Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Junk Fax Prevention Act	)	CG Docket No. 05-338

TO: The Commission

COMMENTS OF THE NATIONAL ASSOCIATION OF REALTORS®

Introduction and Summary

The National Association of REALTORS® ("NAR") appreciates the opportunity to comment on the Commission's Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding concerning unsolicited facsimile advertisements pursuant to the Junk Fax Prevention Act of 2005 (JFPA).[1] NAR represents more than 1,200,000 real estate professionals engaged in all aspects of the residential and commercial real estate business, as well as some 1500 state and local associations of REALTORS®. NAR, our state and local associations and our members have a significant interest in the outcome of this proposed rulemaking.

While our comments will address many issues and questions the Commission raised in the NPRM, we want to emphasize our position on three specific issues: (1) The Commission should forgo setting any limitation on the established business relationship (EBR) until there is

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[1] Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005).

sufficient evidence to demonstrate that a significant number of consumer complaints result from faxes sent within the context of an EBR; (2) The Commission should use its discretionary authority to exempt certain classes of small businesses from the JFPA's requirement of a cost-free mechanism for consumers to transmit do-not-fax requests; and (3) The Commission should exempt tax-exempt nonprofit professional or trade associations from the opt-out notice requirement for faxes sent to members in furtherance of the organization's tax-exempt purpose.

I. RECOGNITION OF ESTABLISHED BUSINESS RELATIONSHIP

A. Parameters defining what it means for a person to provide a facsimile number "within the context of [an] established business relationship."

The Commission has no need to establish parameters defining what it means for a person to provide a facsimile number "within the context of [an] established business relationship."[2] It bears emphasis that Congress enacted the JFPA because it believed that the Commission's 2003 Telephone Consumer Protection Act (TCPA) "do-not-fax" rules placed unreasonable restrictions on legitimate communication between businesses and their customers.[3] Specifically, Congress objected to the Commission's reversal of its longstanding position that an establish business relationship between the sender and the fax recipient (residence and business) satisfied the TCPA's requisite permission to fax.

To now establish a definition of what it means for a person to provide a facsimile number "within the context of [an] established business relationship" reverts back to the

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[2] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278, *Junk Fax Prevention Act of 2005,* CG Docket No. 05-338, Notice of Proposed Rulemaking and Order at para. 10 (*2005 NPRM*).

[3] See, e.g., *Junk Fax Prevention Act of 2005*, Hearing Before the Senate Subcommittee on Trade, Tourism, and Economic Development, 109th Cong. (April 13, 2005) (statement of Senator Gordon Smith).

aggressive regulatory regime which Congress rejected in the JFPA. We urge the Commission to keep in mind Congress' stated intent for enacting the JFPA:

> The purpose of this legislation is to preserve the established business relationship exception currently recognized under the TCPA. . . We believe that this bipartisan bill strikes the appropriate balance in providing significant protections to consumers from unwanted unsolicited fax advertisements and preserves the many benefits that result from legitimate fax communications.[4]

Instead of establishing unnecessary rules relating to "context" of an established business relationship, NAR recommends that the Commission, simply restate the purpose and intent of Congress when it enacted the legislation.

B. "Voluntarily agreed" and "voluntarily-made-available."

NAR believes that Congress did not intend the Commission to take the restrictive approach of prescribing specific circumstances that may satisfy a "recipient voluntarily agreed" test. As a threshold matter, the Commission must recognize that whether an act is "voluntary" turns on the state of mind of the actor, and administrative and judicial efficiency counsels against any procedure that requires delving into the state of mind of the recipient. So if the Commission decides it must address this question -- which is far from clear, given that it is a fact-intensive exercise -- the Commission should proceed cautiously. One approach would be to set a non-inclusive safe harbor for when a fax number is "voluntarily" made available. To illustrate: the Commission asks whether a sender who obtains a fax number from a directory, advertisement, or site on the Internet should be required to make reasonable efforts to confirm with the entity that compiled the numbers that the recipients have "voluntarily" agreed to allow them to be made

[4] 151 Cong. Rec. S3280-01 (daily ed. Apr. 6, 2005) (statement of Sen. Smith).

publicly available? That approach will likely impose substantial transaction costs (since sometimes the entity providing the numbers did not compile the information) with little attendant benefit. Instead, the Commission could provide clarity to by stating that a fax number obtained by a sender from a publicly available source is presumed to be provided "voluntarily" if the sender has a legitimate basis to believe that the public source obtained these numbers voluntarily. If the Commission feels compelled to enter this field, we urge the Commission to state certain clear, illustrative (but not definitive) indicators of a "legitimate basis." The determination will necessarily be made on a case-by-case basis, but the Commission could point to these factors as evidence of a legitimate basis: whether the public source includes a statement in its directory or on its website that its fax numbers were obtained voluntarily; the nature of the public source, that is, whether it is from an organization of which the recipient is voluntarily a member; and any other indications regarding the source or origin of the numbers published by the source.

