



Securities Industry Association

120 Broadway - 35 Fl. • New York, NY 10271-0080 • (212) 608-1500, Fax (212) 968-0703

1425 K Street, NW • Washington, DC 20005-3500 • (202) 216-2000, Fax (202) 216-2119

www.sia.com, info@sia.com

January 18, 2006

Via Electronic Mail

Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
Washington, D.C. 20554

Re: CG Docket No. 05-338: Telephone Consumer Protection Act of 1991

Ladies and Gentlemen:

The Securities Industry Association (“SIA”)¹ appreciates the opportunity to comment on the Federal Communications Commission’s (the “Commission”) notice of proposed rulemaking under the Telephone Consumer Protection Act of 1992 (the “TCPA”), as amended by the Junk Fax Protection Act of 2005.² 70 *Fed. Reg.* 75102 (December 19, 2005). The proposal requests public comment on a proposed amendment to the “established business relationship” (“EBR”) exception to the Commission’s unsolicited facsimile advertising rules.

SIA supports the Act’s goal of providing consumers with the opportunity to control the receipt of facsimile telephone advertisements, but we have significant concerns with certain aspects of the proposed rule. The securities industry recognizes the importance of respecting the privacy of customers’ telephone facsimile facilities.

DEFINITION OF EBR

The Junk Fax Prevention Act added an exemption to the prohibition on sending unsolicited facsimile advertisements when the sender and the recipient have an EBR.

¹ The Securities Industry Association brings together the shared interests of approximately 600 securities firms to accomplish common goals. SIA’s primary mission is to build and maintain public trust and confidence in the securities markets. SIA members (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs nearly 800,000 individuals, and its personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2004, the industry generated \$236.7 billion in domestic revenue and an estimated \$340 billion in global revenues. (More information about SIA is available on its home page: www.sia.com.)

² Pub. L. No. 109-21, 119 Stat. 359.

The Act does not explicitly establish a time limit for an EBR, but rather provides that the EBR shall be subject to a time limitation established by the Commission. This proposed EBR definition differs from the definition of an EBR in the Commission's rules for telephone solicitations in that it expressly extends the exemption to faxes sent to businesses and residences, rather than just residences because prohibition on sending unsolicited facsimile advertisements applies to both business and residential telephone subscribers. SIA assumes that the term exception for "businesses" includes nonprofit organizations and entities that are not strictly businesses or residential telephone subscribers. Accordingly, SIA recommends that the exception be clarified to ensure that all recipients that have an EBR with the sender are regarded as coming within the scope of the exception.

The Junk Fax Prevention Act authorizes the Commission, after a period of three months from the date of enactment of the Act, to consider limits on the duration of an EBR. The Commission is seeking comment on whether to limit the duration of an EBR as applied to unsolicited facsimile advertisements. SIA sees no reason why the Commission should act at this time to limit the exception. We are unaware of any significant number of complaints by recipients that senders are abusing the EBR exception. SIA believes that in the absence of such evidence, it is inappropriate for the Commission to limit the definition of EBR in connection with unsolicited facsimile advertisements.

However, should the Commission determine to limit the duration of the EBR, SIA recommends that it adopt the definition contained in the Commission's Telemarketing and Telephone Solicitation Rule, which defines an EBR as one formed within 18 months following a purchase or transaction and three months after an application or inquiry. 47 C.F.R. § 64.1200(f)(3). This would provide uniformity in the definition of EBR in the Commission's rules and reduce potential burden on companies subject to the telephone solicitation and unsolicited fax advertisement rules.

The Commission requests comment on whether the Commission's rules should provide that a do-not-fax request terminates the EBR exemption with the sender of the facsimile even if the recipient continues to do business with the sender. SIA believes that the Commission should not adopt this approach. The Commission assumes that a recipient's opt-out is an "all or nothing" opt out. This is not necessarily the case. For example, a recipient may choose to opt out from certain types of advertisements but remain on the list for others. In the securities industry it is possible that a customer may ask to receive information via facsimile concerning fixed income bonds, but not about equity securities. Senders and recipients should have the ability to structure what types of facsimiles will continue to be authorized. Treating an opt-out as a termination of the EBR exception is unwarranted and would deny recipients the opportunity to continue to receive information they may regard as beneficial.

CLEAR AND CONSPICUOUS

The Junk Fax Prevention Act requires senders of unsolicited facsimile advertisements to include a clear and conspicuous notice on the first page of the facsimile that informs the recipient of the ability and means to request that they not receive future unsolicited facsimile advertisements from the sender. The Commission requests comment on whether it is necessary to adopt a rule which indicates under what circumstances a notice will be considered “clear and conspicuous.” SIA believes that in view of the great variation in text, format and presentation of advertisements, it would be very difficult for the Commission to construct a satisfactory definition of “clear and conspicuous.” What constitutes “clear and conspicuous” is dependent upon the facts and circumstances of the particular material being transmitted. Accordingly, SIA believes that there is no need for the Commission to provide in its rules a definition of the term “clear and conspicuous.”

