

# Faxing It In

## HOW CONGRESS FAILED CONSUMERS WITH THE JUNK FAX PREVENTION ACT OF 2005

### I. INTRODUCTION

During the past few years, the federal government's regulation of telemarketing practices has enjoyed a front-and-center position in the political spotlight.<sup>1</sup> In 2003, consumers eagerly embraced the establishment of a national do-not-call registry,<sup>2</sup> and in the same year, Congress enacted legislation to curb abusive email marketing practices.<sup>3</sup> Both events exemplified an admirable<sup>4</sup> commitment to furthering consumer

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<sup>1</sup> See, e.g., *Consumers Served by Blocking Ads*, CONN. L. TRIB., Aug. 25, 2003, at 19 ("Responding to overwhelming public demand, our federal and state governments have recently enacted laudable new consumer protections against the frequent onslaught of unwanted direct marketing solicitations."). Such an increase in federal telemarketing regulation has even inspired new compliance technology. William C. Smith, *Ensuring a Peaceful Dinner*, NAT'L L.J., Nov. 10, 2003, at 8 (discussing one company's product that automatically blocks telemarketers from connecting to numbers currently listed on federal and state do-not-call registries).

<sup>2</sup> Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003) (codified at 15 U.S.C. § 6101 (Supp. III 2003)). See FED. COMM'NS COMM'N, ("FCC"), FCC-03-153, RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991, 14-51 (2003), reprinted in 68 Fed. Reg. 44,144, 44,145 (July 3, 2003), available at <http://www.fcc.gov/cgb/donotcall> [hereinafter 2003 FCC Memo] (announcing implementation rules for a nationwide do-not-call list in conjunction with the Federal Trade Commission ("FTC")). Just three days into the national registry's operation, more than ten million telephone numbers had been added to the do-not-call list. FCC, DA 05-2056, ANNUAL REPORT ON THE NAT'L DO-NOT-CALL REGISTRY 2 (2005), available at <http://www.fcc.gov/cbg/donotcall> [hereinafter FCC Do-Not-Call Report]. By the release of the FCC's first annual report, the number grew to 88 million. *Id.*

<sup>3</sup> Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699 (codified at 15 U.S.C. § 7701 (Supp. III 2003)) [hereinafter Can-Spam Act].

<sup>4</sup> Although the email spam legislation may have been an admirable first step, it has continued to receive much criticism. See, e.g., Verne Kopytoff, *Spam Mushrooms*, S.F. CHRON., Sept. 2, 2004, at C1 (noting new research showed spam on the rise eight months after Can-Spam Act's enactment); David McGuire, *New Law Won't Can Spam, Critics Say*, WASH. POST, Dec. 17, 2003, <http://www.washingtonpost.com/wp-dyn/articles/A5943-2003Dec16.html> ("Detractors say the Can-Spam Act will create a safe haven for e-mail marketers willing to follow certain rules for spamming."). The point here, however, is that Congress was at least making a good faith first step to appease consumers by creating an initial national regulation of email

protection against unsavory, invasive marketing tactics that flourished thanks to cheap, easy-to-use technology. In 2005, however, Congress strayed considerably from this apparent trend of pro-consumer commitment when it enacted the Junk Fax Prevention Act of 2005 (“Junk Fax Prevention Act”).<sup>5</sup> The Junk Fax Prevention Act, an amendment to a previous federal law prohibiting unsolicited marketing via facsimile machines, exposes fax machine owners to more unsolicited advertisements than allowed under the previous federal law.<sup>6</sup>

Congress first addressed unsolicited faxed advertisements fifteen years ago as part of the Telephone Consumer Protection Act of 1991 (“TCPA”).<sup>7</sup> Among other provisions, the TCPA instituted a complete ban on unsolicited faxed advertisements sent without the “prior express invitation or permission” of the recipient.<sup>8</sup> Such a strict prohibition against fax marketing differed from the TCPA’s more flexible regulation of telephone marketing.<sup>9</sup> The justification behind the differential treatment between the telephone and the facsimile machine lay in the latter’s technological architecture. It simply was not fair to require consumers to swallow the costs—paper, ink, wear-and-tear on the machine—of automatically-received, unwanted faxes promising great hotel deals or special car wash discounts.<sup>10</sup> Congress reasoned that the consumer protection rights of the fax recipient—who must unfairly waste time waiting while a machine receives and

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marketing. As this Note discusses, Congress’s revision of its junk fax marketing regulations eroded strong federal statutory protection already in place.

<sup>5</sup> The Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (codified at 47 U.S.C.A § 227 (Supp. 2005)) [hereinafter Junk Fax Prevention Act].

<sup>6</sup> See *infra* discussion in Part V.

<sup>7</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (codified at 47 U.S.C. § 227 (2000)) [hereinafter TCPA].

<sup>8</sup> 47 U.S.C. § 227(a)(4) (2000). The statute defines unsolicited advertisement as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.” *Id.* The TCPA fax provision states that “[i]t shall be unlawful for any person within the United States . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine[.]” *Id.* § 227(b)(1)(C). Thus, the prohibition does not apply to (1) faxed advertisements sent to recipients who have invited or permitted the sender to fax an ad or (2) faxes that do not include an ad.

<sup>9</sup> See *id.* § 227(a)(3)(A)-(C). The definition of telephone solicitation expressly offers three major classes of exemptions for calls and messages. *Id.* In contrast, the TCPA, as originally enacted, banned the faxing of all unsolicited advertisements. *Id.* § 227(b)(1)(C).

<sup>10</sup> See H.R. REP. NO. 102-317, at \*10 (1991) (noting that fax machines “are designed to accept, process, and print *all* messages which arrive over their dedicated lines” (emphasis added)). See also *infra* discussion in Part V.B.

prints out an unwanted transmission, all at the recipient's cost—trumped any commercial speech rights of the marketers.<sup>11</sup>

Almost fifteen years after the TCPA's enactment, Congress decided to revisit the TCPA fax provisions. By then, fax machines had survived and surpassed their '80s business stereotype and found a place in the home, in addition to the office.<sup>12</sup> Soon, faxing technology became a standard feature of personal computers and printers.<sup>13</sup> Congress's reexamination of fax marketing regulations resulted in the TCPA amendment, The Junk Fax Prevention Act.<sup>14</sup> The amendment passed quickly and quietly compared with previous telemarketing laws,<sup>15</sup> and unlike other consumer protection laws, the Junk Fax Prevention Act blossomed from the worries and needs of the business community instead of consumers.<sup>16</sup>

The Junk Fax Prevention Act essentially codifies an “established business relationship” (“EBR”) exception to the

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<sup>11</sup> See TCPA, *supra* note 7, § 2(8) (“The Constitution does not prohibit restrictions on commercial telemarketing solicitations.”); S. REP. NO. 102-178, at \*1971 (1991) (“The [Senate] Committee [on Commerce, Science and Transportation] believes that [the reported bill] is an example of a reasonable time, place, and manner restriction on speech, which is constitutional. . . . The Supreme Court has recognized the legitimacy of reasonable time, place, and manner restrictions on speech when the restrictions are not based on the content of the message being conveyed.”). For the view that government regulation of advertising inhibits freedom of speech, see RICHARD T. KAPLAR, *ADVERTISING RIGHTS: THE NEGLECTED FREEDOM* (The Media Institute 1991) and MICHAEL G. GARTNER, *ADVERTISING AND THE FIRST AMENDMENT* 57-60 (Twentieth Century Fund 1989).

<sup>12</sup> See, e.g., Judy Stark, *The New Condo Amenities Are Towering Ideas*, ST. PETERSBURG TIMES, July 2, 2005, at 6F (noting that condo business centers are no longer considered amenities to buyers because “[n]ow almost everyone owns a computer and a printer/scanner/fax”); Leslie Berkman & Paul Herrera, *Energy: Bigger Homes, Lifestyles Overshadow Conservation*, THE PRESS-ENTERPRISE, Oct. 23, 2005, at A1 (noting energy consumption in homes is increasing due in part to “home offices equipped with computers, printers and *fax machines*” (emphasis added)).

<sup>13</sup> See *infra* discussion in Part V.B. See also Sharon Crawford, *Faxing in Windows XP*, Oct. 21, 2002, [http://www.microsoft.com/windowsxp/using/setup/learnmore/crawford\\_02october21.msp](http://www.microsoft.com/windowsxp/using/setup/learnmore/crawford_02october21.msp) (explaining how to fax using Windows XP technology).

<sup>14</sup> S. REP. NO. 109-76, at 2 (2005) (discussing the background for enacting the Junk Fax Prevention Act).

<sup>15</sup> See *infra* discussion in Part IV.A on how quickly the bill passed. Nearly nine months passed between the House's introduction of its version of the TCPA and the signing of the TCPA into law. The Can-Spam Act took eight months to pass after its introduction. The Junk Fax Prevention Act took three months.

<sup>16</sup> S. REP. NO. 109-76, at 6 (explaining that legislation is needed to prevent “businesses [from being] subject to unforeseen and costly litigation unrelated to legitimate consumer protection aims” and citing “costs of training, making multiple contracts to obtain signatures providing consent, and obtaining permission for each fax machine when the recipients change location” as examples of business harms).

TCPA's blanket ban on faxed advertisements sent without permission.<sup>17</sup> A recipient has an EBR with a sender if the recipient currently interacts with or had previously interacted with the sender.<sup>18</sup> Based on this past or present interaction, it is inferred that the recipient has given the sender, as well as the sender's affiliates, permission to send faxed advertisements.<sup>19</sup> Congress, as part of the TCPA, originally created the exception to apply only to telephone solicitations. The Federal Communications Commission (FCC) later imputed the exception onto fax solicitations as part of its implementation of TCPA rules.<sup>20</sup>

The EBR exception thrived for more than a decade despite the fact that the exception as applied to faxes contravened Congress's intent for, and the express language of, the TCPA's fax provision.<sup>21</sup> In 2003, the FCC, recognizing this, planned to eliminate the exception it had erroneously created and announced new written consent requirements for unsolicited faxed advertisements.<sup>22</sup> Businesses balked at the elimination of the exception and heavily lobbied Congress,<sup>23</sup> which reversed the FCC's decision to eliminate the EBR by

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<sup>17</sup> *Id.* at 10.

<sup>18</sup> See 47 C.F.R. § 64.1200(f)(4) (2002) for definition of "established business relationship." It should be noted that the definition's use of "inquiry" and "application" are broad enough to include almost any interaction between a business and a consumer, regardless of whether money ever exchanges hands. For example, a consumer who calls to ask a question, and who does not ever purchase or transact business with the company, now has an established business relationship with the company, and the company may begin sending unsolicited faxed advertisements.