For instance, a sender who obtains a fax number published in an organization's directory which the recipient voluntarily joined, or from a website which declares all of its fax numbers were obtained voluntarily, should be entitled to a conclusive presumption that the public source obtained its fax numbers voluntarily. This proposed standard is practical and workable because it allows the sender of faxes to obtain fax numbers from public sources that have gathered fax numbers of those who have made their fax numbers publicly available. It is only one method to establish the number was voluntarily obtained, and the Commission should leave the door open for other methods if it decides to write any rules on this question.

C. Verifying that a sender has an established business relationship and the recipient's facsimile number prior to July 9, 2005.

There is little need for the Commission to address the JFPA's EBR "grandfather clause," since the legislative language is clear. Thus, NAR opposes any rule that imposes

another layer of record-keeping requirements in a specified manner. At most, the Commission could create a safe harbor for senders who can demonstrate that they have an established business relationship and obtained the recipient's fax number prior to July 9, 2005. We see no need for, and oppose, any prescribed manner by which senders must verify that an EBR relationship existed prior to July 9, 2005, since the facts and circumstances will vary greatly from business to business.

II. DEFINITION OF ESTABLISHED BUSINESS RELATIONSHIP

NAR supports the Commission's proposed definition of established business relationship. Specifically:

> 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.[5]

A. Duration of the established business relationship.

The Commission plainly has authority at some point to limit the duration of the established business relationship for unsolicited facsimile advertisements, but the Commission should not exercise that authority prematurely or inappropriately. We strongly believe it is premature for the Commission to create such a time limit in the context of this rulemaking proceeding, Instead, NAR urges the FCC to apply the structure of the JFPA to first make proper

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[5] *2005 NPRM*, para. 14.

factual determinations, through a notice of inquiry or in the context of this NPRM, and only then, if warranted, initiate rulemaking on the duration issue. In short, the Commission should first consider the findings required by Congress, and if and when those conclusions can be reached, only then turn to altering the duration of the EBR. Accordingly, here are the issues that we think the Commission should address in this proceeding:

> (1) whether the existence of the [established business relationship] exception . . . has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;
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> (2) whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;
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> (3) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and
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> (4) whether with respect to small businesses, the costs would not be unduly burdensome.[6]

The NPRM conflates the inquiry stage into the rulemaking stage, which does not allow the careful consideration of whether and if the problem that Congress envisioned actually exists. In addition to conflating a two-step process, the NPRM also seeks to shift the burden of proof. Thus, the Commission demands those who oppose the establishment of any time frame or the telephone solicitation time frame to provide "empirical evidence" to challenge the Commission's findings that the telephone solicitation 18/3-month time limit on the duration of

[6] Junk Fax Prevention Act of 2005, Sec. 2(f).

an established business relationship strikes an appropriate balance between industry practices and consumers' privacy interests.[7] The Federal Trade Commission settled on an 18/3-month time frame in the context of telemarketing after lengthy study of that sector. The Commission cannot simply rely on the FTC's homework in a related class to claim that its assignment is complete. Consequently, we urge the Commission to follow the structure of the statute and bifurcate its duty to obtain and evaluate the evidence before addressing the important policy question. Of course, NAR stands ready to help Bureau staff address each of the Act's four required EBR evaluations and determinations.

Finally, current practice and precedent weigh heavily against limiting the duration of an EBR along the lines proposed in the NPRM. Since 1991 until 2003, there was no time limit on the EBR that the Commission recognized under the TCPA, and there also were virtually no complaints from established customers. And on October 3, 2003, in response to petitions by NAR and others, the Commission specifically rescinded the 18-month and three-month time limitations it had imposed on the EBR pursuant to its August 18, 2003 Order on Reconsideration.[8] For all the reasons set forth above, we urge the Commission to not limit the duration of the established business relationship as applied to the sending of facsimile advertisements.

III. NOTICE OF OPT-OUT OPPORTUNITY

A. "Clear and conspicuous."

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[7] *See 2005 NPRM*, para. 17.

[8] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-279, Order, 18 FCC Rcd 19890 (2003) staying *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order on Reconsideration, 18 FCC Rcd 16972 (2003).

