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AUGUST 2, 2004

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PRESIDENT-ELECT
STEPHEN CARTER
Attorney General of Indiana

VICE PRESIDENT
THURBERT BAKER
Attorney General of Georgia

IMMEDIATE PAST PRESIDENT
BILL LOCKYER
Attorney General of California

via facsimile

Dear Members of Congress:

We, the undersigned Attorneys General, write to express our concern about the recently proposed Junk Fax Prevention Act of 2004 (H.R. 4600, S. 2603, and S. 2569), which seeks to amend the junk fax provisions of the Telephone Consumer Protection Act ("TCPA"). Since our offices have experience in enforcing the TCPA, we wish to offer our perspective on the effect of the proposed changes and to suggest possible changes to improve effective enforcement of the TCPA. We are concerned that the proposed changes to the TCPA could create obstacles to future effective enforcement of the statute and go beyond measures necessary to protect legitimate businesses.

First, we support the Federal Communications Commission's (FCC) proposed regulation that simply because a person has an established business relationship with a business, that person has not indicated his or her express invitation or permission to receive junk faxes. Nevertheless, should Congress determine that an "established business relationship" does indicate a person's consent to receive junk faxes, certainly the definition of that term should be consistent with the FCC's interpretation of the term elsewhere in the TCPA. In establishing the Do-Not-Call Registry, the FCC, as well as the Federal Trade Commission (FTC), both concluded, based on an extensive administrative record, that an established business relationship should be limited to 18 months following a consumer's last transaction with the business or three months following an inquiry or application. Yet, under H.R. 4600 and S. 2603, the time period during which a company can claim it still has an established business relationship with a consumer could be somewhere between five and seven years. This bill would represent a dramatic departure from existing definitions.

In its consideration of the appropriate length of time for limiting the established business relationship, the FTC specifically determined that consumers who received a call from a company with which the most recent transaction was two years ago would "likely be surprised by that call and find it to be unexpected." The FTC went on to conclude that 18 months "strikes a balance between industry's needs and consumers' privacy rights and reasonable expectations

about who may call them and when."¹ If Congress is to create an "established business relationship" exception to the prohibition on sending unsolicited faxes, the definition of "established business relationship" should be narrow, specifically defined, and consistent with the FCC and FTC rules defining the same phrase in similar contexts.

The tangible costs imposed on the recipients of fax advertisements further support our position that the definition of an "established business relationship" should be narrowly drafted. In fact, a consumer's right not to be forced to pay for the advertising of others, a practice many consumers consider to be theft, may be even greater than a consumer's right not to be disturbed by telemarketing calls. If a consumer would be surprised by a telemarketing call from a business with which they have not done business in two years, as the FTC concluded, the consumer would likely be outraged at having to receive and pay for an unsolicited fax from the same company, especially five to seven years later. Additionally, a business is not disadvantaged by the narrower time limit because it still has 18 months to contact former customers to determine if they would like to continue receiving the faxes.

Second, we recommend that Congress clarify that the established business relationship applies only in circumstances where the person whose goods or services are being advertised, i.e., the seller as that term is defined by 47 C.F.R. § 64.1200(f)(5), has an established business relationship with the recipient. We do not believe that the language in H.R. 4600 and S. 2603 permits the established business relationship exception to be transferred from the business entitled to the exception to the fax broadcaster that sends out faxes for many different companies. This point should be clarified in the legislation.

Third, we strongly recommend that Congress require that, when an established business relationship does not exist, a consumer's express invitation or permission be in writing, just as it is in the Do-Not-Call context. Since the business sending the fax has the burden to prove that it has the express permission of the recipient before it sends the fax, it is prudent to require the business to keep written records in which consumers give their express permission. Furthermore, requiring the business to substantiate a claim of permission by maintaining written documentation signed by the recipient will make enforcement of the statute more efficient without unduly burdening legitimate fax advertisers who would benefit from the clarity of such a straight-forward requirement.

Fourth, the TCPA should be amended to ensure the sender and the advertising business are clearly identified to the recipient. In the States' enforcement actions under the TCPA, we have found that current technology enables fax broadcasters to prevent the States from accessing information about the origin of the faxes. For example, the "sent from" number that appears in the header of the commercial fax is rarely the actual number used to send the fax. Moreover, fax broadcasters' names are rarely connected to the telephone lines used to transmit the faxes. Additionally, the States have had problems identifying and serving those violating the TCPA because the fax broadcasters do not identify themselves on any portion of the junk fax, the

¹ During the FTC's rulemaking process, the longest period that industry representatives suggested for an established business relationship was 36 months, which is considerably shorter than the five years proposed in the current version of H.R. 4600 and S. 2603. The FTC concluded that there was no support for a 36-month time period.

businesses advertising goods or services do not identify themselves on the fax, and the addresses for the fax broadcasters are generally post office boxes. The States have further had problems ensuring that consumers have been successful in getting their names removed from fax lists because the fax broadcasters use multiple removal numbers, often the only way to identify the fax broadcaster, and vary them often.

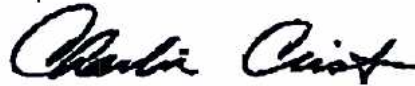
To address these concerns, we suggest that the TCPA be amended to require that every fax disclose the identity of the fax broadcaster, including: (a) a physical address for the fax broadcaster's actual place of business; (b) a telephone number the recipient can call and speak to a live person; (c) the identity of the business advertising, including a valid physical address for the business and the telephone number the recipient can call and speak to a live person; and (d) the actual number from which the fax is sent. Additionally, we suggest that fax broadcasters be required to maintain records of requests for removal and records showing that the requests for removal were honored. These small requirements can lead to more effective enforcement without imposing additional costs on the business advertising by fax. In fact, these requirements would help a legitimate business contracting with a fax broadcaster by enabling it to see if the fax broadcaster is following the statute.

We appreciate your consideration of our concerns about junk faxes. Unsolicited fax complaints are consistently a top area of complaint in our offices so this is obviously an important issue to the general public. If Congress is determined to create exceptions to the general ban on the sending of junk faxes, we urge you to narrow them to the greatest extent possible. We also urge you to add protections important to consumers and legitimate businesses.

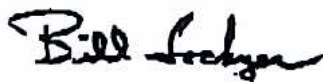
Sincerely,



Hardy Myers
Attorney General of Oregon
Chair, Consumer Protection Committee



Charlie Crist
Attorney General of Florida
Co-Chair, Consumer Protection Committee



Bill Lockyer
Attorney General of California
Member, Unsolicited Faxes Working Group



Lisa Madigan
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M. Jane Brady
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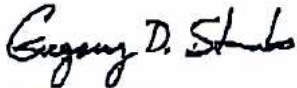
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Brian Sandoval
Attorney General of Nevada



Patricia Madrid
Attorney General of New Mexico



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Attorney General of Ohio



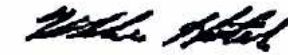
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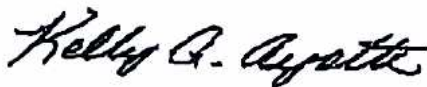
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Attorney General of Wisconsin

Pat Crank
Attorney General of Wyoming

2. Of the states listed, Hawaii is represented by its Attorney General and its Office of Consumer Protection, an agency which is not a part of the state Attorney General's Office, but which is statutorily authorized to represent the State of Hawaii in consumer protection actions. For the sake of simplicity, the entire group will be referred to as the "Attorney General," and such designation as it pertains to Hawaii, refers to both the Attorney General and the Executive Director of the State of Hawaii Office of Consumer Protection.