<sup>19</sup> See *infra* discussion in Part III.A.

<sup>20</sup> FCC, FCC-92-443, RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991 (1992), reprinted in 7 F.C.C.R. 8752, available at <http://www.fcc.gov/cgb/donotcall> [hereinafter 1992 FCC Memo].

<sup>21</sup> See *infra* discussion in Part III.B.

<sup>22</sup> 2003 FCC Memo, *supra* note 2, at 4.

<sup>23</sup> See, e.g., Press Release, Nat'l Assoc. of Prof'l Ins. Agents, Junk Fax Prevention Act Stalls in Congress (Dec. 14, 2004) (noting the association "will continue to lobby for the passage of a measure that achieves" the goal of restoring the established business relationship), available at <http://www.pianet.com/IssuesOffocus/OngoingIssues/privacy/12-14-04-2.htm>; *Public Policy News: Update—"Do-Not-Fax" Rule*, NEWSPAPER ASS'N OF AM., May 2005 (stating that a coalition of trade associations, including the Newspaper Association of America, petitioned the FCC to delay the elimination of the Fax EBR in order to allow Congress to pass legislation), available at <http://www.naa.org/Government-and-Legal/Government-Affairs/Public-Policy-News/NAA-Public-Policy-News-May-2005.aspx>. See also Bart T. Murphy, *Death of the EBR Exemption May be "Greatly Exaggerated,"* MODERN PRACTICE, November 2004 (noting that "several associations began lobbying efforts to restore the EBR exemption" in anticipation of the FCC's elimination), available at <http://practice.findlaw.com/tooltalk-1104.html>.

changing the EBR exception for faxed advertisements from an administrative ruling to statutory law.<sup>24</sup>

This Note argues that the Junk Fax Prevention Act fails in exactly what its title promises—namely, the prevention of junk faxes—by gravely undermining the strict prohibition against unsolicited fax marketing set out in its parent legislation, the TCPA.<sup>25</sup> Part II of this Note discusses the legislative background and purpose of the TCPA fax regulations. Part III details the creation of the TCPA’s various EBR exemptions and explains why the EBR exception for faxed advertisements (“Fax EBR”) should never have existed. Part IV examines the FCC’s decision to eliminate the Fax EBR and Congress’s response to this elimination by way of the Junk Fax Prevention Act. Part V argues that the Junk Fax Prevention Act fails to preserve the strong consumer protection set out in the TCPA, that modern faxing technology requires stricter telemarketing prohibitions, and that Congress should have given greater deference to the FCC’s decision to eliminate the Fax EBR. Part V further posits that an inadequate federal law will effectively weaken current state laws that implement a strict prohibition against sending unsolicited advertisements via fax, similar to the TCPA as originally implemented.<sup>26</sup> Finally, Part VI explains that Congress should reinstate the strict ban on junk faxes because other avenues of law, including future Congressional review, a national do-not-fax

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<sup>24</sup> S. REP. NO. 109-76, at 6 (2005) (“[T]he ‘Junk Fax Prevention Act of 2005’ specifically creates a statutory exception from the general prohibition on sending unsolicited advertisements if the fax is sent based on an EBR[.]”). One concern about this EBR codification is the weakening effect it will have on states with stricter fax marketing laws. See *infra* discussion in Part VI for California’s response to the Junk Fax Prevention Act.

<sup>25</sup> The “parent” aspect of the legislation takes on a double meaning when one considers that the Junk Fax Prevention Act, signed into law by President George W. Bush on July 9, 2005, has severely weakened the TCPA, signed into law by his father, President George H.W. Bush, on December 20, 1991. See *Law to Stop Junk Calls*, *NEWSDAY*, Dec. 21, 1991, at 9 (noting President George W. Bush signed new telemarketing law).

<sup>26</sup> The TCPA, and by extension, the Junk Fax Prevention Act, has no preemptive effect on state junk fax laws already in place that offer more protection than the TCPA, except the TCPA preempts certain technological requirements on telemarketing equipment. 47 U.S.C. § 227(e)(1) (“State law not preempted. . . . [N]othing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations.”). By contrast, the Can-Spam Act explicitly preempted all state email spam laws. Can-Spam Act, *supra* note 3, § 8 (“This Act supersedes any statute, regulation or rule of a State . . . that expressly regulates the use of electronic mail to send commercial messages . . .”). See *infra* discussion in Part V.C on how a weaker interstate fax rule effectively weakens stronger intrastate fax laws.

registry and state legislature response, would provide ineffective protection against consumer costs.

## II. THE TELEPHONE CONSUMER PROTECTION ACT OF 1991

### A. *Brief History of the TCPA*

The TCPA was an extensive, ambitious amendment to the Communications Act of 1934<sup>27</sup> that regulated the rapidly expanding and increasingly automated telemarketing industry.<sup>28</sup> The Senate and House Reports addressing the TCPA<sup>29</sup> emphasized the need to “protect the privacy interest of residential telephone subscribers,” as well as to facilitate interstate commerce.<sup>30</sup> Congress also acknowledged its duty to consider the telemarketers’ interest in freedom of commercial speech.<sup>31</sup>

What troubled Congress was not limited to the nuisances of a solicitor phoning too late in the evening or interrupting dinner with tempting offers of magazine discounts. In fact, Congress reserved the strictest provisions for those types of human-less telemarketing practices that made it difficult for consumers to protest, such as automated dialing systems, pre-recorded messages and facsimile transmissions.<sup>32</sup> The TCPA’s legislative history makes a clear

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<sup>27</sup> Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.) [hereinafter 1934 Communications Act].

<sup>28</sup> S. REP. NO. 102-178, at 1969 (1991) (noting an increasing number of consumer telemarketing complaints due to “the increasing number of telemarketing firms in the business of placing telephone calls, and the advance of technology which makes automated phone calls more cost-effective”).

<sup>29</sup> The finished TCPA was a combination of several bills introduced into Congress, including S. 1462 (Automated Telephone Consumer Protection Act), S. 1410 (Telephone Advertising Consumer Rights Act) and H.R. 1304 (Telephone Advertising Consumer Rights Act).

<sup>30</sup> S. REP. NO. 102-178, at 1968. Specifically, residential and business subscribers were concerned about automatic dialers tying up lines and preventing any outgoing calls, as well as automated calls that did not disconnect from the line even after the called party hung up the phone. *Id.*

<sup>31</sup> *See id.* at 1973 (“These regulations are consistent with the constitutional guarantee of free speech.”). *See also* “Findings” in H.R. REP. NO. 102-317, at \*2 (1991) (“Individuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.”).

<sup>32</sup> *See* S. REP. NO. 102-178, at 1972 (“In addition, it is clear that automated telephone calls that deliver an artificial or prerecorded voice message are more of a nuisance and a greater invasion of privacy than calls placed by ‘live’ persons.”). In fact, an earlier version of the TCPA was titled “Automated Telephone Consumer Protection Act.” *Id.* at 1970. This distinction between these two types of telemarketing can be further inferred from that fact that the Direct Marketing Association and other groups

distinction between live in-person calls and new technologies that rendered human solicitors unnecessary.<sup>33</sup>

At the time of the TCPA's enactment, more than forty states had implemented or were in the process of implementing legislation restricting or flat-out prohibiting telemarketing activity within the state, but these laws could not reach interstate telephone calls or faxes.<sup>34</sup> The TCPA was created in part to address this gap in jurisdiction.<sup>35</sup> In the case of a TCPA provision conflicting with a state telemarketing law, the stricter law would prevail.<sup>36</sup>

The FCC opposed the TCPA, seeing no need for sweeping federal legislation regulating telemarketing activity.<sup>37</sup> The agency argued that it preferred handling unsolicited marketing calls with "continued regulatory scrutiny and monitoring" without legislation.<sup>38</sup> Congress, possibly skeptical of this contention because the FCC had previously declined to regulate unsolicited calls in 1980 and 1986,<sup>39</sup> ultimately passed the TCPA. In the final bill, Congress included a provision that designated the FCC as a major interpreter of the TCPA.<sup>40</sup> In this role, the FCC would later

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representing telemarketing companies that did not use automatic dialers or other equipment to make automated phone calls did not object to legislation targeting only the automated telemarketing industry. *Id.* at 1971.

<sup>33</sup> See H.R. REP. NO. 102-317, at \*10. There was a special concern that certain automated systems endangered public safety by tying up phone lines of hospitals, emergency responders, and law enforcement agencies. *Id.* See also S. REP. NO. 102-178, at 1972 ("[I]t is legitimate and consistent with the constitution to impose greater restrictions on automated calls than on calls placed by 'live' persons.").

<sup>34</sup> S. REP. NO. 102-178, at 1970.

<sup>35</sup> *Id.* at 1970 ("These [state] measures have had limited effect, however, because States do not have jurisdiction over interstate calls. Many States have expressed a desire for Federal legislation to regulate interstate telemarketing calls to supplement their restrictions on intrastate calls.").

<sup>36</sup> 47 U.S.C. § 227(e) (2000). Although the language of the preemption provision addresses only preemption of state laws affecting intrastate faxes that are less restrictive than the TCPA, the question has recently been raised whether states would have the ability to create a state law affecting both intrastate faxes and interstate faxes that cross their state lines. See *infra* Part VI for discussion of California's attempt to create a more restrictive junk fax law than the Junk Fax Prevention Act that would affect faxes entering or leaving California.

<sup>37</sup> S. REP. NO. 102-178, at 1970 (quoting then-FCC Chairman Alfred C. Sikes).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> 47 U.S.C. § 227(b)(2) (ordering the FCC "to prescribe regulations to implement the requirements of" TCPA provisions).

cause great controversy over its interpretation of the TCPA fax provision.<sup>41</sup>

*B. The TCPA Fax Provision*

While the majority of the TCPA addressed the restriction of certain telephone marketing activities, the TCPA also prohibited the faxing of any unsolicited advertisements without “prior express invitation or permission.”<sup>42</sup> The statute provided no definition of prior express invitation or permission, but the Congressional reports put the responsibility of determining the definition of the phrase “invited or given permission” on the telemarketers.<sup>43</sup> No exceptions were carved out for unsolicited faxed advertisements in the statutory language—prior invitation or permission was a must.<sup>44</sup>

The law allowed<sup>45</sup> consumers to bring a private action in state court against violators of the TCPA fax provision, provided state laws or rules did not contradict such a right of action.<sup>46</sup> State officials had the option to bring civil actions in federal court in the name of their citizens.<sup>47</sup> If the recipient of

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<sup>41</sup> See *infra* discussion in Part III-IV.

<sup>42</sup> 47 U.S.C. § 227(a)(4).

