reference to a commercial entity does not by itself make a message a commercial message. For example, a company logo or business slogan found on an account statement would not convert the communication into an advertisement, so long as the primary purpose of the communication is, for example, to relay account information to the fax recipient.

Offers for Free Goods and Services and Informational Messages

The Commission concludes that facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition. In many instances, "free" seminars serve as a pretext to advertise commercial products and services. Similarly, "free" publications are often part of an overall marketing campaign to sell property, goods, or services. For instance, while the publication itself may be offered at no cost to the facsimile recipient, the products promoted within the publication are often commercially available. Based on this, it is reasonable to presume that such messages describe the "quality of any property, goods, or services." Therefore, facsimile communications regarding such free goods and services, if not purely "transactional," would require the sender to obtain the recipient's permission beforehand, in the absence of an EBR.

By contrast, facsimile communications that contain only information, such as industry news articles, legislative updates, or employee

benefit information, would not be prohibited by the TCPA rules. An incidental advertisement contained in such a newsletter does not convert the entire communication into an advertisement. (In determining whether an advertisement is incidental to an informational communication, the Commission will consider, among other factors, whether the advertisement is a bona fide "informational communication." In determining whether the advertisement is to a bona fide "informational communication," the Commission will consider whether the communication is issued on a regular schedule; whether the text of the communication changes from issue to issue; and whether the communication is directed to specific regular recipients, i.e., to paid subscribers or to recipients who have initiated membership in the organization that sends the communication. The Commission may also consider the amount of space devoted to advertising versus the amount of space used for information or "transactional" messages and whether the advertising is on behalf of the sender of the communication, such as an announcement in a membership organization's monthly newsletter about an upcoming conference, or whether the advertising space is sold to and transmitted on behalf of entities other than the sender). Thus, a trade organization's newsletter sent via facsimile would not constitute an unsolicited advertisement, so long as the newsletter's primary purpose is informational, rather than to promote commercial products. The Commission emphasizes that a newsletter format used to advertise products or services will not protect a sender from liability for delivery of an unsolicited advertisement under the TCPA and the Commission's rules. The Commission will review such newsletters on a case-by-case basis.

Finally, the Commission concludes that any surveys that serve as a pretext to an advertisement are subject to the TCPA's facsimile advertising rules. The TCPA's definition of "unsolicited advertisement" applies to any communication that advertises the commercial availability or quality of property, goods or services, even if the message purports to be conducting a survey.

Petitions for Reconsideration on EBR Exemption

The Commission also takes this opportunity to dismiss as moot, any pending petitions, or parts thereof, that seek reconsideration of the Commission's determination that an

established business relationship will no longer be sufficient to show that an individual or business has given prior express permission to receive unsolicited facsimile advertisements and those that seek reconsideration of the written permission requirement in § 64.1200(a)(3)(i) of the Commission's rules. The Junk Fax Prevention Act codifies an established business relationship exception to the prohibition on sending unsolicited facsimile advertisements; therefore, such petitions are now moot.

Private Right of Action

The TCPA provides consumers with a private right of action in state court for any violation of the TCPA's prohibitions on the use of automatic dialing systems, artificial or prerecorded voice messages, and unsolicited facsimile advertisements. One commenter raises concerns about class action lawsuits brought under the TCPA, and asks the Commission to clarify the parameters of the private right of action. As the Commission has stated in previous orders, Congress provided consumers with a private right of action, "if otherwise permitted by the laws or rules of court of a State." This language suggests that Congress contemplated that such legal action was a matter for consumers to pursue in appropriate state courts, subject to those state courts' rules. The Commission continues to believe that it is for Congress, not the Commission, either to clarify or limit this right of action. Therefore, the Commission declines to make any determinations about the specific contours of the private right of action.

Effective Date of Rules

The record reveals that facsimile senders may need additional time beyond 30 days to comply with the rules adopted herein. For example, senders will need to ensure that opt-out contact information is provided on all facsimile advertisements. They also will need to put in place mechanisms to allow recipients to opt-out of unwanted facsimile advertisements and establish procedures for removing facsimile numbers for individuals that have opted out of such advertisements. The Commission believes it is important to provide adequate time for senders to come into compliance with the rules adopted in this order. Therefore, the amended facsimile advertising rules will become effective August 1, 2006. (Those rules requiring OMB approval under the Paperwork Reduction Act are not effective until approved by OMB).

