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August 22, 2003

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Dear Chairman Powell:

On behalf of the American Bar Association (“ABA”) and our more than 410,000 members throughout the country, I write to express our support for the recent decision of the Federal Communications Commission (“FCC”) to stay until January 1, 2005 certain aspects of its July 3, 2003 Report and Order which modified prior provisions of its “do-not-fax” rules under the Telephone Consumer Protection Act of 1991 (“TCPA”). In particular, we applaud that portion of the FCC’s Order on Reconsideration dated August 18, 2003 that delays implementation of its new rules eliminating the “established business relationship” (“EBR”) exemption to the TCPA’s general prohibition against the sending of unsolicited facsimile advertisements.

While the ABA appreciates the Commission’s decision to stay these new rules and regulations, we have serious concerns regarding the substance of the new rules, as we believe that they will interfere with our Association’s ability to communicate with our members and with others who are interested in the profession-critical information available from the ABA through its products and services. Therefore, the ABA requests that the FCC reconsider and permanently withdraw that portion of the new rules that would eliminate the EBR exemption as well as issue a clarification that tax-exempt nonprofit organizations are exempt from the do-not-fax rules under the TCPA. Attached for your reference is a copy of the new policy adopted by the ABA Board of Governors on August 8, 2003, which succinctly states the ABA’s position on these matters.

Please consider this letter to be the ABA’s Petition for Reconsideration of the FCC’s Report and Order, released July 3, 2003, for the reasons outlined in this letter.

As you know, the FCC released its new rules implementing the TCPA in July 2003.¹ Included in the new rules are provisions that would eliminate the EBR exemption to the general “do-not-fax” rule under the Act. As a result, bar associations would be severely restricted in their ability to fax unsolicited advertisements, defined as “any material advertising the commercial availability or

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 (“Report and Order”), and referenced herein, can be found at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-153A1.pdf.

quality of any property, goods, or services,”² to their own members or to anyone else. Before such advertisements could be sent, bar associations would be required to obtain the signed written consent of each fax recipient—including their own members—and the consent forms must be sent by some method other than fax. The revised rules also subject anyone violating the new regulations to stiff fines and potential judgments ranging from \$500 to \$11,000 per unsolicited fax. Most of the new FCC rules will become effective on August 25, 2003, except that portion of the new rules eliminating the EBR exemption, which is stayed until January 1, 2005.

The ABA opposes the elimination of the EBR exemption to the general do-not-fax rule under the TCPA for a number of important reasons. First of all, the ABA believes that the new rule will interfere with its ability to communicate with its members and will create unreasonable financial and administrative burdens for the Association. While the revised 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 fax communications. 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.

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 236,754 of its members who voluntarily provided their fax numbers to the ABA. Of these ABA members, only 3,195 have utilized our specific no-fax restriction. Therefore, only 1.3% 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.

In addition to the financial and administrative burdens outlined above, 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 fact, the ABA Center for Continuing Legal Education (“CLE”) and the various ABA Sections estimate that 73 of their teleconference programs so far this year have been promoted by fax, which subsequently generated \$300,000 from the “fax registrants.”

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

² TCPA, 47 U.S.C. § 227(a)(4).

example, direct mail will be significantly more costly—up to \$400,000 in additional expense for the ABA Center for CLE alone—and less flexible in that lead times for production and mailings are longer than for faxing. The e-mail channel, while flexible, 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 EBR exemption because we believe that the same policy reasons cited by the FCC for continuing this exemption for telemarketers applies equally to the sending of facsimiles to existing members and customers. In its revised rules, the FCC decided to retain an EBR exemption for telemarketers—and permit them to call consumers registered on the national “do-not-call” list if such a business relationship exists—because the Commission deemed it necessary to allow companies to communicate with their existing customers.³ As the FCC stated in the Report and Order:

Companies maintain that the exemption allows them to make new offers to existing customers, such as mortgage refinancing, insurance updates, and subscription renewals. They suggest that customers benefit from calls that inform them in a timely manner of new products, services and pricing plans. American Express contends that its financial advisors have a fiduciary duty to their customers, requiring them to contact customers with time-sensitive information. We are persuaded that eliminating this EBR exemption would possibly interfere with these types of business relationships.⁴

The rationale for maintaining an EBR exemption for telemarketing continues to hold true for facsimile advertisements as well. Unfortunately, the FCC's refusal to apply these same considerations to associations, like the ABA, which send faxes to its existing members and customers will seriously interfere with our ability to promote upcoming seminars, books and other CLE opportunities, and will hinder our ability to offer the best possible goods and services that our members and customers expect and deserve.

The FCC's suggestion that an existing business relationship in the telemarketing field creates implied consent by consumers to receive communications also applies in the context of facsimile advertisements. In its Report and Order, the FCC provides further support for this point when it states:

[T]he exemption focuses on the relationship between the sender of the message and the consumer, rather than on the content of the message. It appears that consumers have come to expect calls from companies with whom they have such a relationship, and that, under certain circumstances, they may be willing to accept these calls.⁵

³ Report and Order at ¶112.