<sup>43</sup> S. REP. NO. 102-178, at 1975-76 (“While telemarketers will be responsible for determining whether a potential recipient of an advertisement, in fact, has invited or given permission to receive such fax messages, such a responsibility, is the minimum necessary to protect unwilling recipients from receiving fax messages that are detrimental to the owner’s uses of his or her fax machine.”). Additionally, 47 U.S.C. § 227(d) creates minimum technical identification standards for fax machines, including fax number identification and date/time stamps, but these standards are not relevant to this Note because they affect manufacturers of the machines, not advertisers who use the machines.

<sup>44</sup> See generally 47 U.S.C. § 227.

<sup>45</sup> Although this section incorporates past tense language because it is describing the TCPA at the time of enactment, the Junk Fax Prevention Act had no effect on the penalty and cause of action provisions, which remain effective today. See generally Junk Fax Prevention Act, *supra* note 5.

<sup>46</sup> 47 U.S.C. § 227(b)(3) (allowing for an action “if otherwise permitted by the laws or rules of court of a State”). There have been many battles over the permission provision as to whether it meant states had to officially opt-in legislation recognizing the TCPA’s authority through an affirmative action, whether states had to officially opt-out to reject the TCPA, or whether the language was merely an acknowledgement of the states’ ability to decide how their courts would handle TCPA claims. Courts in early cases chose to adopt an “opt-out” approach, interpreting a state legislature’s silence on the TCPA as acceptance, while courts in more recent cases have embraced the “acknowledgement” meaning, arguing that such a meaning is the only way to maintain the balance between federal and state government. For in-depth summaries of the three interpretations, see *Accounting Outsourcing, L.L.C. v. Verizon Wireless Pers. Commc’ns*, 329 F. Supp. 2d 789, 795-99 (M.D. La. 2004) and *Chair King, Inc. v. GTE Mobilenet of Houston*, 135 S.W.3d 365, 374-76 (Tex. App. 2004).

<sup>47</sup> 47 U.S.C. § 227(f)(1).

an unsolicited faxed advertisement succeeded in showing a TCPA violation, the sender of the advertisement paid statutory damages: actual damages or \$500 *per fax*.<sup>48</sup> The penalty increased to \$1500 *per fax* for those individuals or businesses willfully or knowingly sending unsolicited advertisements.<sup>49</sup> Again, at the time of enactment, there were no exceptions for the fax provision, so, theoretically, if a marketer mistakenly dialed the wrong fax number and transmitted an advertisement to an unintended consumer, the consumer could bring an action for \$500.<sup>50</sup>

The two main reasons set out in the Congressional reports for such a strict prohibition against fax marketing<sup>51</sup>

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<sup>48</sup> *Id.* § 227(b)(3)(A)-(C).

<sup>49</sup> *Id.* § 227(b)(3). This statutory per-fax fine for willful violations can compound into an extremely expensive judgment if a company knowingly initiates risky advertising methods. For example, a Georgia judge recently entered a \$12 million verdict against a Hooters restaurant for unsolicited faxes. Eric Williamson, *Hooters Hit with \$11.9 Million Fee*, AUGUSTA CHRON., May 1, 2001, at A07. Hooters reportedly settled the case for \$9 million. Jeremiah Marquez, *Court Rulings, Lawsuits Threaten to Unplug Junk Fax Industry*, DETROIT NEWS/ASSOCIATED PRESS, Sept. 6, 2003 (noting that the Hooters award “was later reduced to about \$9 million through a settlement”). Fax.com, a third-party fax blasting company that sent huge volumes of faxed advertisements on behalf of companies, received the largest FCC-proposed fine in TCPA history—\$5.37 million, or \$11,000 for each of the 489 fax violations. *In re Fax.com, Inc.*, File No. EB-02-TC-120 (FCC 2002) (notice of apparent liability for forfeiture).

<sup>50</sup> As consumer knowledge spread of the TCPA fax provision throughout the late '90s, there were a significant number of class action suits. See Craig Anderson, *Executive Fights Faxes, One at a Time*, L.A. DAILY J., June 6, 2005, at 3; Lisa Napoli, *Crusaders Against Junk Faxes Brandish Lawsuits*, N.Y. TIMES, Dec. 16, 2003, at C1. See also <http://www.junkfaxorg.com> for information on recent and current class action cases. As a result of the possible immense fines, there have been many challenges by defendants over the eligibility of class action suits for TCPA violations. Compare *Kaufman v. ACS Sys.*, 2 Cal. Rptr. 3d 296, 327 (Ct. App. 2003) (holding class action for TCPA fax violation permissible), and *Hooters of Augusta, Inc. v. Nicholson*, 537 S.E.2d 468, 472 (Ga. Ct. App. 2000) (holding that class certification for a TCPA violation was proper), with *Carnett's Inc. v. Hammond*, 610 S.E.2d 529, 532 (Ga. 2005) (denying class certification for lack of commonality).

<sup>51</sup> Most of the TCPA congressional reports are dedicated to telephone issues. Very little space or emphasis is given to the fax provisions. In the official findings of the TCPA, “faxes” are not specifically mentioned. See TCPA, *supra* note 7, § 2. Although not acknowledging faxes in the opening findings, the TCPA drafters noted in a legislative report that there were “tens of thousands of unsolicited messages per week” being sent to “facsimile machines across the country.” H.R. REP. NO. 102-317, at \*6-7 (1991). This is not exactly a compelling number when compared with the fact that nearly 30 billion pages of faxes were being sent at the time of enactment. *Id.* at \*8. It may be the case, however, that unsolicited advertisement statistics were not yet compelling because fax marketing was still a new business. See *Destination Ventures, LTD v. FCC*, 844 F. Supp. 632, 635 (D. Or. 1994), *aff'd*, 46 F.3d 54, 57 (9th Cir. 1995) (noting that the lack of “specific congressional concern for unsolicited fax advertising . . . may have more to do with the unprecedented medium of the facsimile rather than any lack of a substantial interest in the exploitation of that medium”). Clearly the explosive growth of third-party fax blasting companies in the mid-'90s

were the prevention of cost-shifting and invasion of privacy.<sup>52</sup> The cost-shifting theory is by far the strongest argument for a complete ban on unsolicited faxed advertisements.<sup>53</sup> Every time an unsolicited faxed advertisement is sent to a recipient, the recipient's machine suffers wear and tear, and the recipient is left footing the bill for paper and ink.<sup>54</sup> The cost-shifting justification for the fax provision is sound due to the unique architecture of faxing technology, of which paper and ink are essential components.<sup>55</sup>

In contrast, the invasion of privacy reasoning applies to all types of telemarketing, no matter the specific technological

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justified Congress's concern over unsolicited fax advertisements, especially as the fax machine enjoyed more regular residential use. Julie Harnett, *Host of Fresh Applications—Advances in Fax Systems*, FIN. TIMES, Dec. 6, 1995, at 6 (mentioning "the growth of fax broadcasting which is able to exploit both the unlimited database capabilities of a computer to target . . . potential customers around the world who have access to a standard fax machine").

<sup>52</sup> H.R. REP. NO. 102-317, at \*10.

<sup>53</sup> Courts also supported the view that the cost-shifting feature of fax technology allowed for a complete ban on faxed advertisements sent without permission, even in light of the limited First Amendment protection allowed for commercial speech. The complete ban on unsolicited fax advertisements, as opposed to the time, place, and manner regulation on telephone solicitations, led to many First Amendment challenges in courts. *See, e.g.*, *Mo. ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 659 (8th Cir. 2003) (finding a substantial government interest in preventing cost-shifting even if it means "some consumers will not receive unsolicited advertisements they might have appreciated"); *Kaufman*, 2 Cal. Rptr. 3d at 317 (finding the government's substantial interest in prevention of cost-shifting and allowing fax machine owners to control their equipment justified the commercial speech regulations); *Destination Ventures Ltd. v. FCC*, 46 F.3d 54, 56 (9th Cir. 1995) (no violation of First Amendment); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1169 (S.D. Ind. 1997) (same). Courts also noted other avenues were open to advertisers other than faxes sent without consent. *See, e.g.*, *Kaufman*, 2 Cal. Rptr. 3d at 317 ("[T]he TCPA does not prevent advertisers from marketing their goods and services in a myriad of ways: television, radio, newspapers, magazines, billboards, mailings, the Yellow Pages, the Internet, and telephone calls as permitted by law, and faxes to consenting consumers.").

There were other unsuccessful constitutional challenges, including the Tenth Amendment, the Commerce Clause, the Fourteenth Amendment's Equal Protection Clause and the Fifth Amendment's Due Process. *See, e.g.*, *Int'l Sci. & Tech. Inst. v. Inacom Comm'ns, Inc.*, 106 F.3d 1146, 1156-58 (4th Cir. 1997) (holding that the TCPA's exclusive state court jurisdiction violated neither the Tenth Amendment nor the "equal protection component of the Fifth Amendment's Due Process Clause"); *Kenro, Inc.*, 92 F. Supp. at 1166 (holding that the \$500 per fax statutory fine is not severe or oppressive enough to violate Due Process); *Chair King, Inc. v. GTE Mobilenet of Houston, Inc.*, 135 S.W.3d 365, 385 (Tex. App. 2004) (holding the TCPA did not exceed Congress's Commerce Clause power); *Kaufman*, 2 Cal. Rptr. 3d at 325 (rejecting advertiser defendants' "void-for-vagueness" arguments).

<sup>54</sup> *See* H.R. REP. NO. 102-317, at \*10. *See also infra* discussion in Part V.B.

<sup>55</sup> There has been an argument that modern fax computer programs which allow for faxes to arrive directly to a computer desktop instead of printing automatically at a fax machine weaken the cost-shifting theory. *See infra* discussion in Part V.B.

features, and thus, is Congress's threshold argument for the TCPA's enactment as a whole.<sup>56</sup> When considering the TCPA as a whole, Congress seemed to view the telemarketing industry's invasion of privacy as an attack of a fundamental right—the right not to receive unexpected, intrusive phone calls from solicitors.<sup>57</sup> When presenting the invasion of privacy issue as it applied specifically to the fax provision, however, Congress viewed the invasion of privacy in a slightly different sense. The privacy right thought to be infringed by unsolicited junk faxes was that of the recipient to use and control his or her own machine. By protecting this right, Congress sought to prevent junk faxes from impeding or prohibiting the transmission of consumers' legitimate business faxes.<sup>58</sup> Hence, even the invasion of privacy argument for prohibiting unsolicited faxed advertisements had an underlying economic theme.