Filings in Response to This Order

The Commission recently opened a new docket—CG Docket No. 05–338—and asked that all filings addressing the facsimile advertising rules be filed in the new docket. Any filings in response to this Report and Order also should be filed in CG Docket No. 05–338.

Final Regulatory Flexibility Analysis (FRFA)

As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking and Order (JFPA NPRM)*. The Commission sought written public comment on the proposals in the *JFPA NPRM*, including comment on the IRFA. The only comment received on the IRFA from the Office of Advocacy, U.S. Small Business Administration is discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

Need for, and Objectives of, the Report and Order and Third Order on Reconsideration

This *Order* is necessary to comply with Congress' mandate for the Commission to issue regulations implementing the Junk Fax Prevention Act of 2005. In this *Order*, and as set forth in the statute, the Commission: (1) Codifies an established business relationship (EBR) exemption to the prohibition on sending unsolicited facsimile advertisements; (2) provides a definition of an EBR to be used in the context of unsolicited facsimile advertisements that is not limited in duration; (3) requires the sender of a facsimile advertisement to provide specified notice and contact information on the facsimile that allows recipients to "opt-out" of any future facsimile transmissions from the sender; and (4) specifies the circumstances under which a request to "opt-out" complies with the Act.

Specifically, in accordance with the Junk Fax Prevention Act, the *Order* permits the sending of facsimile advertisements to recipients with whom the sender has an EBR, provided certain conditions are met regarding how the facsimile number was obtained. In addition, the definition of EBR for purposes of sending facsimile advertisements extends the EBR exemption to faxes sent to both businesses and residential subscribers and is not be limited in duration. Under the new rules, senders of facsimile advertisements must include a notice describing the procedures for opting out of future faxes. The notice must be clear

and conspicuous and located on the first page of the advertisement. The rules require that an opt-out notice include a cost-free mechanism for the recipient to request not to receive future faxes. The cost-free mechanism must include a toll-free telephone number, toll-free facsimile number, Web site address, or e-mail address. If the recipient makes a request not to receive future fax advertisements, the sender must honor that request within the shortest reasonable time, not to exceed 30 days.

In addition, the *Order* declines to exempt small businesses from the cost-free mechanism requirement, in part because the Commission is not requiring senders to provide toll-free telephone numbers for recipients to make opt-out requests. Finally, the *Order* does not carve out an exemption for tax-exempt nonprofit professional or trade associations from the opt-out notice requirement, noting that the benefits to consumers of having opt-out information readily available outweigh the burden in including such notices. Finally, the *Order* addresses certain issues raised in petitions for reconsideration of the *2003 TCPA Order* concerning the TCPA's facsimile advertising rules. Specifically, the *Order* provides guidance to fax senders on what messages do not constitute unsolicited advertisements for purposes of the fax rules and therefore could be sent without the prior permission of the recipient. The *Order* clarifies that messages that do not promote a commercial product or service, including all messages involving political or religious discourse, such as request for a donation to a political campaign, political action committee or charitable organization, are not unsolicited advertisements under the TCPA. The *Order* also concludes that messages whose purpose is to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender are not advertisements. These might include a receipt or invoice, the primary purpose of which is to confirm the purchase of certain items by the facsimile recipient, an account statement, or communications sent to facilitate a loan transaction already entered into by the recipient. In addition, the *Order* determines that facsimile communications that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited by the TCPA rules. An incidental advertisement contained in such a facsimile does not convert the

entire communication into an advertisement.

Summary of Significant Issues Raised by Public Comments in Response to the Supplemental IRFA

The only comment filed directly in response to the IRFA was from the Office of Advocacy of the U.S. Small Business Administration (Advocacy).

In its comments, Advocacy identified five proposed rules that would impact small businesses. First, Advocacy noted the Commission's proposal to limit the duration of the EBR as it applies to unsolicited fax advertisements. Advocacy contends that, as required by the Junk Fax Prevention Act, the proposed rule does not include an analysis or determination that the EBR has resulted in a significant number of complaints. Advocacy does not believe that the Commission has gathered the necessary information about complaints to limit the EBR. In addition, Advocacy contends that for small businesses to keep track of inquiries by customers would require a considerable increase in the amount of recordkeeping and would impede the ability of small businesses to respond to such inquiries.

