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June 18, 2004

The Honorable Fred Upton
Chairman
Subcommittee on Telecommunications
and the Internet
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Re: H.R. 4600, the "Junk Fax Prevention Act of 2004"

Dear Mr. Chairman:

On behalf of the American Bar Association ("ABA") and its more than 400,000 members throughout the country, I write to express our support for the key provisions in H.R. 4600, the "Junk Fax Prevention Act of 2004," that would preserve the ability of associations and businesses to fax important information to their members and customers under the Telephone Consumer Protection Act of 1991 ("TCPA"). In particular, the ABA supports those provisions of the bill that would reverse harmful new Federal Communication Commission ("FCC") rules eliminating the so-called "established business relationship" ("EBR") exception to the TCPA's general prohibition against unsolicited facsimile advertisements.

For more than a decade after Congress passed the TCPA in 1991, the FCC recognized the existence of an EBR exception to the statute. Under the EBR rule, associations, businesses, and others were permitted to send unsolicited commercial faxes to their members, customers, and anyone else with whom they had conducted business, because the recipients were deemed to have given their implied consent to receive these messages. Although the EBR rule worked well and reflected the wishes of the vast majority of both the senders and recipients of commercial faxes, the FCC inexplicably decided to issue new regulations in July 2003¹ that would eliminate the EBR exemption to the general "do-not-fax" rule under the TCPA.

¹ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 68 Fed. Reg. 44143 (July 25, 2003) (to be codified at 47 C.F.R. pts. 64 and 68). The TCPA is codified at 47 U.S.C. § 227. The FCC's Report and Order, released July 3, 2003, can be found at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-153A1.pdf.

Under the new FCC rules, all professional and trade associations—including the ABA—would be severely restricted in their ability to fax unsolicited advertisements, defined as “any material advertising the commercial availability or quality of any property, goods, or services,” to their own members or to anyone else. Before such advertisements could be sent, associations would be required to obtain the *written and signed* consent of each fax recipient—including their own members—and the consent forms would have to be sent by some method other than fax. The proposed rules would also prohibit all businesses from faxing commercial information to any person—whether a subcontractor, supplier, or existing customer—without first obtaining a signed consent form. Anyone violating the new rules would face stiff fines, as well as potential judgments of up to *\$1,500 per unsolicited fax*.

In response to the proposed rules, the ABA and many other associations and businesses filed petitions with the FCC urging that the regulations be withdrawn. Although the FCC refused to withdraw its new rules, the agency ultimately agreed to postpone the effective date until January 1, 2005. Unless Congress intervenes before that date by passing legislation like H.R. 4600, however, the new FCC rules will likely take effect without substantial change.

The ABA supports the provisions in H.R. 4600 that would overturn the FCC’s do-not-fax rules for several important reasons. First of all, the ABA believes that the new FCC rules will interfere with its ability to communicate with its members and will create unreasonable financial and administrative burdens for the Association, without any tangible benefit to its members. While the new rules provide that facsimile advertising may continue with the express written permission of the recipients, this will require the ABA to contact hundreds of thousands of our existing members and customers in a manner other than faxing to confirm that continued faxing is permissible. Even though many of our members may prefer to receive communications by fax, they will now receive an e-mail or mailing to request signed permission for future faxes. As a result, the ABA (and, indirectly, our members and customers) will be forced to incur substantial new expenses, including the cost of mailing, processing, and storing consent forms. The financial and administrative burdens associated with these new rules will be substantial and will not be cost-effective.

In addition to these burdens, the new rules will create inefficiencies by discouraging the use of facsimiles to promote the ABA’s member benefits, legal resources, products and services. For many years, facsimiles have provided the ABA and its various entities with an effective method of communicating and promoting products and services to the legal community. In the absence of the fax channel of communications, all ABA entities will be forced to use alternative methods of communications, all of which entail significant additional expenses. For example, direct mail will be significantly more costly—up to \$400,000 in additional annual expenses for the ABA Center for Continuing Legal Education alone—and less flexible in that lead times for production and mailings are longer than for faxing. The e-mail channel, while very useful, has reached near saturation in member tolerance. Diverting the former fax messaging to e-mail may further diminish the effectiveness of *all* ABA e-mail communications.

The ABA also supports the provisions in the bill preserving the EBR exception because we believe that the overwhelming majority of association members want to receive facsimile communications from their association. Currently, many organizations, including the ABA, have opt-out options in place that can limit those who receive unwanted faxes, without putting a financial and administrative burden on the business or association. For instance, the ABA has in its system the fax numbers of over 215,000 of its members who voluntarily provided their fax numbers to the ABA. Of these ABA members, less than 3,200 have utilized our specific no-fax restriction. Therefore, less than 1.5% of ABA members who have given us fax numbers have pro-actively chosen not to receive unsolicited faxes from the ABA. This system to manage our members' privacy wishes regarding faxes has been in place since January 2000 and has worked remarkably well.

As the ABA's own opt-out system described above has confirmed, the ABA's members have come to expect facsimiles from the Association advertising the availability of such useful and valued services as continuing legal education programs, books and publications. If the FCC rule eliminating the EBR exception is implemented, however, associations and other entities like the ABA that have typically communicated with their members and customers via fax will now lose that popular and cost-effective method of communication, to the detriment of all concerned.

H.R. 4600 effectively addresses all of these concerns by preserving the EBR exception under the TCPA and by permitting associations and businesses to continue to send facsimile advertisements to their members and customers. In addition, the legislation would also help protect consumers by requiring unsolicited facsimile advertisements to include a conspicuous notice on the first page that gives the recipient an absolute right to opt out of receiving future faxes. These and other related provisions, taken together, are a reasonable and measured response to the problem of unwanted faxes. If enacted, these provisions would curb many of the abuses under the current system without unduly affecting the ability of law-abiding associations and businesses to advertise their products and services.

The ABA also supports the provisions in Section 2(b)(3) of H.R. 4600 that would authorize—but not require—the FCC to issue new rules allowing tax-exempt nonprofit professional trade associations to send unsolicited advertisements to their members without being required to include the opt-out language referenced above. Although we support these provisions, if you decide to offer a manager's amendment when the Energy and Commerce Committee marks up the bill, we would recommend that the term "unsolicited advertisement" be clarified to specifically exclude all facsimiles sent by associations and other tax-exempt nonprofit organizations to their current members. In addition, if a manager's amendment is offered, we recommend that the term "unsolicited advertisement" be clarified to exclude all facsimiles that are transactional in nature. This is the approach that Congress followed last year when it overwhelmingly approved the CAN-

SPAM Act of 2003² and we believe that the same reasoning should be applied to the regulation of facsimile advertisements. In our view, there is no public policy rationale to treat such faxes as June 18, 2004
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“unsolicited advertisements” subject to federal regulation, and it would be inappropriate to subject such facsimiles to the opt-out requirements of the bill.

In sum, the American Bar Association supports those key provisions in H.R. 4600 that would protect the ability to associations and businesses to communicate with its members and customers by preventing the FCC from eliminating the established business relationship exemption to the TCPA’s general do-not-fax rules. Because the new FCC rules are scheduled to take effect in January 2005—and because associations and businesses throughout the country will be forced to begin costly compliance programs well before that date—we urge you and your House colleagues to promptly pass this important legislation

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

cc: All members of the House Energy and Commerce Committee

² Section 3(2) of the CAN-SPAM Act of 2003, P.L. 108-187, specifically exempted “transactional or relationship messages” from the definition of “commercial electronic mail message” and Section 3(17) of the Act then provided a detailed definition of the term “transactional or relationship message”.