That is not to say the “fundamental right” privacy interest would not apply to the fax provisions, even if Congress did not specifically address them as such in the legislative history. The same fundamental right to privacy interest Congress attaches in its report to automated telephone calls—not being able to interact with the caller or not allowing the caller to feel the frustration of the called party<sup>59</sup>—can be easily applied to unsolicited faxed advertisements.<sup>60</sup> Further, several courts later interpreting the policies behind the fax provisions of the TCPA supported the idea that unsolicited faxes were invasions of privacy, apart from impeding commerce.<sup>61</sup>

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<sup>56</sup> S. REP. NO. 102-178, at 1969 (1991) (citing the first purpose of the bill is to “protect the privacy interests”).

<sup>57</sup> *Id.* at 1977 (“The Supreme Court has recognized explicitly that the right to privacy is founded in the Constitution, and telemarketers who place telephone calls to the home can be considered ‘intruders’ upon that privacy.”).

<sup>58</sup> H.R. REP. NO. 102-317, at \*10 (noting that an unsolicited faxed advertisement “occupies the recipient’s [sic] facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax”).

<sup>59</sup> S. REP. NO. 102-178, at 1972 n.3 (citing comments from a consumer advocate that “slamming a phone down on a computer just does not have the same sense of release” compared to hanging up on a live in-person operator).

<sup>60</sup> *See Mo. ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 657 n.5 (8th Cir. 2003) (“Artificial or prerecorded messages, like a faxed advertisement, were believed to have heightened intrusiveness because they are unable to interact with the customer except in preprogrammed ways.”) (emphasis added) (internal citations omitted).

<sup>61</sup> *See, e.g., Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network*, 401 F.3d 876, 881-82 (8th Cir. 2005) (holding unsolicited faxes were an “injury” within the meaning of an insurance contract because they invaded insured’s privacy); *Adler v. Vision Lab Telecomms., Inc.*, 393 F. Supp. 2d 35, 41-42 (D.D.C. 2005) (suggesting that a recipient who continually sends unsolicited faxes might be subject to a tort invasion of

Thus, Congress had two distinct policy reasons supporting the strict anti-junk fax provisions: preventing unfair cost-shifting from businesses to consumers and limiting invasion of consumer privacy. As this Note discusses in Part V, these two goals complement the history and modern development of consumer protection law.

### III. THE ESTABLISHED BUSINESS RELATIONSHIP EXCEPTIONS

#### A. *Creation of the EBR Exception*

There are three “established business relationship” (“EBR”) exceptions related to the TCPA, each with its own distinct origin. There is the telephone solicitation EBR exception (“Telephone EBR”) that originates from the TCPA statute language,<sup>62</sup> the artificial and pre-recorded telephone solicitation EBR exception (“Artificial/Pre-Recorded EBR”) that derives from an FCC memo,<sup>63</sup> and the Fax EBR that derives from a brief footnote in an FCC memo.<sup>64</sup> Each will be discussed in turn.

The “established business relationship” made its initial appearance in an early House of Representatives version of the TCPA as part of the definition of “unsolicited advertisement.” If that version had passed, the EBR would have been an exception for advertisements made via telephone *and* fax.<sup>65</sup> The finished version of the TCPA, however, explicitly limited the EBR exception to telephone solicitations only:

The term “telephone solicitation” means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such terms do not include a call or message

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privacy action); *Minn. v. Sunbelt Commc'ns & Mktg.*, 282 F. Supp. 2d 976, 979 (D. Minn. 2002) (noting that a plaintiff who kept a fax machine at home for personal and business use “received fax advertisements between 4:15 a.m. and 7:15 a.m., intruding upon her privacy”); *Chair King, Inc. v. GTE Mobilenet of Houston, Inc.*, 135 S.W.3d 365, 395 (Tex. App. 2004) (“[S]ending unauthorized fax advertising may constitute invasion of privacy in some circumstances.”).

<sup>62</sup> 47 U.S.C. § 227(a)(3) (2000).

<sup>63</sup> 1992 FCC Memo, *supra* note 20, at 18-20.

<sup>64</sup> *Id.* at 28 n.87.

<sup>65</sup> This is because “unsolicited advertisement” was a term that appeared in the fax provision. As originally enacted, the fax provision did not prohibit all faxed advertisements from being sent; it prohibited the sending of an *unsolicited* advertisement without prior express invitation or permission. See *supra* note 8 and accompanying text.

- (A) to any person with that person's prior express invitation or permission,
- (B) to any person with whom the caller has an established business relationship, or
- (C) by a tax exempt nonprofit organization.<sup>66</sup>

Congress did not define "established business relationship" in the statute.<sup>67</sup> The FCC subsequently created a definition of "established business relationship" in its initial 1992 rulemaking memo:

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 residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase, or transaction by the residential subscriber regarding products or services offered by such person or entity, and relationship has not been previously terminated by either party.<sup>68</sup>

The Telephone EBR was the only reference to an established business relationship in the TCPA when it was signed into law.<sup>69</sup>

By contrast, the Artificial/Pre-Recorded EBR did not originate in the TCPA language.<sup>70</sup> The TCPA language did, however, order the FCC to implement rules in conjunction with the TCPA provisions on calls using artificial or pre-recorded voices.<sup>71</sup> Specifically, the FCC had to consider two possible exemption groups to the prohibition against pre-recorded calls: (1) calls that were not made for a commercial purpose and (2) calls that were made for a commercial purpose but that did not adversely affect the privacy rights the TCPA was intended to protect and did not include the transmission of any unsolicited

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<sup>66</sup> 47 U.S.C. § 227(a)(3).

<sup>67</sup> See S. REP. NO. 102-178, at 1975-76 (1991).

<sup>68</sup> 1992 FCC Memo, *supra* note 20, at 42. The FCC specifically rejected a company-specific list as part of the EBR definition (such as allowing "public utilities" to be automatically exempted) and rather adopted a broad enough definition to include most businesses. *Id.* at 19-20. The FCC also decided not to include a time limit for the expiration of an EBR. *Id.* at 20. Further, the FCC rejected narrowing the EBR to a current business relationship, thereby making a prior business relationship a qualifying EBR. *Id.* at 20. An EBR, however, ceased to exist at the request of the consumer. *Id.* at 20. The broad language of this definition is further discussed *infra* in Part V.

<sup>69</sup> See generally TCPA, *supra* note 7.

<sup>70</sup> 1992 FCC Memo, *supra* note 20, at 18-20.

<sup>71</sup> 47 U.S.C. § 227(b)(2).

advertisement.<sup>72</sup> Based on these orders, in its initial 1992 rule-making TCPA memo, the FCC determined that it was feasible to extend the established business relationship exemption to pre-recorded commercial calls because the exemption met Congress's necessary criteria.<sup>73</sup> According to the FCC's analysis, using pre-recorded calls to solicit someone with whom one has a prior or existing business relationship does not adversely affect privacy interests of the called party.<sup>74</sup> The FCC further determined pre-recorded commercial calls based on an established business relationship could not include an *unsolicited* advertisement because the advertisement "can be deemed to be invited or permitted by a subscriber in light of the business relationship."<sup>75</sup> Equating an established business relationship with permission to send advertisements seems a wrong conclusion, however, given that the statutory provision defining telephone solicitation presents an established business relationship and prior express permission as two distinct exemptions.<sup>76</sup>

The Fax EBR's origin is much humbler by comparison; it came to life in a footnote of the same 1992 FCC memo.<sup>77</sup> The only explanation for the FCC extending its already extended exception to include unsolicited faxed advertisements is a reference to its previous—and, arguably, erroneous—discussion involving pre-recorded phone calls.<sup>78</sup> Ironically, in the same footnote, the sentence before the one announcing the Fax EBR states, "In banning telephone facsimile advertisements, the TCPA leaves the Commission *without discretion* to create exemptions from or limit the effects of the prohibition . . . ."<sup>79</sup> Nevertheless, for almost a decade, the courts fully embraced

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<sup>72</sup> *Id.* § 227(b)(2)(B)(i)-(ii).

<sup>73</sup> 1992 FCC Memo, *supra* note 20, at 19.

<sup>74</sup> *Id.* The FCC memo makes no further explanation of exactly how this does not constitute an invasion of privacy. *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> 47 U.S.C. § 227(a)(3)(A)-(B) ("Telephone solicitation . . . does not include a call or message . . . to any person with that person's prior express invitation or permission" or "to any person with whom the caller has an established business relationship . . .").

<sup>77</sup> 1992 FCC Memo, *supra* note 20, at 28 n.87 ("We note, however, that facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient.").

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* (emphasis added).

the FCC-created Fax EBR as a legitimate exception to the TCPA's ban on unsolicited faxed advertisements.<sup>80</sup>

*B. Why the Fax EBR Should Have Never Existed*

The FCC should have never created the Fax EBR because it was never Congress's intent to include one. This is clear for two reasons. First, the TCPA legislative history explicitly rejected a Fax EBR.<sup>81</sup> Second, the FCC-created Fax EBR is contrary to the language of the TCPA.<sup>82</sup>

The legislative history supports the argument that Congress never intended to create a Fax EBR. Congress specifically rejected adopting an EBR exception as part of the definition of unsolicited advertisement, which would affect both telephones and faxes, and, instead, chose to limit its use to telephone solicitations only.<sup>83</sup>

Second, the Fax EBR is contrary to the language of the TCPA. The TCPA prohibits using a fax machine to send an unsolicited advertisement.<sup>84</sup> The definition of unsolicited advertisement is one that is "without that person's prior *express* invitation or permission."<sup>85</sup> Therefore, the FCC's conclusion that the Fax EBR is sufficient because it indicates an inferred or implied permission contradicts Congress's requirement that the permission be "express." Further evidence of Congress's intent not to create any exemptions for its strict prohibition against unsolicited faxed advertisements is the fact that it did not include language asking the Commission to consider implementing rules regarding one, as it had for pre-recorded calls.<sup>86</sup>

Two recent court cases raised this express-inferred issue as well. In *Carnett's, Inc. v. Hammond*,<sup>87</sup> plaintiff Michelle Hammond brought a class action suit in Georgia against a car wash company, which had hired an ad agent to fax 73,500

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<sup>80</sup> See *Accounting Outsourcing, L.L.C. v. Verizon Wireless Pers. Commc'ns, L.P.*, 329 F. Supp. 2d 789, 808 (M.D. La. 2004) (noting the FCC's "longstanding interpretation" of its established business relationship exception lasted more than ten years); *McGarry v. Cingular Wireless, LLC*, 599 S.E.2d 34, 36-37 (Ga. App. 2004) (noting the long history of the FCC's established business relationship exception).

<sup>81</sup> See *supra* notes 65-69 and accompanying text.