Second, the Commission asked whether it was necessary to set forth rules on what is to be considered "clear and conspicuous" for purposes of an opt-out notice on a fax advertisement. Advocacy believes that the clear and conspicuous requirement should be held to a reasonable standard and that "any further attempts by the Commission to define the notice requirement would likely become mired in minutia and would likely cause more confusion than guidance."

Third, Advocacy believes that 30 days to comply with a do-not-fax request is reasonable. Fourth, Advocacy recommends that the Commission exempt small businesses from the cost-free mechanism requirement in the Junk Fax Prevention Act. Advocacy contends that many small businesses (particularly very small businesses) do not have toll-free numbers. If the Commission determines not to exempt small businesses, Advocacy recommends that the Commission allow them to use alternatives to toll-free numbers because of the "great expense associated with maintaining toll-free numbers." They state that small businesses recommend e-mail, web-based systems, or the designation of a third party as viable alternatives. Advocacy also says that small businesses believe that once a small business has chosen a means of receiving do-not-fax requests, then opt-out requests should only be enforceable if they are received in that manner.

Finally, Advocacy indicates that small businesses believe an exemption for tax-exempt nonprofit associations from the opt-out notice requirement would be appropriate.

Description and Estimate of the Number of Small Entities to Which Rules Will Apply

The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A "small business concern" is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

The IFRA stated that the Commission's rules on the sending of unsolicited facsimile advertisements would apply to any entity, including any telecommunications carrier, which uses the telephone facsimile machine to advertise. Advocacy agreed, stating that "since what can be considered a commercial fax is so broad, it is appropriate for the Commission to consider that its rule could potentially impact almost all small businesses." Advocacy also noted that the U.S. Census Bureau updated its estimates based upon census information from 2002, which places the total number of small businesses in the United States (which it defines as firms with fewer than 500 employees) at 5.68 million. Advocacy explains that ordinarily the SBA defines small business on an industry-by-industry basis. However, Advocacy contends that this is not practicable for the proposed rules 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 rules. Accordingly, Advocacy recommends the Commission consider adopting a new small business size standard for this rule. Drawing from the input from small business groups, Advocacy recommends that the Commission adopt a size standard of 100 employees for this rulemaking. Based on the U.S. Census 2002 numbers, Advocacy indicates that 5.6 million firms would then qualify as small businesses. Given that the Commission is not exempting small

businesses from the requirement to identify a cost-free mechanism for fax recipients to opt-out of future unwanted faxes, the Commission concludes that it is not necessary at this time to adopt a new small business size standard for this rule. Therefore, the Commission estimates that, consistent with Advocacy's comments, the rules apply to 5.68 million small entities across all industries in the United States.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

The *Order* will likely result in increases in projected reporting, recordkeeping, and other compliance requirements for senders of facsimile advertisements. The statutory and rule changes affect both small and large companies. First, in accordance with the Junk Fax Prevention Act, the *Order* adopts an EBR exemption for sending fax advertisements. Should a question arise as to the validity of an EBR, the burden will be on the sender to show that it has a valid EBR with the recipient. However, the Commission emphasized that there is no requirement that senders of fax advertisements maintain any specific records demonstrating that an EBR exists. The Commission believes the EBR can be demonstrated with records kept in the ordinary course of business, such as purchase agreements, sales slips, applications and inquiry records.