CONFIRMATION OF FACSIMILE TELEPHONE NUMBERS

The Junk Fax Prevention Act provides that if a sender relies on an EBR for permission to fax an advertisement the sender must have obtained the number of the telephone facsimile machine through the voluntary communication of such number, within the context of such EBR or through a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number. This provision does not apply in the case of an advertisement sent based on an established business relationship with the recipient that was in existence before July 9, 2005, the date of enactment of the Junk Fax Prevention Act. The Commission asks whether a sender should be required to make reasonable efforts to confirm with the person that compiled facsimile telephone numbers that the recipients have voluntarily agreed to allow them to be made publicly available.

Nothing in the TCPA, as amended by the Junk Fax Prevention Act, requires senders to confirm with persons that compile facsimile telephone numbers that recipients have voluntarily agreed to allow them to be made publicly available. While senders may choose to obtain such assurances in connection with contracting with compilers, SIA does not believe the Commission should impose burdens on senders that are not contained in the TCPA or the Junk Fax Prevention Act. Accordingly, SIA opposes such a requirement.

COST-FREE OPT OUT MECHANISM

The Commission requests comment on whether the Commission needs to specify “cost-free” mechanisms for a recipient to transmit a do-not-fax request, and, if so, what those mechanisms should be. SIA sees no need for the Commission to specify what opt-out mechanisms are “cost free.” However, if the Commission determines to provide guidance, SIA believes that senders should be permitted to provide alternative

mechanisms such as a toll-free telephone number, a website, or email address to receive do-not-fax requests from recipients.

In addition, senders should not be required to honor opt-out requests unless the requests are sent by means of a mechanism that senders have specified. For example, an opt-out request sent by mail should be effective only if the sender has specified that recipients may opt out by sending a letter through the mail to the sender. Otherwise, senders will not be able to establish effective and efficient procedures for processing opt-out requests.

OPT-OUT PROCESSING PERIOD

Under the TCPA, a person may request a sender of an unsolicited facsimile advertisement not to send any future unsolicited advertisements to the person's telephone facsimile machine. The TCPA provides that the sender must comply within "the shortest reasonable time." The Commission proposes that senders comply with such requests within 30 calendar days, and asks whether 30 days is the shortest reasonable period for processing such requests. SIA believes that 30 days is the minimum time period that should be established by the Commission. Companies often require a minimum of 30 days to process opt-out requests because of internal processes or because third-party service providers are used to process consumer opt-out requests. This may be especially true for smaller firms that do not have continuous processing procedures in place due to the associated expense. Reducing the current required processing period would result in hardship for many of these companies, particularly smaller companies that are forced to bear additional expenses associated with more frequent processing of their lists by service providers. SIA believes that because of operational considerations a 45-day period would be a more reasonable minimum period in which to require senders to process opt-out requests.

DURATION OF OPT-OUT REQUESTS

The SIA believes there should be a limitation on the duration of opt-out requests. The SIA supports the implementation of a three-year limit to the duration of opt-out requests. Maintenance of the opt-out lists for an indefinite duration would be increasingly costly for businesses, and would not effectively serve recipients. The maintenance of these large lists is burdensome on businesses and degrades their systems. Additionally, the requirements of the TCPA make it easy for recipients to opt-out. If, after the expiration of an opt-out request, the recipient would not like to receive unsolicited facsimile advertisements from the sender, the person or organization may opt out again.

EXCEPTION FOR NONPROFIT ORGANIZATIONS

The Junk Fax Prevention Act of 2005 authorizes the Commission to exempt tax-exempt, nonprofit trade and professional organizations from the Act's opt-out notice requirements so that such organizations may send unsolicited advertisements to their members in furtherance of the organization's tax-exempt purpose. In view of the special relationship nonprofit organizations have with their members and the type of information that such organizations send, SIA believes that there is no need for such organizations to provide opt-out notices to members. Moreover, the facsimile advertisements sent to members is information members typically desire to receive. Accordingly, there is little reason to require trade and professional organizations to provide opt-out information to members.

UNSOLICITED ADVERTISEMENT

The Commission proposes to amend the definition of unsolicited advertisement in its rules to mean "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." The Commission asks what other forms of permission should be permitted in addition to written permission. As the Commission is aware, the Electronic Signatures in Global and National Commerce Act (the "E-SIGN Act")³ provides that notwithstanding any statute or regulation, a record relating to a transaction may not be denied legal effect, validity or enforceability solely because it is in electronic form.⁴ Accordingly, SIA believes that the Commission's rules should acknowledge that a person's prior express invitation or permission may be in electronic form as permitted in the E-SIGN Act.

PREEMPTION

The Commission's notice does not indicate the Commission's view as to the preemptive effect of the proposed rule. SIA believes that the Commission should reaffirm that the amendments preempt state laws, as the Commission indicated in its rules implementing the Do Not Call provisions of the TCPA in 2003.⁵

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³ Pub. L. No. 106-229, 114 Stat. 464.

⁴ E-SIGN Act, § 101(a).

⁵ 68 *Fed. Reg.* 44144 (July 25, 2003).

June 14, 2006

SIA appreciates the Commission's consideration of our views. If we can provide additional information, please contact the undersigned at (202) 216-2000.

Sincerely,

Alan E. Sorcher
Vice President and
Associate General Counsel