<sup>82</sup> See *infra* notes 86-101 and accompanying text.

<sup>83</sup> See *supra* notes 65-69 and accompanying text.

<sup>84</sup> 47 U.S.C. § 227(b)(1)(B) (2000).

<sup>85</sup> *Id.* § 227(a)(1)(4) (emphasis added).

<sup>86</sup> See *supra* notes 70-76 and accompanying text.

<sup>87</sup> 610 S.E.2d 529 (Ga. 2005).

unsolicited advertisements to Atlanta-area residents, including Hammond.<sup>88</sup> The Georgia Supreme Court reversed the appellate court's finding that there was no evidence that the car wash company had express permission to fax the recipients.<sup>89</sup> The Georgia Supreme Court disagreed regarding the lack of permission, citing the possibility that some of the recipients had an "established business relationship" with the local car wash.<sup>90</sup> Hammond argued that the established business relationship exemption did not exist because it was "contrary to the clear statutory language of the TCPA."<sup>91</sup> The court, however, said it had an obligation to accept FCC regulations as valid.<sup>92</sup>

In *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*,<sup>93</sup> a Texas appellate court appeared more open to the language argument against allowing a Fax EBR exemption. In *Chair King*, the plaintiff was a customer of the defendant, who had sent unsolicited faxes to the plaintiff.<sup>94</sup> The court openly questioned the soundness of the FCC's established business relationship.<sup>95</sup> It noted that deeming permission on an inference seemed to conflict with the TCPA's requirement of express permission.<sup>96</sup> The court continued by forcefully stating that "[c]haracterizing permission granted by implication as 'express' runs afoul of the plain meaning of the word."<sup>97</sup> Ultimately, the court determined plaintiff had raised a genuine issue of material fact as to whether he gave prior express invitation or permission.<sup>98</sup>

Finally, the TCPA definition of telephone solicitation offers a choice between an established business relationship and express permission.<sup>99</sup> This statutory distinction shows that Congress did not see an established business relationship and permission as interrelated options.<sup>100</sup> Thus, the legislative

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<sup>88</sup> *Id.* at 529-30.

<sup>89</sup> *Id.* at 531.

<sup>90</sup> *Id.* at 532.

<sup>91</sup> *Id.* at 531.

<sup>92</sup> *Carnett's, Inc.*, 610 S.E.2d at 531.

<sup>93</sup> 135 S.W.3d 365 (Tex. App. 2004).

<sup>94</sup> *Id.* at 370.

<sup>95</sup> *Id.* at 394.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> 47 U.S.C. § 227(a)(3) (2000).

<sup>100</sup> *Id.* See *supra* discussion in Part III.A.

history and language of the TCPA support the argument that the FCC erroneously created the Fax EBR. It was the distinction between express and inferred permission, coupled with continuing consumer complaints about cost and privacy, that persuaded the FCC to eliminate the Fax EBR more than a decade after the agency had created it in a memo footnote.<sup>101</sup>

#### IV. THE JUNK FAX PREVENTION ACT OF 2005 LEGITIMIZES THE FAX EBR EXCEPTION

##### A. *History and Passing of the Junk Fax Prevention Act of 2005*

In July 2003, the FCC released a sweeping 164-page study on the TCPA rules it had enacted during the past decade.<sup>102</sup> As part of this overhaul, in addition to announcing plans to implement a national do-not-call registry, the FCC reversed its stance on the Fax EBR it created in its 1992 initial rule-making memo.<sup>103</sup> In making this decision, the FCC emphasized that it wished to prohibit cost-shifting from the advertiser to the consumer, as well as to limit the intrusiveness of unsolicited faxed advertisements.<sup>104</sup> In particular, the FCC found that consumers paid out of pocket not only for wasted ink and paper but also for lost labor costs.<sup>105</sup> In this same memo, the FCC maintained the Telephone EBR because it did not impose the same type of costs as faxing technology. The FCC, however, decided to put a time limit on the Telephone EBR, ruling that a Telephone EBR expires eighteen months after the last purchase or three months after a consumer's last inquiry about a product.<sup>106</sup> In support of narrowing the Telephone EBR definition, the FCC cited "confused and even frustrated"

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<sup>101</sup> 2003 FCC Memo, *supra* note 2, at 112-15.

<sup>102</sup> See generally 2003 FCC Memo, *supra* note 2.

<sup>103</sup> *Id.* at 4.

<sup>104</sup> *Id.* at 111-12 (noting consumers' additional burden of "time spent reading and disposing of faxes, the time the machine is printing an advertisement and is not operational for other purposes, and the intrusiveness of faxes transmitted at inconvenient times, including in the middle of the night"). One court rejected a defendant's argument that plaintiff's invasion of privacy claim should fail because plaintiff should have turned his fax machine off at night to avoid interruptions. *Adler v. Vision Lab Telecomms., Inc.*, 393 F. Supp. 2d 35, 42 n.11 (D.D.C. 2005).

<sup>105</sup> 2003 FCC Memo, *supra* note 2, at 111-12 (noting time spent collecting and sorting faxes increases labor costs).

<sup>106</sup> *Id.* at 65.

consumers who receive phone calls from companies they have not contacted or done business with for many years.<sup>107</sup>

When the FCC reported the elimination of the Fax EBR, it announced that “prior express invitation or permission” must be shown through a written, signed statement that lists the fax number to which the consent refers.<sup>108</sup> In other words, every business that wanted to engage in sending unsolicited faxed advertisements would need to collect signed, written consent before beginning any fax marketing campaign. The elimination of the Fax EBR exemption was set to take effect on August 25, 2003—just thirty days after the FCC’s rules first appeared in the Federal Register.<sup>109</sup>

Understandably, members of the business community were concerned about the cost and time it would take to collect signed, written consent. In response, the FCC delayed the implementation of the Fax EBR elimination until January 1, 2005 to allow businesses ample time to adjust to the new regulations.<sup>110</sup> By the time January 1, 2005 arrived, trade organizations had begun to lobby Congress, which started work on what would later pass as the Junk Fax Prevention Act.<sup>111</sup> In light of this impending legislation, the FCC agreed, once more, to extend the Fax EBR elimination to July 1, 2005.<sup>112</sup>

In early April 2005, Representative Gordon Smith (D-OR) introduced the Junk Fax Prevention Act to the Senate, and the Senate then referred the bill to the Committee on Commerce, Science, and Transportation.<sup>113</sup> With the FCC’s elimination of the Fax EBR and its rule of signed, written consent set to take effect on July 1, 2005, the Junk Fax Prevention Act earned Senate and House approval at lightning

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 112. Interestingly, Congress specifically rejected a written consent requirement for “prior express consent” in relation to automated telephone calls in the TCPA legislative history. S. REP. NO. 102-178, at 1971 (1991) (“[T]he reported bill does not include the requirement included in the bill as introduced the requirement that any consent to receiving an automated call be in writing.”).

<sup>109</sup> 2003 FCC Memo, *supra* note 2, at 128 S. REP. NO. 109-76, at 4 (2005).

<sup>110</sup> FCC, FCC 03-208, ORDER ON RECONSIDERATION, RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991 3 (2003), reprinted in 68 Fed. Reg. 50,978 (Aug. 18, 2003).

<sup>111</sup> Effective Date Delayed, 69 Fed. Reg. 62,816 (Oct. 28, 2004).

<sup>112</sup> *Id.* (“[W]e believe the public interest would best be served by delaying the effective date of the written consent requirement for six months to allow Congress to act.”).

<sup>113</sup> S. REP. NO. 109-76, at 7.

speed.<sup>114</sup> In fact, the House—which had a heavy hand in shaping the original TCPA legislation<sup>115</sup>—did not meaningfully debate any aspect of the Junk Fax Prevention Act.<sup>116</sup> The House introduced and passed the bill by voice vote in less than a half-hour.<sup>117</sup> Despite the House’s hurried efforts to meet the FCC’s July 1 deadline, the bill had yet to be signed by President George W. Bush (and thus was still not law), so the FCC delayed the effective date—again—from July 1, 2005 until January 9, 2006.<sup>118</sup> Finally, President George W. Bush signed the Junk Fax Prevention Act on July 9, 2005, thus amending and undermining the extensive consumer protection legislation signed by his father, George H.W. Bush.<sup>119</sup>

*B. Congress’s New Version of “Established Business Relationship”—The Junk Fax Prevention Act of 2005’s New Consent Requirements*

The Junk Fax Prevention Act’s main effect is to make the Fax EBR a statutory exemption against the sending of unsolicited faxed advertisements.<sup>120</sup> The Junk Fax Prevention Act’s statutory definition of Fax EBR reverts to the broad definition found in the 1992 FCC memo.<sup>121</sup> Congress explicitly did not adopt the 2003 revised Telephone EBR, which included a time limit on the established business relationship.<sup>122</sup> But

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<sup>114</sup> For a summary of the bill’s history on the Library of Congress’s website, visit <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN00714:@@X>.

<sup>115</sup> The House had introduced one of the bills incorporated into the final TCPA. See *supra* note 29 and accompanying text.

<sup>116</sup> See generally 151 CONG. REC. H5262-65 (daily ed. June 28, 2005). Only the bill’s three co-sponsors spoke about the Junk Fax Prevention Act. No senator expressed dissenting or critical opinions. *Id.* The House did have a more active role in a previous Fax EBR bill in 2004 that failed to become law. *Id.* at H5264.

<sup>117</sup> *Id.* at H5261-67 (recording the bill’s passing between 10:30 a.m. and 11:00 a.m. on June 28, 2005). This was just two days before the effective date of the FCC’s elimination of the Fax EBR. See *supra* notes 111-12.

<sup>118</sup> Effective Date Delayed, 70 Fed. Reg. 37,705 (June 30, 2005). The Junk Fax Prevention Act of 2005 would pass just nine days after this announcement.

<sup>119</sup> *President Signs Junk Fax Prevention Act of 2005*, FED. INFO. AND NEWS DISPATCH, July 11, 2005.

<sup>120</sup> S. REP. NO. 109-76, at 1 (2005) (citing its first purpose as to “[c]reate a limited statutory exception” for Fax EBRs).

<sup>121</sup> Junk Fax Prevention Act, *supra* note 5, § 2(b) (ordering the definition of established business relationship to revert back to the meaning before the one enacted by the 2003 FCC Memo).