In accordance with the Junk Fax Prevention Act, the Commission concludes that an EBR alone does not entitle a sender to fax an advertisement to an individual consumer or business. The sender must also ensure that the telephone facsimile number was provided voluntarily by the recipient. The Commission finds that it would be permissible for the sender to fax an advertisement to a recipient that had provided a facsimile number directly to the sender, for example, on an application, information request, contact information form, or membership renewal form. In the event a recipient complains that its facsimile number was not provided to the sender, the burden rests with the sender to demonstrate, with such business records, that the number was communicated in the context of the EBR. Similarly, if the facsimile number was obtained from the recipient's own directory, advertisement, or internet site, the Commission determined that it was voluntarily made available for public distribution, unless the recipient has noted on such materials that it does not accept unsolicited advertisements at the facsimile number in question. In

such circumstances, the facsimile recipient's own advertisement would serve as evidence of the recipient's agreement to make the number available for public distribution. If the sender obtains the number from sources of information compiled by third parties, the sender must take reasonable steps to verify that the recipient consented to have the number listed, such as calling or emailing the recipient. While the Commission is not requiring that any specific records be kept, should a question arise about how the facsimile number was obtained, the sender would need to demonstrate that it was voluntarily provided. It is up to senders to determine the best way to do so if that becomes necessary.

The Junk Fax Prevention Act requires facsimile senders to include a notice on the first page of the unsolicited advertisement that instructs the recipient how to request that they not receive future unsolicited facsimile advertisements from the sender. In the *Order*, the Commission requires that all unsolicited facsimile advertisements contain a notice on the first page of the advertisement stating that the recipient is entitled to request that the sender not send any future unsolicited advertisements. The notice must be separate from the advertising copy or other disclosures and placed at either the top or bottom of the fax. The notice also must include a domestic contact telephone number and a facsimile machine number, and at least one cost-free mechanism for transmitting an opt-out request. In the *Order*, the Commission concludes that a Web site address, e-mail address, toll-free telephone number, or toll-free facsimile machine number will constitute "cost-free mechanisms" for purposes of the rules. For those facsimile senders that do not already have one of these mechanisms in place, they will need to implement one in order to give recipients a cost-free way of opting-out of faxes. In accordance with the statute, the mechanism must accept opt-out requests 24 hours, 7 days a week at the mechanisms identified in the notice. The rules also require that highly involved fax broadcasters must ensure that the faxes it transmits on behalf of each sender contain the necessary information to allow a consumer to opt-out of a particular sender's faxes in the future.

The new rules require that a facsimile sender that receives a request not to send future unsolicited advertisements that complies with the rules must honor that request within the shortest reasonable time from the date of such request, not to exceed 30 days, and is

prohibited from sending unsolicited advertisements to the recipient unless the recipient subsequently provides prior express invitation or permission to the sender. Facsimile senders will need to take steps to remove such facsimile numbers from their faxing databases, or maintain do-not-fax lists to avoid sending advertisements to recipients that have opted out, within the shortest reasonable time, not to exceed 30 days. If a recipient subsequently provides the sender with his express permission to send advertisements, whether orally or in writing, the burden of proof rests with the sender to demonstrate that permission was given. Thus, the Commission suggests that senders take steps to promptly document that they received such permission by, for instance, recording the oral authorization, or using established business practices or contact forms.

Steps Taken To Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

In this *Order*, the Commission adopts rules in accordance with the provisions in the Junk Fax Prevention Act. In doing so, the Commission considers a number of alternatives to minimize the economic impact on small entities that must comply with the rules. In this *Order*, the Commission adopts an EBR exemption to the prohibition on sending unsolicited facsimile advertisements. The exemption will permit all entities, including small businesses, to send fax advertisements to their EBR customers without having to secure written permission from them first. In addition, the Commission was authorized by Congress to consider limiting the duration of the EBR. In the *Order*, the Commission determined not to limit the EBR and alternatively indicated it would closely monitor implementation of the new EBR exemption and opt-out policies adopted in the *Order*. Within one year of the effective date of the *Order*, the Commission will evaluate the

Commission's complaint data to determine whether the EBR exception has resulted in a significant number of complaints regarding facsimile advertisements and whether such complaints involve fax advertisements sent based on an EBR of a duration that is inconsistent with the reasonable expectations of consumers.