NAR cautions the Commission against promulgating a specific definition or offering detailed illustrations that, while well intentioned, would expose legitimate businesses to heightened litigation risks under arguably subjective standards. Instead NAR strongly urges the Commission to adopt similar "clear" standards akin to the MSCM (CAN SPAM) disclosure requirements.[9] In that setting, the Commission stated that "[a]ny such disclosure notice containing the required disclosures must be clearly legible, use sufficiently large type, and be placed so as to be readily apparent to a customer."[10] The Commission should adopt a similar rule here.

B. "Shortest reasonable time."

NAR supports the implementation of a rule containing a 30-day or longer period for businesses to respond to opt-out requests, as anything shorter would create a costly burden upon small businesses like real estate brokerages and is thus unreasonable. The overwhelming majority of NAR's members are small business owners. A time frame of less than 30 days for incorporating a consumer's opt-out request places NAR's members in danger of inadvertently violating the Act, as they may not have the resources to instantaneously incorporate these consumer requests into do-not-fax lists.

A 30-day period will give small businesses a reasonable time to assure the consumer's opt-out request is processed without detrimental effect on the interests of those

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[9] *See Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003,* CG Docket No. 04-53, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278, Report and Order (*2004 MSCM Order*).

[10] *Id.* para. 50.

receiving facsimile advertisements, as businesses will still have to cease sending such faxes within a relatively short time frame.

C. Small businesses and cost-free mechanism.

NAR strongly urges the Commission to exercise its discretionary authority to exempt certain classes of small businesses from the JFPA's requirement to provide a cost-free mechanism for a consumer to transmit a do-not-fax request. Seventy percent of the NAR membership is composed of small firms with five or fewer agents per office. Furthermore, 80 percent of REALTOR®-owned small businesses have four or fewer employees. Over the last 36 months, these very small businesses were subjected to several new federal regulations:

- FTC and FCC Do-Not-Call rules and the establishment of the National Do-Not-Call Registry;
- FTC and FCC CAN SPAM Act provisions;
- FTC and FCC monthly registry access rules;
- Two separate fee increases for access to the National Do-Not-Call Registry; and now
- FCC Junk Fax Prevention Act rules.

All of these new regulations have increased operating expenses for REALTOR®-owned small businesses due to the changes in office compliance procedures. In fact, according to a recent NAR survey, almost 70 percent of REALTORS® reported that the Federal Do-Not-Call and CAN SPAM rules have increased their cost of doing business.

Unlike many other business professions, real estate brokers and agents make a personal financial investment in themselves in order to attract business and serve clients. Such personally paid business expenses relate to advertising and marketing, professional development,

technology, and compliance with federal and state regulatory requirements. In fact, in 2004 REALTORS® spent an average of $8,200 on business expenses – an increase from $6,200 in 2002.

The JFPA requires the Commission to first make a determination that the costs associated with a "cost-free mechanism" are unduly burdensome for small businesses. In response to the Commission's request for " empirical information" on this issue, NAR surveyed its members specifically focusing on a requirement that senders maintain a toll-free number for recipients to use to opt-out. About 80 percent of REALTORS® responded that they would be negatively impacted by such a requirement. Here are some examples of REALTOR® written responses obtained via our survey on this issue:

- "If I put an 800 number on my fax cover sheet, everyone will automatically use it for all calls, not just those who would be calling to not receive any more faxes from me."
- "I am a minority small business owner and I work on a tight budget. To add another line to my phone system would cause me to have to spend much more (sic) money to upgrade the system, which I've just installed in my office. I believe an 800 number guideline would be cost prohibitive."
- "Getting a separate toll-free line installed seems easy in a metro area, but adding phone lines in our small rural area near the Canadian border can be cumbersome, costly and in some cases, not possible at all."
- "I work from home and having to obtain and maintain an 800 number at home could become very costly."
- "Right now in my area almost everything is long distance and we only have one provider for local service. I would have to cut somewhere else to afford a toll-free number."
- "I work from a home office with already 3 phone lines, which I believe is the maximum usage. The costs of having an 800# is very costly and would exceed by budget."

In short, the overwhelming majority of NAR members are predominantly small business owners who believe that requiring fax senders to maintain a toll-free number will have an adverse impact on their business. Therefore, NAR urges the Commission to allow for

alternatives to a toll-free phone number to satisfy the JFPA cost-free mechanism requirement, which we discuss in more detail below.

D. How to define "classes" of small businesses.

NAR strongly urges the Commission to define exempted "classes" of small business in terms of 100 employees or fewer. The U.S. Small Business Administration's Office of Advocacy recently held a JFPA implementation roundtable which included many participants from the Fax Ban Coalition.[11] During the discussion on size standards, SBA staff, who clearly researched numerous methods of classifying small businesses for the purpose of the JFPA's exemption provision, presented a number of options that would be consistent with SBA rules.