<sup>122</sup> S. REP. NO. 109-76, at 10 (“[T]his provision would specifically exclude the 18/3 time limits that are in the current definition of ‘established business relationship’ in the C.F.R. . . . Therefore, the effect would be to reinstate the junk fax rules back to the FCC’s original interpretation established in 1992.”).

the Junk Fax Prevention Act adds additional limitations to the EBR exception, including the method in which the sender obtained the recipient's fax number.<sup>123</sup> The Junk Fax Prevention Act requires that the fax number be obtained either through

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution [except that this clause does not apply to numbers collected as part of an EBR before the Junk Fax Prevention Act enactment.]<sup>124</sup>

Thus, if a fax sender and recipient fall within the broad, no-time limit Fax EBR definition, the sender may fax unsolicited advertisements if the recipient gave the sender the fax number pursuant to a business inquiry or transaction or if the fax number is otherwise made public.<sup>125</sup>

As part of the statutory Fax EBR exemption, the Junk Fax Prevention Act sets out several compliance requirements. In an attempt to balance the needs of consumers and businesses, the Junk Fax Prevention Act now requires advertisers wishing to send an unsolicited faxed advertisement based on an EBR between sender and recipient to include identification information on the front page of a fax, including name of sender and telephone or fax information for consumers to opt out of future unsolicited faxes.<sup>126</sup> Specifically, senders must offer at least one cost-free mechanism available twenty-four hours a day, seven days a week for consumers to make opt-out requests.<sup>127</sup> The opt-out notice also must include a

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<sup>123</sup> Junk Fax Prevention Act, *supra* note 5, § 2(a).

<sup>124</sup> *Id.*

<sup>125</sup> See *infra* discussion in Part V.A on why this "public distribution" fax number provision weakens consumer protection.

<sup>126</sup> Junk Fax Prevention Act, *supra* note 5, § 2(c). For a discussion on why this unfairly puts the burden on consumers, see *infra* Part.V.

<sup>127</sup> It is unclear from the statutory language whether an email address or website would constitute a cost-free mechanism. As part of its rules implementing the Junk Fax Prevention Act, the FCC stated that an email address or website would satisfy the cost-free requirement. FEDERAL COMMUNICATIONS COMMISSION FCC-06-42, RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991 15-16 (2006), reprinted in 71 Fed. Reg. 25, 967 (May 3, 2006), available at <http://www.fcc.gov/cgb/policy/faxadvertising.html>. Also, the Junk Fax Prevention Act orders the FCC to determine whether small businesses should be able to forgo the cost-free mechanism requirement due to small businesses' heavy reliance on faxed

statement telling the recipient that consumers may opt out of future unsolicited advertisements and that it is unlawful for fax senders to not timely comply with opt-out requests.<sup>128</sup>

Another change in consent that the Junk Fax Prevention Act makes is a small but telling one. Now, the definition of unsolicited advertisement refers to an ad transmitted without the recipient's "prior express invitation or permission, *in writing or otherwise*."<sup>129</sup> The addition of "in writing or otherwise" shows Congress deemed verbal consent sufficient. Therefore, Congress rejected the FCC's written, signed consent rule.<sup>130</sup>

Thus, Congress's Fax EBR is a slightly more specific exemption than the FCC's 1992 Fax EBR in that Congress attempted to narrow the Fax EBR's definition by limiting the source of fax numbers senders may use pursuant to a Fax EBR.<sup>131</sup> In a seemingly contradictory move to narrowing the definition, however, Congress refused to adopt an expiration date for the Fax EBR.<sup>132</sup> Another difference from the FCC's Fax EBR is Congress's notice requirements to educate consumers about their right to refuse future junk faxes using cost-free mechanisms.<sup>133</sup> Despite the consumer-friendly opt-out notices, however, Congress's version of the Fax EBR does little to protect consumers from cost-shifting and invasions of privacy.<sup>134</sup>

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advertisements. S. REP. NO. 109-76, at 10. The "cost-free" mechanism is arguably the only consumer-friendly part of the legislation. To allow small businesses to be exempt from the cost-free mechanism would undermine consumer protection even more than the Junk Fax Prevention Act does as it passed because small businesses are likely to rely on junk fax as the preferred advertising method of choice because it is more cost-effective. *Id.* at 3 ("Industry comments maintained that 'faxing is a cost-effective way to reach customers' particularly for small business from whom faxing is a cheaper way to advertise.").

<sup>128</sup> Junk Fax Prevention Act, *supra* note 5, § 2(c) ("[T]he notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request . . . is unlawful.").

<sup>129</sup> Junk Fax Prevention Act, *supra* note 5, § 2(g) (emphasis added).

<sup>130</sup> See *infra* discussion in Part V.

<sup>131</sup> See *infra* text accompanying notes 161-63 for why the "limit" on source of fax numbers is not an effective limit.

<sup>132</sup> See *supra* note 122.

<sup>133</sup> Junk Fax Prevention Act, *supra* note 5, § 2(c)

<sup>134</sup> See *infra* discussion in Part V.

V. DISCUSSION—WHY THE JUNK FAX PREVENTION ACT FAILS AS AN AMENDMENT TO THE TCPA

Consumers should not be misled by the cleverly titled amendment. The Junk Fax Prevention Act does little to prevent the junk faxes that the TCPA strictly prohibited. This is due to Congress's broad, no-expiration definition of Fax EBR, its reliance on a company-specific opt-out provision that continues to shift costs to consumers, and its decision to allow for the collection of numbers based on a Fax EBR from public databases.<sup>135</sup> Additionally, the cost-shifting effects of a facsimile machine's unique technology remain today, even in light of new, computer-based faxing capabilities.<sup>136</sup> This new federal law also puts state laws offering stronger protection against junk faxing in jeopardy.<sup>137</sup> Finally, Congress could have struck a better balance between consumer and business needs by showing more deference to the FCC and its decision to eliminate an exception of its own creation because the FCC had more first-hand experience dealing with and spent more time studying the issue.<sup>138</sup>

A. *Congress's Broad, No-Expiration Fax EBR Weakens The Strong Consumer Protection Set Out In The TCPA*

The history of modern state and federal consumer protection law stems from the desire to shield consumers from economic loss as a result of deception, fraud or other abuses in commerce.<sup>139</sup> For example, consumer protection law guards against a used car salesman who turns the odometer back to make an auto seem to have less wear-and-tear.<sup>140</sup> Gradually,

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<sup>135</sup> See *infra* discussion in Part V.A.

<sup>136</sup> See *infra* discussion in Part V.B.

<sup>137</sup> See *infra* discussion in Part V.C.

<sup>138</sup> See *infra* discussion in Part V.D.

<sup>139</sup> See Spencer Weber Waller, *In Search of Economic Justice: Considering Competition and Consumer Protection Law*, 36 LOY. U. CHI. L.J. 631, 633 (2005) (noting modern consumer protection covers unfair advertising, "outright fraud," consumer credit, and debt collection, among other things).

<sup>140</sup> *Jones v. West Side Buick Auto Co.*, 231 Mo. App. 187, 195-96 (1936). See, e.g., *Hebe Co. v. Calvert*, 246 F. 711, 716-17 (S.D. Ohio 1917) (upholding state's ability to protect consumers from deceptively labeled milk). In 1938, Congress amended the Federal Trade Commission's responsibilities to include regulation of unfair and deceptive trade practices. Act of Mar. 21, 1938, ch. 49, § 3, 52 Stat. 111. For an in-depth history of the Federal Trade Commission, see Mark Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003).

the doctrine of consumer protection law expanded from solely economic protection to protections against business methods that constituted nuisance<sup>141</sup> and threatened privacy,<sup>142</sup> including marketing techniques. For example, in *Breard v. Alexander*,<sup>143</sup> the Supreme Court upheld a city ordinance that prohibited door-to-door commercial solicitation without prior consent.<sup>144</sup> The ordinance originated from unhappy citizens who deemed such commercial visits an “uninvited intrusion into the privacy of their home.”<sup>145</sup> While the Court decided this case before commercial speech received First Amendment protection<sup>146</sup> in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*,<sup>147</sup> the Court never shied away from the idea that a citizen’s privacy is a valid interest for

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<sup>141</sup> *Larson v. State*, 97 So. 2d 776, 786, 789-91 (Ala. 1957) (upholding an injunction against loan creditors’ business practice deemed to be a public nuisance).

<sup>142</sup> *Lehman v. Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring) (arguing that city transit system policy of forbidding political advertisements on city buses should be upheld because “the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience”). In 1890, Samuel Warren and Louis Brandeis’ Harvard Law Review article famously drew early attention to the issue of privacy by calling for a new tort action for invasion of privacy. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (“Recent inventions and business methods call attention to the next step that must be taken for the protection of the person, and for securing the individual what Judge Cooley calls the right ‘to be let alone.’”). For historical significance of this article, see Daniel J. Solove, *The Origins and Growth of Information Privacy*, 838 PLI/Pat 23, 34-35 (May-June 2005).

<sup>143</sup> 341 U.S. 622 (1951), *overturned by* *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 641-45 (1980).

<sup>144</sup> *Breard*, 341 U.S. at 625.

<sup>145</sup> *Id.* The Court noted that, “[t]here is equal unanimity that opportunists, for private gain, cannot be permitted to arm themselves with an acceptable principle, such as that of a right to work, a privilege to engage in interstate commerce, or a free press, and proceed to use it as an iron standard to smooth their path by crushing the living rights of others to privacy and repose.” *Id.* at 625-26.

<sup>146</sup> The Court refused to hear a First Amendment argument against the city ordinance, saying “[o]nly the press and oral advocates of ideas could urge this point. It was not open to solicitors of gadgets and brushes.” *Id.* at 641.

<sup>147</sup> 425 U.S. 748, 770 (1976) (holding a consumer’s interest in the free flow of commercial information was entitled to First Amendment protection). The Court later clarified that commercial speech receives a limited First Amendment protection that must only pass intermediate scrutiny. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 562-63 (1980). Recent members of the Court have questioned the logic in offering less protection based on the commercial content of speech, suggesting that it receive full First Amendment protection. See Adam Zitter, Note, *Good Laws for Junk Fax? Government Regulation of Unsolicited Solicitations*, 72 *FORDHAM L. REV.* 2767, 2794-96 (2004) (discussing recent Supreme Court commercial speech cases).

states to protect through legislation<sup>148</sup> or that commercial speech is subject to privacy limitations.<sup>149</sup> Thus, the two main policies behind the TCPA fax regulations—cost-shifting and privacy—complemented the development of consumer protection law.<sup>150</sup> The drafters of the Junk Fax Prevention Act should not have blatantly brushed off such well-established policies in favor of making it easier for businesses to market their products through a particular method.