In addition, the Junk Fax Prevention Act requires facsimile senders to include a clear and conspicuous notice on the first page of the unsolicited advertisement that instructs the recipient how to opt-out of future unwanted faxes. As discussed in the *Order*, the Commission considered defining clear and conspicuous to mean a notice that is on the first page of the advertisement and apparent to a reasonable consumer. Alternatively, the Commission considered providing additional guidance to ensure that consumers are aware of their opt-out rights and sending parties have standards by which they can comply with the law. In the *Order*, the Commission determined that "clear and conspicuous" for purposes of the opt-out notice means a notice that would be apparent to a reasonable consumer and located on the first page of the fax advertisement. The Commission further clarified that the notice must be separate from the advertising copy or other disclosures and placed at either the top or bottom of the fax. However, the Commission declined to adopt rules specifying the font type, size and wording of the notice. The statute also requires that senders identify in their notices a cost-free mechanism for recipients to transmit opt-out requests to the senders. Rather than require senders to provide a toll-free telephone number for consumers to request that no future faxes be sent, the Commission alternatively adopted rules that permit senders to use a Web site address, e-mail address, toll-free telephone number, or toll-free facsimile number. Allowing senders to use Web sites and e-mail addresses should minimize any burdens on them, particularly small businesses for whom setting up a toll-free number might be costly. The Commission also determined that recipients must use the opt-out mechanisms identified by the senders in their notices so that such businesses, including small businesses, can more easily account for all opt-out requests and process them in a timely manner.

In the *JFPA NPRM*, the Commission sought comment on whether to exempt small businesses from the requirement to provide a cost-free mechanism for a recipient to transmit an opt-out request. As noted above, the Commission

declined to require fax senders to offer a toll-free number for recipients to request that no future faxes be sent. Given that the Commission is not mandating the use of toll-free numbers, as well as the support in the record for using Web sites and e-mail addresses by small businesses, the Commission determined not to exempt small businesses from the cost-free mechanism requirement. The Commission found that the record contained little empirical evidence that the costs associated with setting up a Web site or e-mail address would be unduly burdensome to a small business given their revenues.

The Commission also considered the burdens to businesses of having to comply with opt-out requests in the "shortest reasonable time." The record revealed that some commenters support a period of 30 days within which senders must comply with opt-out requests. Other commenters support a shorter period of time for honoring do-not-fax requests, such as 10 or 15 days. In the *Order*, the Commission determined to require senders to honor requests within the shortest reasonable time from the date of such request, not to exceed 30 days from the date of such request. The Commission believes this will permit both senders with large databases of facsimile numbers, as well as small businesses with limited resources, to remove numbers for individuals that opt-out of faxes.

Finally, the *Order* withdraws § 64.1200(a)(3)(i) of the Commission's rules which requires the recipient to obtain a signed, written statement indicating the recipient's consent to receive facsimile advertisements from the sender. The Commission determined instead that prior express invitation or permission to send an advertisement may be given by oral or written means, including electronic methods. The Commission notes that written permission could take many forms, including e-mail, facsimile, and internet form. The Commission believes this determination will permit small entities to obtain permission more easily from consumers who make inquiries, file applications, or request information.

Congressional Review Act

The Commission will send a copy of the *Report and Order and Third Order on Reconsideration*, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

Ordering Clauses

Pursuant to the authority contained in sections 1–4, 201, 202, 217, 227, 258, 303(r), and 332 of the Communications Act of 1934, as amended; 47 U.S.C. 151–154, 201, 202, 217, 227, 258, 303(r), and 332; and §§ 64.1200 and 64.318 of the Commission's rules, 47 CFR 64.1200 and 64.318, the report and order is adopted, and part 64 of the Commission's rules, 47 CFR 64.1200, is amended.

The rules and requirements contained in this Report and *Order and Third Order on Reconsideration* shall become effective August 1, 2006, except for 47 CFR 64.1200(a)(3)(i), (ii), (iii), (iv), and (vi) which contains information collection requirements under PRA are not effective until approved by OMB. Certain petitions for reconsideration and/or clarification of the facsimile advertising rules in CG Docket No. 02–278 are denied in part, granted in part, and dismissed in part. Specifically, those petitions filed by Air Conditioning Contractors of America, American Association of Advertising Agencies, *et al.*, American Business Media, American Dietetic Association, American Society of Association Executives, American Tire Distributors, Inc., America's Community Bankers, Association of Small Business Development Centers, California Association of Realtors, Chamber of Commerce of the U.S., *et al.*, Coalition for Healthcare Communication, Consumer Bankers Association, Consumer Electronics Association, Copia International, LTC, Faxes, Inc., Federal Election Commission, Financial Services Coalition, Independent Insurance Agents and Brokers of America, Independent Sector, Jobson Publishing, LLC, Maryland Association of Nonprofit Organizations, John Mayhill, National Association of Chain Drugstores, National Association of Realtors, National Retail Federation, Newsletter & Electronic Publishers Association, Newspaper Association of America, Presidential Classroom for Young Americans, Inc., Produce Marketing Association, Proximity Marketing, Reed Elsevier, Inc., Scholastic, Inc., State and Regional Newspaper Associations, Travel Industry Group, Wells Fargo & Co., and Yellow Pages Integrated Media Association are dismissed to the extent they seek reinstatement of the established business relationship exemption.

The Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, shall send a copy of the *Report and Order and Third Order*

on *Reconsideration* to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 64

Communications common carriers, Telecommunications, Telephone.

Federal Communications Commission.

William F. Caton,
Deputy Secretary.

Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 64 as follows:

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

■ 1. The authority citation for part 64 continues to read as follows:

Authority: 47 U.S.C. 154, 254(k) secs. 403(b)(2)(B), (c), Pub. L. 104–104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 222, 225, 226, 228, and 254(k) unless otherwise noted.

■ 2. Revise the heading to part 64 subpart L to read as follows:

Subpart L—Restrictions on Telemarketing, Telephone Solicitation, and Facsimile Advertising

■ 3. Section 64.1200 is amended by revising paragraphs (a) and (f) to read as follows:

§ 64.1200 Delivery restrictions.

(a) No person or entity may: (1) Initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice;

(i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;

(ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

(iv) A person will not be liable for violating the prohibition in paragraph (a)(1)(iii) of this section when the call is placed to a wireless number that has been ported from wireline service and such call is a voice call; not knowingly made to a wireless number; and made

within 15 days of the porting of the number from wireline to wireless service, provided the number is not already on the national do-not-call registry or caller's company-specific do-not-call list.

(2) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call;

(i) Is made for emergency purposes;

(ii) Is not made for a commercial purpose;

(iii) Is made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation;

(iv) Is made to any person with whom the caller has an established business relationship at the time the call is made; or

(v) Is made by or on behalf of a tax-exempt nonprofit organization.

(3) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless—

(i) The unsolicited advertisement is from a sender with an established business relationship, as defined in paragraph (f)(5) of this section, with the recipient; and

(ii) The sender obtained the number of the telephone facsimile machine through—

(A) The voluntary communication of such number by the recipient directly to the sender, within the context of such established business relationship; or

(B) A directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution. If a sender obtains the facsimile number from the recipient's own directory, advertisement, or Internet site, it will be presumed that the number was voluntarily made available for public distribution, unless such materials explicitly note that unsolicited advertisements are not accepted at the specified facsimile number. If a sender obtains the facsimile number from other sources, the sender must take reasonable steps to verify that the recipient agreed to make the number available for public distribution.

(C) This clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005 if the sender also possessed the facsimile machine number of the recipient before July 9, 2005. There shall be a rebuttable presumption that if a valid established business relationship was formed prior to July 9, 2005, the

sender possessed the facsimile number prior to such date as well; and

(iii) The advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements. A notice contained in an advertisement complies with the requirements under this paragraph only if—

(A) The notice is clear and conspicuous and on the first page of the advertisement;

(B) The notice states that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under paragraph (a)(2)(v) of this section is unlawful;

(C) The notice sets forth the requirements for an opt-out request under paragraph (a)(2)(v) of this section;

(D) The notice includes—

(1) A domestic contact telephone number and facsimile machine number for the recipient to transmit such a request to the sender; and

(2) If neither the required telephone number nor facsimile machine number is a toll-free number, a separate cost-free mechanism including a Web site address or e-mail address, for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. A local telephone number also shall constitute a cost-free mechanism so long as recipients are local and will not incur any long distance or other separate charges for calls made to such number; and

(E) The telephone and facsimile numbers and cost-free mechanism identified in the notice must permit an individual or business to make an opt-out request 24 hours a day, 7 days a week.

(iv) A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(3)(iii) of this section.

(v) A request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(A) The request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(B) The request is made to the telephone number, facsimile number, Web site address or e-mail address identified in the sender's facsimile advertisement; and

(C) The person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine.

