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July 20, 2004

The Honorable John McCain
Chairman
Committee on Commerce, Science and Transportation
United States Senate
Washington, D.C. 20510

The Honorable Ernest F. Hollings
Ranking Member
Committee on Commerce, Science and Transportation
United States Senate
Washington, D.C. 20510

Re: S. 2603, the "Junk Fax Prevention Act of 2004"

Dear Chairman McCain and Ranking Member Hollings:

On behalf of the American Bar Association ("ABA") and its more than 400,000 members nationwide, I write to reiterate our strong support for S. 2603, the "Junk Fax Prevention Act of 2004," as originally introduced and to express our opposition to recent proposals that would weaken the legislation by imposing strict time limits on the established business relationship ("EBR") concept outlined in the bill.

As we explained in greater detail in our previous letter to the committee dated July 15, the ABA strongly supports S. 2603 as introduced because it would preserve the ability of thousands of tax-exempt nonprofit associations like the ABA to fax important information to their own members and to anyone else with whom they have an established business relationship¹. It has recently come to our attention, however, that the Federal Communications Commission ("FCC") and several state attorneys general have suggested amendments to S. 2603 that would significantly weaken the bill by limiting the duration of its EBR provisions to 3 months following an inquiry or application and 18 months following an actual transaction—and/or any other time period "as subsequently determined by the Commission." Consumers Union, on the other hand, has proposed an 18-month time limit for all EBRs.

¹ S. 2603 and the House companion bill, H.R. 4600, would reverse the harmful new FCC rules that seek to eliminate the EBR exception to the general prohibition against unsolicited facsimile advertisements established by the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 ("TCPA"). The Report and Order explaining the new FCC rules, released July 3, 2003, is available online at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-153A1.pdf.

In our view, these proposed changes to the bill are counterproductive and should be opposed for several reasons:

- **The legislation already protects consumers, making EBR time limits unnecessary.** As introduced, S. 2603 contains provisions requiring every facsimile advertisement to include a conspicuous notice on the first page that gives the recipient an absolute right to opt out of receiving future faxes. Therefore, because any person with an EBR can easily opt out of further faxes at any time and at no cost, arbitrary time limits are unnecessary. In addition, S. 2603 also protects consumers by allowing the FCC to create an EBR time limit, subject to certain reasonable restrictions, if abuses relating to the duration of EBRs arise in the future.
- **The proposed EBR time limits are overly rigid and arbitrary.** The proposal to limit the EBR to 3 months following an inquiry or application and/or 18 months following an actual transaction—or any other “one-size-fits-all” approach—would not be appropriate for a great many individual associations and businesses. For example, while ABA memberships are renewed each year, many other associations operate on multi-year membership cycles. Because so many different types of business relationships exist in the real world, a comprehensive opt-out system is a far better way to address the reasonable expectations of the parties to these relationships.
- **The proposed EBR time limits would impose substantial costs and administrative burdens on associations and businesses.** Although S. 2603 would require associations like the ABA to maintain detailed records of its business relationships and of written requests to opt out of future facsimile advertisements, we believe that these provisions are both reasonable and manageable. If rigid EBR time limits were to be imposed, however, the ABA—like many thousands of other associations and businesses—would be required to update its records every day, not just with respect to our own members but also for the many thousands of non-members who have contacted us in the past. The record-keeping and other expenses required to accomplish this would be enormous, without any corresponding benefit for our members, our non-member customers, or the public in general.

The American Bar Association strongly supports S. 2603 as originally introduced, and when your committee marks up the bill later this week, we urge you to oppose any amendments that would establish rigid new EBR time limits. In addition, because the new FCC rules are scheduled to take effect on January 1, 2005—and because associations and businesses throughout the country will be forced to begin costly compliance programs well before that date if no relief is provided—we urge you and your Senate colleagues to pass this important legislation as soon as possible.

Thank you for considering the views of the ABA. If you would like more information regarding the ABA's positions on these issues, please contact our legislative counsel for business law issues, Larson Frisby, at (202) 662-1098.

Sincerely,



Robert D. Evans

July 20, 2004

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cc: All members of the Senate Commerce, Science and Transportation Committee

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