There are several ways Congress brushed off consumer protection policies. First, the drafters refused to adopt a time limit for the Fax EBR. Congress chose to keep its Fax EBR similar to the original 1992 FCC definition.<sup>151</sup> This language—“interaction” or “application”—is broad enough to encompass almost any consumer interaction, past or present, with a business.<sup>152</sup> When coupled with the fact that this interaction or application could have conceivably happened twenty years ago and still count as a Fax EBR, it severely cuts against any consumer protection rhetoric in the law’s title. Not having any time limit on a broad definition clearly did not suit the Telephone EBR, which is why the FCC chose in 2003 to limit the Telephone EBR to eighteen months from last purchase or three months from the last consumer inquiry.<sup>153</sup> Again,

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<sup>148</sup> See, e.g., *Carey v. Brown*, 447 U.S. 455, 471 (1980) (“The State’s interest in protecting the well-being, tranquility and privacy of the home is certainly of the highest order in a free and civilized society.”). For purposes of this footnote, the term “privacy” refers to privacy as a fundamental right that emerged through Constitutional doctrine and not to the tort of intrusion against seclusion.

<sup>149</sup> These privacy limitations on commercial speech are usually referred to as “time, place, and manner” restrictions. See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748:

In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible . . . There is no claim, for example, that the prohibition on prescription drug price advertising is a mere time, place, and manner restriction. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information.

*Id.* at 770-71.

<sup>150</sup> See *supra* text accompanying notes 51-62.

<sup>151</sup> S. REP. NO. 109-76, at 10 (“[T]he effect would be to reinstate the junk fax rules back to the FCC’s original interpretation established in 1992. . .”).

<sup>152</sup> See *supra* note 18 and accompanying text.

<sup>153</sup> 2003 FCC Memo, *supra* note 2, at 65-66. Compare 47 C.F.R. § 64.1200(f)(4) (2002), with 47 C.F.R. § 64.1200(f)(3) (2003).

Congress explicitly rejected adopting the time limit for the Fax EBR.<sup>154</sup>

A second example of how Congress ignored consumer protection policies is its choice to include a company-specific opt-out mechanism.<sup>155</sup> Supporters of the Junk Fax Prevention Act are likely point to the opt-out provision and its required cost-free mechanism as an indication of Congress's desire to protect consumers.<sup>156</sup> While it is true that giving consumers the power to more effectively identify their purported unsolicited fax origins is consumer friendly, allowing company-specific opt-out lists still unfairly shifts costs to consumers because it allows for that first fax to clog up their machines and to waste their ink and paper.<sup>157</sup> This is in addition to the labor costs and nuisances involved in contacting each sender to be removed from lists.<sup>158</sup> Ironically, Congress found that allowing company-specific do-not-call lists failed to protect consumers from invasive telemarketing calls and enacted a law to create a national do-not-call registry.<sup>159</sup> It is unclear why Congress thought a company-specific list would be effective for faxes.<sup>160</sup>

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<sup>154</sup> S. REP. NO. 109-76, at 10. But Congress did give the FCC the authority to examine at a later date whether a time limit would be appropriate. Junk Fax Prevention Act, *supra* note 5, § 2(f).

<sup>155</sup> See Junk Fax Prevention Act, *supra* note 5, § 2(c).

<sup>156</sup> S. REP. NO. 109-76, at 7 (noting the new law provides a cost-free mechanism so recipients would be able "to stop future unwanted faxes sent pursuant to [a Fax EBR]").

<sup>157</sup> See *Covington & Burling v. Int'l Mktg. & Research, Inc.*, No. 01-0004360, 2003 LEXIS 29, \*11 (D.C. Super. Apr. 17, 2003) (rejecting a company-specific do-not-fax approach because it would "still allow a fax advertiser to send one fax to every fax number for which the recipient would have to bear the cost. Moreover, the consumer would still have to bear the cost and the burden of receiving at least on [sic] fax and then contacting the sender of the unsolicited fax to be removed from the database. As we have seen from this case, this may still not immediately stop the unwanted faxes").

<sup>158</sup> This is because the Junk Fax Prevention Act opt-out provision is company-specific, not a national registry. Junk fax recipients must contact each Fax EBR sender individually. See Junk Fax Prevention Act, *supra* note 5, § 2(c).

<sup>159</sup> Do-Not-Call Implementation Act, Pub. L. No. 108-8, 117 Stat. 557 (2003) (codified at 15 U.S.C. § 6101 (Supp. III 2003)).

<sup>160</sup> One recent case pointedly shows such company-specific do-not-fax lists are not effective. *Covington & Burling*, 2003 LEXIS 29, at \*2 (noting that, *after* plaintiff asked to be removed from defendant's lists, plaintiff "received 172 fax advertisements for vacation packages . . . and 104 fax advertisements for laser printer supplies. . . . [The next day plaintiff] received 147 more fax advertisements for vacation packages"). Ironically, the government—as an intervener in a TCPA fax case—has made this exact argument against company-specific fax lists. See *Accounting Outsourcing, L.L.C. v. Verizon Wireless Pers. Commc'ns*, 329 F. Supp. 2d 789, 817 (M.D. La. 2004) (explaining government's contention that do-not-fax lists would not eliminate cost-shifting of unwanted faxes, would unfairly burden the consumer to contact each fax advertiser and would put the burden on consumers to prove they had requested to be removed from a company's fax marketing list). In addition to shifting ink and paper costs to

Finally, Congress's "limit" on sources of fax numbers contradicts any notion of consumer protection.<sup>161</sup> Congress's new definition of EBR limits how an EBR sender can collect the fax number of a recipient. It gives senders two options: either collect the number from the recipient within the context of the established business relationship or find the number in a directory, on a website or any other public place.<sup>162</sup> Thus, according to the second option, a business which publishes its fax number on a website for the purposes of legitimate business exposes itself to more unwanted faxes. This is in direct contrast to the TCPA's purpose of facilitating interstate commerce by prohibiting unsolicited faxed advertisements from interfering with "legitimate business messages."<sup>163</sup> By allowing senders to collect fax numbers outside of the context of the established business relationship, Congress has helped make it easier for businesses to send unsolicited faxes. Thus, Congress's version of the Fax EBR in the Junk Fax Prevention Act weakens consumer protection instead of enhancing it.

*B. Faxing Deserves Stricter Telemarketing Policies Due to Its Unique Technological Features*

As made clear in the legislative history of the TCPA, faxing technology deserves a broader ban on marketing than other methods due to the technology that sends and receives faxes.<sup>164</sup> Proponents of the Junk Fax Prevention Act argue that the cost-shifting policy is outdated due to improvements in faxing technology, but this technology remains largely unchanged today in the sense that a fax must still be printed

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recipients, do-not-fax lists do not completely prevent unwanted faxes from interrupting legitimate messages. See *Minn. v. Sunbelt Commc'ns & Mktg.*, 282 F. Supp. 2d 976, 984 (D. Minn. 2002) (rejecting the creation of a do-not-fax list due to the fact that even one unwanted fax "can prevent the receipt of wanted faxes").

<sup>161</sup> Junk Fax Prevention Act, *supra* note 5, § 2(a).

<sup>162</sup> *Id.*

<sup>163</sup> H.R. REP. NO. 102-317, at \*10.

<sup>164</sup> See *supra* text accompanying notes 10, 53 and 58. Other methods such as telephone and email do not present as strong of a case for cost-shifting as faxing. For example, marketing via telephone does not cause paper or ink costs to the called party. It is for cost-shifting reasons that cell phones are explicitly banned from calls made with autodialing systems or artificial or prerecorded voice programs. See 47 U.S.C. § 227 (b)(1)(A)(iii) (2000). For email, a recipient of unwanted email spam controls which message to print. Spam, however, can raise cost-shifting concerns for corporations or server owners when the totality of spam overwhelms computer systems. Adam Zitter, Note, *Good Laws for Junk Fax? Government Regulation of Unsolicited Solicitations*, 72 *FORDHAM L. REV.* 2767, 2777 (2004) (noting one recent study reported U.S. corporations spend \$8.9 billion a year fighting spam).

out at a cost—in terms of paper, ink and time—to the recipient.<sup>165</sup> Defenders of maintaining the Fax EBR also point to the fact that modern fax machines are capable of receiving and storing in the machine's memory more than one message, and thus there is no interruption of legitimate business faxes while an unsolicited faxed advertisement prints.<sup>166</sup> This theory fails, however, in every-day application due to the disruption that occurs as a result of server delays caused by overfilled memory.<sup>167</sup>

This is not to suggest that there has been no advancement in terms of faxing technology. Today, faxes can be sent as either an attachment to emails or transmitted to fax servers<sup>168</sup> or personal computers equipped with modems. A fax sent as an email attachment instead of directly to a fax

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<sup>165</sup> The FCC as late as 2003 found that fax machines, although faster in terms of processing messages, still required paper to be printed for each message. 2003 FCC Memo, *supra* note 2, at 118-20. Furthermore, the U.S. government as late as 2002 defended the constitutionality of the TCPA fax provision by arguing that the law is best viewed “as an anti-conversion statute because its purpose is to prevent the shifting of advertising costs (paper, toner, human resources, business disruption), from the advertiser to the recipient of the advertising.” *Sunbelt Commc'ns & Mktg.*, 282 F. Supp. 2d at 981.

<sup>166</sup> *See, e.g.*, Comments of Nextel Communications, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, at 30-31, *available at* [http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6513396853](http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513396853):

When the TCPA was passed in 1991, the vast majority of faxes were sent and received by stand-alone thermal paper telephone fax machines. These analog devices had no scanning or receiving memory, operated at slow data transfer speeds, tied up telephone lines for significant periods of time, and consumed expensive thermal paper with every transmission. These considerations lay at the heart of both Congress' decision to regulate fax advertising and its constitutional justification for doing so. Since the passage of the TCPA, however, data transfer speeds have increased and transmission times have decreased dramatically. Plain-paper fax technology has obviated the need for costly thermal paper. Most important, fax modem technology now enables the delivery of faxes to email inboxes where consumers can electronically retrieve, view or discard a fax image without ever reducing it to paper.

*Id.*

<sup>167</sup> How many pages a fax machine will store in its memory vary from twenty to two hundred pages, depending on the model and manufacturer. Scott Cullen, *Fax Buying Tips*, OFFICE DEALER AND OFFICE SOLUTIONS, Nov. 1, 2003, at 10 (“The number of pages a fax can store in memory is based on a standard test page with minimal amount of text. For text or graphics-intensive documents, 200 pages of memory may in reality only allow you to store 100 or fewer pages in memory.”). Courts have also noted that modern fax machines are not sufficient to fight the onslaught of junk fax transmissions. *See, e.g.*, *Mo. ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 653 (8th Cir. 2003) (agreeing with plaintiff's argument that technological changes have not eliminated burdens imposed on recipients of unwanted fax advertising).