(vi) A sender that receives a request not to send future unsolicited advertisements that complies with paragraph (a)(3)(v) of this section must honor that request within the shortest reasonable time from the date of such request, not to exceed 30 days, and is prohibited from sending unsolicited advertisements to the recipient unless the recipient subsequently provides prior express invitation or permission to the sender. The recipient's opt-out request terminates the established business relationship exemption for purposes of sending future unsolicited advertisements. If such requests are recorded or maintained by a party other than the sender on whose behalf the unsolicited advertisement is sent, the sender will be liable for any failures to honor the opt-out request.

(vii) A facsimile broadcaster will be liable for violations of paragraph (a)(3) of this section, including the inclusion of opt-out notices on unsolicited advertisements, if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.

* * * * *

(f) As used in this section: (1) The terms *automatic telephone dialing system* and *autodialer* mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

(2) The term *clear and conspicuous* for purposes of paragraph (a)(3)(iii)(A) of this section means a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures, and placed at either the top or bottom of the facsimile.

(3) The term *emergency purposes* means calls made necessary in any situation affecting the health and safety of consumers.

(4) The term *established business relationship* for purposes of telephone solicitations means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date

of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

(i) The subscriber's seller-specific do-not-call request, as set forth in paragraph (d)(3) of this section, terminates an established business relationship for purposes of telemarketing and telephone solicitation even if the subscriber continues to do business with the seller.

(ii) The subscriber's established business relationship with a particular business entity does not extend to affiliated entities unless the subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.

(5) The term *established business relationship* for purposes of paragraph (a)(3) of this section on the sending of facsimile advertisements means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

(6) The term *facsimile broadcaster* means a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.

(7) The term *seller* means the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(8) The term *sender* for purposes of paragraph (a)(3) of this section means the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement.

(9) The term *telemarketer* means the person or entity that initiates a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(10) The term *telemarketing* means the initiation of a telephone call or message for the purpose of encouraging

the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(11) The term *telephone facsimile machine* means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(12) The term *telephone solicitation* means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message:

(i) To any person with that person's prior express invitation or permission;

(ii) To any person with whom the caller has an established business relationship; or

(iii) By or on behalf of a tax-exempt nonprofit organization.

(13) The term *unsolicited advertisement* means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(14) The term *personal relationship* means any family member, friend, or acquaintance of the telemarketer making the call.

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[FR Doc. 06-4169 Filed 5-2-06; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 06-794; MB Docket No. 05-100, RM-11181; MB Docket No. 05-153, RM-11223]

Radio Broadcasting Services; Encino, TX; and Steamboat Springs, CO

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document allots two new allotments in Encino, Texas and Steamboat Springs, Colorado. The Audio Division, at the request of Linda Crawford, allots Channel 250A at Encino, Texas, as the community's second local aural transmission service. The reference coordinates for Channel 250A at Encino are 26-56-09 North Latitude and 98-08-06 West Longitude. The allotment requires no site

restriction because the location is at city reference coordinates. **SUPPLEMENTARY INFORMATION, *infra*.**

DATES: Effective May 22, 2006. The window period for filing applications for these allotments will not be opened at this time. Instead, the issue of opening these allotments for auction will be addressed by the Commission in a subsequent order.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418-2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MB Docket Nos. 05-100 and 05-153, adopted April 5, 2006 and released April 7, 2006. The full text of this Commission decision is available for inspection and copying during regular business hours at the FCC's Reference Information Center, Portals II, 445 Twelfth Street, SW., Room CY-A257, Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY-B402, Washington, DC, 20054, telephone 1-800-378-3160 or <http://www.BCPIWEB.com>. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

The Audio Division, at the request of Dana J. Puopolo, allots Channel 289A at Steamboat Springs, Colorado, as the community's third FM commercial broadcast service. The reference coordinates for Channel 289A at Steamboat Springs are 40-30-00 North Latitude and 106-54-00 West Longitude. The allotment requires a site restriction of 6.1 kilometers (3.8 miles) west of the community to avoid a short-spacing to the licensed site of FM Station KJAC, Channel 288C1, Timnath, Colorado.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

■ The Federal Communications Commission amends 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.