There was a general consensus among roundtable participants that supporting a small business classification of 100 or fewer employees would minimize the financial burden associated with establishing and maintaining a cost-free mechanism. According to a representative from the SBA's Office of Size Standards, this number accurately represents the average number of employees in the service and retail trade industries pursuant to the SBA size standards.[12] Therefore, we urge the Commission to consider this generally agreed to standard and issue a rule exempting small businesses with 100 employees or fewer from the JFPA's requirement to provide a cost-free mechanism for a consumer to transmit a do-not-fax request.

E. Alternative cost-free mechanisms.

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[11] The members of the Fax Ban Coalition are a diverse group of small and large businesses and other organizations active in a variety of industries. Coalition members include bankers, health care providers, magazine publishers, trade show operators, restaurateurs, travel agents, attorneys, insurance agents, real estate professionals and scores of other small businesses and professionals that form the core of the American economy.

[12] 13 C.F.R. § 121.201.

As for those classes of businesses not considered exempt, NAR recommends the Commission closely follow Congress' guidelines in this area. Specifically,

> This [cost-free mechanism] provision should not be interpreted as a mandate for [interstate] businesses to establish a toll-free number to receive opt-out requests. Businesses should be allowed to exercise some flexibility and creativity in providing cost-free options, such as e-mail, walk-ins, etc.[13]

We therefore strongly urge the Commission to recognize, as Congress did, that "for those businesses that have interstate business relationships, the requirement of providing a cost-free mechanism to opt-out of future faxes could be an expensive proposition."[14] Further, the Commission should not mandate a single mechanism, such as a toll-free number, which can be very costly on all businesses. Instead, NAR requests the Commission to specifically allow for e-mail, walk-ins, websites and other alternative cost-free mechanisms, consistent with Congress' expressed intent in mandating this requirement.

IV. REQUEST TO OPT-OUT OF FUTURE UNSOLICITED ADVERTISEMENTS

A. Definition of "sender."

One important issue that the Commission did not address in the NPRM is a definition of "sender" for the purpose of the opt-out provision. That is, when a recipient validly opts-out of receiving future faxes, to whom is it applicable? We propose that, consistent with the telemarketing rules adopted by the Commission and by the Federal Trade Commission, the Commission consider the issue from the perspective of the reasonable expectation of recipients.

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13 H.R. Rep. No. 108-593, at 10 (2004).

14 *Id.*

This issue is particularly important to the many industries, including the real estate industry, that actually operate on a daily basis. While it is difficult to characterize typical real estate firms, they generally fall under one of the following business models: (1) independent office; (2) franchisee; or (3) national or regional corporation. Within each model, however, the overwhelming majority of real estate sales agents operate as independent contractors (i.e., self-employed).

Consider the question of who is the "sender" as it applies to a real estate franchise. Company A is a real estate franchisee that is organized and incorporated separately from a national real estate franchisor. While Company A uses the national corporation's branding, the franchisee operates and advertises itself as a distinguishable entity. As this franchisee and all other franchisees of the national real estate corporation are legally separate and distinguishable entities, it may make sense at one level that each franchisee is a separate fax sender. Therefore, a valid opt-out sent to Company A should only be binding for facsimiles sent from that franchisee, but not from other separately incorporated franchisees or the franchisor itself.

Next, consider the question of who is a "sender" as it applies to a national real estate company where each office is owned and operated by the corporation, but is functionally distinct. For instance, Company B is organized and incorporated on a national basis. Company B has offices all over the country that are not separately incorporated but nevertheless distinguish and identify themselves by location -- for example, Company B of Arlington, Virginia. As a practical matter, although these offices are incorporated as part of Company B, each office is functionally distinct and often operated by different broker-managers. In this situation, to the extent faxes sent from Company B of Arlington, Virginia, state in the opt-out notice which specific real estate office actually sent the fax, a reasonable recipient would assume it is sent by

that particular office, not the entire national Company B, and correspondingly a consumers opt out issued to such office should apply only to Company B, and not the national Company B or other offices of that company.

In sum, the Commission should be mindful of how at least the real estate industry is organized as it crafts its rules and policies implementing the JFPA. Specifically, we urge the Commission to adopt a rule that a valid opt-out request is binding upon any facsimile machine or sender of faxes associated with or employed by (1) a separately incorporated or otherwise legally organized entity; or (2) branches or offices of the same legal entity that plainly distinguish and identify themselves separately in the opt-out notice. These conclusions are consistent with both the reasonable expectations of recipients and the realities of the business world.