⁴ *Id.*

⁵ *Id.* at ¶ 112.

As this statement suggests, the ABA's members have come to expect facsimiles from the Association advertising the availability of such useful and valued services as CLE programs,
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books and publications. If the FCC rule eliminating the EBR exemption 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 cost-effective method of communication, to the detriment of all concerned.

Apart from the issue of the EBR exemption, the American Bar Association believes that the FCC rules prohibiting unsolicited facsimile advertisements should not be applied to tax-exempt nonprofit organizations. After the FCC adopted the initial rules implementing the TCPA in 1992, including the EBR exemption, the Commission released a Memorandum Opinion and Order on August 7, 1995, stating that communications made on behalf of tax-exempt nonprofit organizations were exempt from the TCPA. Unfortunately, when the FCC revised the TCPA rules prohibiting unsolicited facsimile advertisements earlier this year, it did not directly address the special situation of tax-exempt nonprofit organizations in the context of sending facsimiles. Therefore, there is some confusion as to whether the new FCC rules prohibiting facsimile advertisements apply to all entities, including tax-exempt nonprofit organizations.

The American Society of Association Executives ("ASAE") filed a Petition for Emergency Clarification with the FCC on July 25, 2003, in which it asked the Commission to issue, on an emergency basis, "a clarification that unsolicited facsimile communications are not prohibited when issued by tax-exempt nonprofit organizations in pursuit of their recognized and authorized tax-exempt nonprofit purposes." On the same day, ASAE filed a Petition for Stay asking the FCC to delay implementation of the new TCPA rules as they apply to tax-exempt nonprofit organizations until it determines whether such groups are covered by the new rules. In these filings, ASAE argued that the definition of the term "unsolicited advertisement" contained in the TCPA (i.e., "any material advertising the commercial availability or quality of any property, goods, or services") should not be interpreted to include advertisements made by organizations in pursuit of their tax-exempt and nonprofit purposes. In addition, ASAE advanced a number of public policy reasons why an express consent only-ban on unsolicited facsimiles from non-profit organizations would harm society.

The American Bar Association fully supports the Petition for Emergency Clarification and the Petition for Stay filed by ASAE. Accordingly, the ABA urges the FCC to issue a clarification that the new rules and regulations issued by the FCC under the TCPA do not prohibit unsolicited facsimile advertisements sent by tax-exempt nonprofit organizations in pursuit of their authorized tax-exempt nonprofit purposes. In addition, we urge the FCC to expand its Order on Reconsideration dated August 18, 2003 to delay implementation of these new rules as they apply to tax-exempt nonprofit organizations until it determines whether such groups are covered by the new rules.

In sum, although the ABA applauds the FCC's decision to stay that portion of the "do-not-fax" rules that would eliminate the EBR exemption until January 1, 2005, we strongly oppose the substance of those provisions as they would interfere with the ABA's ability to communicate with its members and the legal profession regarding urgent legal developments while imposing

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significant, and unwarranted, economic and administrative burdens on the Association. For these reasons, the ABA strongly urges the Commission to reconsider and permanently withdraw that

portion of the new rules outlined in its July 3, 2003 Report and Order. In addition, the ABA urges the FCC to reconsider its Report and Order to expressly hold that unsolicited facsimile communications of any type do not require prior consent, express or otherwise, of the recipient where the communication is (i) from a tax-exempt nonprofit organization and (ii) relates to one or more of the organization's duly authorized tax-exempt purposes. Furthermore, we urge the Commission to stay the new rules until this clarification is complete.

Thank you for considering the views of the American Bar Association on these important issues. If you have any questions regarding our position on any of these matters, please call me at (313) 223-3630 or Robert Evans, Director of the ABA Governmental Affairs Office, at (202) 662-1765.

Sincerely,



Dennis W. Archer
President, American Bar Association

encl.

cc: The Honorable Kathleen Q. Abernathy
Commissioner

The Honorable Michael J. Copps
Commissioner

The Honorable Kevin J. Martin
Commissioner

The Honorable Jonathan S. Adelstein
Commissioner

RESOLUTION ADOPTED BY THE
BOARD OF GOVERNORS
OF THE
AMERICAN BAR ASSOCIATION
AUGUST 2003

RESOLVED, that the American Bar Association opposes the Federal Communications Commission ("FCC") rules and regulations implementing the Telephone Consumer Protection Act of 1991, published July 25, 2003, that would eliminate the "established business relationship" exception to the general rule prohibiting the sending of unsolicited facsimile advertisements and urges the FCC to revise the rules and regulations accordingly.

FURTHER RESOLVED, that the American Bar Association urges the FCC to issue a clarification that the rules and regulations referenced above do not prohibit unsolicited facsimile advertisements sent by tax-exempt nonprofit organizations in pursuit of their authorized tax-exempt nonprofit purposes.

FURTHER RESOLVED that the American Bar Association urges Congress and the FCC to take appropriate action to restore the established business relationship exception and to permit tax-exempt nonprofit organizations to send unsolicited facsimile advertisements in pursuit of their authorized tax-exempt nonprofit purposes.