

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing)	CG Docket No. 05-338
The Junk Fax Prevention Act of 2005)	
)	
Comments by the National Stone, Sand &)	
Gravel Association in Support of the JFPA)	

TO: The Federal Communications Commission (“FCC”)

**From: National Stone, Sand & Gravel Association
1605 King Street
Alexandria, VA 22314**

The National Stone, Sand & Gravel Association (“NSSGA”) respectfully submits these comments in response to the Notice of Proposed Rulemaking (“NPRM”) wherein the FCC asks for comments on the proposed facsimile advertising rules.

The FCC is required to issue such rules consistent with the Junk Fax Prevention Act of 2005 (“JFPA”) passed July 9, 2005. The JFPA requires such rules to be in place by April 5, 2006.

Introduction

NSSGA represents the crushed stone, sand and gravel (“construction aggregates”) producing industries. Our member companies produce 90 percent of the crushed stone and 70 percent of the sand and gravel consumed annually in the United States.

Accordingly, NSSGA is the largest mining association by volume in the world (*U.S. Geological Survey*). Thirty-three percent of our market is in residential construction, 31 percent is roads and highways and 36 percent is in public works such as airports, water treatment plants and schools, etc. A small portion of our products also go into the manufacture of glass, paint, pharmaceuticals, cosmetics, chewing gum, household cleansers and many other consumer goods.

More than three billion tons of aggregates (or 2.86 billion metric tons) were produced in the U.S. in 2004 at a value of approximately \$16 billion, contributing \$37.5 billion to the GDP of America. The aggregates industry workforce is made up of about 115,000 men and women. Every \$1 million in aggregate sales creates 19.5 jobs, and every dollar of industry output returns \$1.58 to the economy.

NSSGA member companies, many of which are small businesses, have operations in approximately 70 percent of the nation's counties. NSSGA also has an affiliation with a network of 42 state aggregate and crushed stone associations across the country. These companies and non-profit associations would be adversely impacted by the FCC's proposal to limit the Established Business Relationship (EBR).

(A) Limitation of Established Business Relationship Exemption

The JFPA allows the FCC to consider limits to the EBR exemption as it applies to unsolicited facsimile advertisements three months after the date of enactment of the Act. In addition to a general call for comment on whether it should limit the EBR, the FCC is

proposing to limit the duration of an EBR to 18 months following a purchase or transaction and three months after an inquiry. Under the JFPA, the Commission may limit the EBR if it has:

- (1) determined that the EBR exemption results in a significant number of complaints;
- (2) determined that a significant number of complaints involved unsolicited faxes sent under an EBR that is older than what the FCC believes is consistent with the reasonable expectations of consumers;
- (3) evaluated the costs to senders of demonstrating the existence of an EBR and the benefits of establishing a limitation on an EBR; and
- (4) determined that small businesses would not be unduly burdened.

Although the FCC is required by law to have rules in place consistent with the JFPA by April 5, there is no requirement for an EBR limitation to be in place by that date. In fact, the statute expressly prohibits the FCC from even considering a limitation on the EBR for the first three months following the enactment of the law. Once that time frame has expired, the FCC may consider limitations only if the four-pronged test in the statute has been met. Under this language, the FCC still would not be required to impose limits even if all four-prongs of the test have been fulfilled, but at that time it could be considered.

The proposed rule does not include a determination by the FCC that the EBR has in fact resulted in a significant number of complaints as required by statute. NSSGA does not

believe that it is possible for such a determination to have been made in the short span of time since JFPA became law on July 9, 2005. Furthermore, the post-JFPA EBR is not the same as the one that existed from 1992 to 2002. The current EBR exists in the context of an opt-out, so no complaints filed in earlier years would be relevant to making such a determination. Any complaints to be considered must have been made after the JFPA went into effect. NSSGA does not believe the FCC has demonstrated that it has met the minimum statutory threshold and thus a move to limit the EBR is premature.

(B) Exemption for Non-Profit Associations

The FCC, in that portion of the NPRM entitled “Authority to Establish Nonprofit Exception,” seeks comments on whether it:

should allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the associations' tax-exempt purpose that do not contain the “opt-out” notice required by the Junk Fax Prevention Act.

Additionally, comments are sought on the related issues of whether such notice is necessary to protect the ability of members to stop future unwanted faxes, how members will obtain the necessary information to opt out if associations are not required to provide that information, and what benefits, if any, nonprofit organizations will receive from such an exemption.

NSSGA supports exempting nonprofit associations from the opt-out requirement of the JFPA. NSSGA, like most membership organizations, exists to serve its members. It is not in a membership organization's best interest to ignore a member's expressed wish to "opt out" of receiving faxes. Ignoring a member's request not to receive faxes could well lead them to "opt-out" of the organization completely, ceasing any business relationship. A simple request from a member should be sufficient to stop future unwanted faxes from intentionally being sent.

The very nature of a membership organization necessitates a certain degree of two-way communication. Membership organizations routinely provide contact information on annual dues forms, in publications and via various correspondence disseminated during the term of an individual or entity's membership. As a result, members should have no problem making an opt-out request even if opt-out contact information is not contained on a fax that is received from the non-profit organization. This type of situation is vastly different from a casual customer receiving a fax from a business with which he once engaged in a transaction and for whom he has no other contact information.

A distinction must be made between an ongoing membership organization relationship and that formed by a simple and often one-time business transaction. Individuals or entities that join nonprofit membership organizations typically receive various rights along with their membership, such as voting rights, the ability to run for positions of leadership within the organization and the opportunity to set policy and business

practices. This creates a much closer nexus between the two parties justifying an exemption from standard opt-out requirements.

Conclusion.

NSSGA urges the FCC to delay consideration of limiting the duration of an EBR until the matter is ripe and all four-prongs of the statutory test have been met. NSSGA also asks that the FCC institute an exemption for nonprofit trade associations with regard to the opt-out language requirement of the JFPA based upon the unique and distinct relationship that nonprofit associations have with their members.

Respectfully submitted,

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