B. Burden of proof to demonstrate express invitation or permission.

In cases where a party had previously opted-out of receiving faxes but subsequently wishes to grant a sender an express invitation or permission to send fax messages, the sender should be able to obtain consent either in oral or written form. However, if the recipient challenges the sender's right to send such messages, the burden to prove that such consent was provided may reasonably be imposed on the sender to establish that he received the lawful authorization before sending the fax advertisement. This standard mirrors the Commission's MSCM (CAN SPAM) rules, which also allow for oral or written consent.[15]

V. AUTHORITY TO ESTABLISH NONPROFIT EXCEPTION

NAR urges the Commission to exercise thediscretionary authority provided by Congress to exempt tax-exempt nonprofit professional or trade associations from the opt-out

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[15] *See 2004 MSCM Order*.

notice requirement for faxes sent to members in furtherance of the organization's tax-exempt purpose. This issue is not unlike the exemption of tax-exempt nonprofit organizations from the definition of "telephone solicitation" and, more recently, the Commission's exemption of tax-exempt nonprofit organizations from the do-not-call registry requirements.[16]

The Commission drew its rationale for the DNC registry exemption from Congress's findings that "the two sources of consumer problems—high volume of solicitations and unexpected solicitations—are not present in solicitations by nonprofit organizations."[17] In addition to citing the above in the Commission's 2003 TCPA Order, the Commission noted that "the Committee also reached the conclusion, based on the evidence, that such calls [from tax-exempt nonprofit organizations] are less intrusive to consumers because they are more expected."[18]

Similarly regarding fax messages sent to members of nonprofit professional associations, the Commission should be mindful that its own record of unsolicited fax advertising violations (1999 to present) does not have a single one forfeiture order or citation notice issued to a professional or trade association.[19] The same record shows only one citation

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[16] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-246, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227 and *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003) (2003 *TCPA Order).*

[17] H.R. Rep. No. 102-317, at 16 (1991).

[18] 2003 *TCPA Order,* para. 46, citing H.R. Rep. No. 102-317, at 16 (1991).

[19] Federal Communications Commission, January 6, 2006, Unsolicited Faxes – Citations and Forfeitures, http://www.fcc.gov/eb/tcd/ufax.html.

issued to a non-profit.[20] Clearly, there is no evidence that fax advertisements from tax-exempt professional associations are the source of consumer and business frustrations.

This finding is not surprising at all, since individuals who pay dues or fees to be a member of a professional or trade association expect a return on their "investment." The publications, programs, activities and benefits offered by associations that are the common subject of fax communications to members are examples of the reasons individuals choose to join REALTOR® associations and pay dues. As a consequence, the faxed information from a trade association is not intrusive but instead is expected and desired. Therefore, because there is no evidence that professional associations are the source of fax abuse and because members of associations expect certain information consistent with the association's purpose, NAR believes such an exemption would not detract from the original intent of the TCPA and strikes a fair balance between protecting individual privacy rights and the legitimate faxing practices of associations.

VI. UNSOLICITED ADVERTISEMENTS

A. Forms of permission "in writing or otherwise."

NAR urges the Commission to address the form in which permission may be granted as it did in its MSCM wireless rule. Specifically, the Commission should permit senders to obtain permission by oral or written means, including electronic methods. This approach represents a sensible balance between the legitimate interests of consumers to avoid unwanted faxes and the need of businesses to reach their customers.

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[20] *Id.*

NAR further urges the Commission not promulgate specific methods for demonstrating proof that a sender had the consumer's permission. Instead, we ask the Commission to adopt JFPA rules that parallel the existing standard in the FCC's MSCM (CAN SPAM) rules, so that "[s]enders who chose to obtain authorization in oral format are also expected to take reasonable steps to ensure that such authorization can be verified."[21]

[21] *2004 MSCM Order*, para, 43.

CONCLUSION

These comment address a number of issues raised in the NPRM, but we emphasize the following key issues: (1) NAR opposes limiting the duration of an established business relationship; (2) NAR strongly urges the Commission to exercise its discretionary authority and exempt certain classes of small businesses from the JFPA's requirement to provide a cost-free mechanism for a consumer to transmit a do-not-fax request; and (3) NAR urges the Commission to exempt certain tax-exempt nonprofit professional or trade associations from the opt-out notice requirement in the case of faxes sent to members in furtherance of the organization's tax-exempt purposes.

Respectfully submitted,

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January 18, 2006