<sup>168</sup> Fax servers enable multiple computers to send and receive faxes from the same or shared number. 2003 FCC Memo, *supra* note 2, at 119.

machine is received instantly, which saves time and cost because it allows recipients to see the fax before deciding whether to print it. The FCC, however, in its 2003 memo overhauling the TCPA, clarified that its TCPA rules do not apply to fax advertisements sent as email attachments,<sup>169</sup> so faxes sent as email attachments are irrelevant to a TCPA analysis.

According to the same 2003 FCC memo, the TCPA does govern faxes sent to “personal computers equipped with, or attached to, modems and to computerized fax servers.”<sup>170</sup> Some businesses contend that fax server and desktop faxing technology do not raise the same cost-shifting issue as a conventional stand-alone fax machine because not every message from a fax server and personal computer is automatically printed.<sup>171</sup> The FCC disagreed, however, finding the totality of harm—the cost of paper and toner if the message is printed, the possibility that faxes will tie up modem or fax server lines,<sup>172</sup> and increased labor costs for monitoring which faxes were legitimate—justified subjecting personal computers and fax servers to TCPA regulations.<sup>173</sup> Further, and more persuasively, the FCC argued that there is no way to indicate which type of faxing technology the recipient owns.<sup>174</sup> There is no distinction in the numerical coding of fax numbers to indicate whether a fax sent to a recipient will go to a fax server or a traditional, cost-shifting machine.<sup>175</sup>

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<sup>169</sup> *Id.* at 119 n.736 (noting that this type of transmission does not fit the definition of ‘telephone facsimile machine’ at 47 U.S.C. § 227(a)(2)).

<sup>170</sup> 2003 FCC Memo, *supra* note 2, at 119.

<sup>171</sup> *Id.* (“Nextel maintains that such faxes do not implicate the harms that Congress sought to redress in the TCPA, as they are not reduced to paper can be deleted from one’s inbox without being opened or examined.”).

<sup>172</sup> *See, e.g.,* Accounting Outsourcing, L.L.C. v. Verizon Wireless Pers. Commc’ns., 329 F. Supp. 2d 789, 815 (M.D. La. 2004) (noting faxes sent directly to email systems burden business’s computer networks); Covington & Burling v. Int’l Mktg. & Research, Inc., No. 01-0004360, 2003 LEXIS 29, at \*9-10 (D.C. Super. Apr. 17, 2003) (rejecting defendant’s argument that plaintiff’s incurred no costs because plaintiff did not print out faxes) (“[T]he critical fact is that Covington’s fax server was unavailable to receive or transmit other faxes. Covington’s memorandum and affidavits in support of their summary judgment motion are persuasive that attorneys and staff at Covington reported delays in sending or receiving faxes on the dates in question.”). Sometimes more than the modem or sever is tied up. In one recent case, a man’s whole computer became inoperable due to the deluge of unwanted faxed advertisements sent to his computer modem. *Minn. v. Sunbelt Commc’ns & Mktg.*, 282 F. Supp. 2d 976, 978 (D. Minn. 2002).

<sup>173</sup> 2003 FCC Memo, *supra* note 2, at 120.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* *See* Kaufman v. ACS Sys., 2 Cal. Rptr. 3d 296, 317-18 (Ct. App. 2003) (rejecting defendant’s argument that faxing technology outdates the TCPA cost-shifting

Thus, the cost-shifting arguments for a broad ban against unsolicited fax advertisements remain relevant and persuasive, even in light of modern fax technological developments and trends.

*C. Having Weak Federal Interstate Protection Will Undo Any Strong Intrastate Protection Of Faxes*

A main motivation behind the TCPA was to close up the jurisdictional gap state telemarketing laws could not reach.<sup>176</sup> The TCPA explicitly does not preempt any state law that is more restrictive than the TCPA.<sup>177</sup> In essence, the TCPA creates a minimum floor of protection for telemarketing legislation. Some states did not create intrastate junk fax laws after the TCPA was enacted.<sup>178</sup> At least one state even repealed its junk fax law because it was unnecessary in light of the TCPA's initial strict prohibition against all faxes.<sup>179</sup> The Junk Fax Prevention Act did not amend the TCPA's minimum floor preemption provision.<sup>180</sup> Thus, for states with strong anti-junk fax laws,<sup>181</sup> the Junk Fax Act Prevention Act severely undermines these efforts because marketers will simply move their faxing across state borders to trigger the weaker interstate protection.

*D. Congress Should Have Deferred or Given More Weight to the FCC's Determination to Get Rid of the Fax EBR*

The junk fax debate is understandably framed in terms of consumer needs versus business needs. It can also be easily

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needs because defendant presented no evidence of how many people actually use the fancy technology).

<sup>176</sup> S. REP. NO. 102-178, at 1970 (1991).

<sup>177</sup> 47 U.S.C. § 227(e) (2000). In contrast, the Can-Spam Act preempted all state laws involving email spam. Can-Spam Act, *supra* note 3, § 8 ("This Act supersedes any statute, regulation or rule of a State . . . that expressly regulates the use of electronic mail to send commercial messages[.]").

<sup>178</sup> For example, Iowa currently does not have a law regulating junk fax within the state of Iowa.

<sup>179</sup> See *infra* discussion in Part VI.

<sup>180</sup> S. REP. NO. 109-76, at 21 (2005).

<sup>181</sup> For instance, Florida's statute prohibits all intrastate junk faxes regardless of any EBR between sender and recipient. See FLA. STAT. § 365.1657(1) (1997) ("It is unlawful for any person to use a machine that electronically transmits facsimiles of documents through connection with a telephone network to transmit within this state unsolicited advertising material for the sale of any real property, goods or services."). The broad ban is similar to the original text of the TCPA. See 47 U.S.C. § 227(a)(4).

viewed as a separation of powers struggle. Congress created the TCPA with strict prohibition against faxes, but granted the FCC the authority to implement its necessary rules.<sup>182</sup> The FCC erroneously created a Fax EBR, which it later sought to overturn.<sup>183</sup> Congress, unhappy with this decision to eliminate the Fax EBR, enacted the Junk Fax Prevention Act.<sup>184</sup> This action serves as a reminder to the FCC that while the agency's rulings have the force of law, Congress gave them the power to promulgate rules in the first place.<sup>185</sup> Despite Congress's position as authorizing law maker, Congress should have deferred more to the FCC's decision to eliminate the Fax EBR.

First, the FCC had more time to study and consider the Fax EBR effect, both as part of the comment process<sup>186</sup> and in its various TCPA fines and cases,<sup>187</sup> since the Fax EBR's establishment in 1992. In contrast, the Senate had two weeks of hearings in April 2005; the House had none.<sup>188</sup> It is likely that Congress moved the bill faster than it should have due to the impending FCC deadline of July 1, 2005.<sup>189</sup>

Second, it remains questionable whether codifying the Fax EBR was necessary to meet Congress's true motivation in rushing the Junk Fax Prevention Act. The 2003 FCC memo announced two separate rule changes: (1) the elimination of the Fax EBR and (2) consent to fax would need to be written, signed and collected prior to a faxing campaign.<sup>190</sup> Notwithstanding the codification of the Fax EBR, the legislative history primarily posits the Junk Fax Prevention Act as legislation to prohibit the costs of obtaining prior written consent for businesses.<sup>191</sup> So it seems very possible that

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<sup>182</sup> 47 U.S.C. § 227(b)(2).

<sup>183</sup> See *supra* discussion in Part III.

<sup>184</sup> See *supra* discussion in Part IV.

<sup>185</sup> Congress created the FCC as part of the 1934 Communications Act. See <http://www.fcc.gov/aboutus.html>.

<sup>186</sup> FCC, FCC 02-250, RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991: NOTICE OF PROPOSED RULE MAKING 3 (2002) (seeking comment on upcoming TCPA review).

<sup>187</sup> See <http://www.fcc.gov/eb/tcd/ufax.html> for listing of recent TCPA forfeitures and notices of apparent liability for unsolicited faxes.

<sup>188</sup> See <http://thomas.loc.gov> (enter S. 714.ENR for bill number, and then click on Congressional Record References for a history of the bill as passed).

<sup>189</sup> See *supra* notes 113-19 and accompanying text.

<sup>190</sup> 2003 FCC Memo, *supra* note 2, at 112-13.

<sup>191</sup> See S. REP. NO. 109-76, at 6 (1991) ("This legislation is designed to permit legitimate businesses to do business . . . without the burden of collecting prior written permission to send these recipients commercial faxes."); *id.* (noting that that trade associations "would be saddled with a huge burden to collect signatures from each

Congress could have respected the FCC's Fax EBR elimination but overturned the written consent requirement. Arguably, Congress could have limited its TCPA amendment to its adjustment of what consent meant in the definition of "unsolicited advertisement," which after the Junk Fax Prevention Act reads "prior express invitation or permission, *in writing or otherwise*" instead of the previous "prior express invitation or permission."<sup>192</sup> In regards to the specific "writing or otherwise" change, the Senate Report states: "[t]he effect of this amendment would be to statutorily prohibit the FCC from promulgating a rule that would require prior express permission to be secured only in writing."<sup>193</sup> If Congress had deferred to the FCC by allowing the Fax EBR to expire but had changed consent to mean written *or* verbal, it would have created a better balance between consumer and business needs.

## VI. FATE OF CONSUMER PROTECTION AND JUNK FAXES

With the passing of the Junk Fax Prevention Act, businesses have a clear authorization to send junk faxes based on an established business relationship.<sup>194</sup> In response to the cost and privacy concerns of this new law, consumer advocates are likely to focus on other avenues of change, including mandated annual Congressional reports on junk faxes, the possibility of a national do-not-fax registry, and state legislatures reacting with stronger telemarketing statutes. However, this Note argues these options are ineffective solutions for prohibiting unfair cost-shifting from advertiser to consumer, which is arguably the most important policy reason for the ban against junk faxing.

Junk faxes essentially act as a "postage-due" tax on consumers. This is true whether a person receives 500 junk faxes or if a person receives one. Thus, merely reducing the number of junk faxes to a more manageable level by allowing only unsolicited fax advertisements sent based on an

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member just to send an unsolicited fax advertisement."); *id.* at 8 ("If this bill were enacted, it would eliminate the requirement to obtain written permission from customers[.]"); 151 CONG. REC. H5265 (daily ed. June 28, 2005) (statement of Rep. Green) ("This new law will prevent businesses and realtors from having to fill out paperwork to communicate with each other about an existing business relationship.").

<sup>192</sup> Junk Fax Prevention Act, *supra* note 5, § 2(g). (emphasis added). Compare 47 U.S.C. § 227(a)(4) (2000), with Junk Fax Prevention Act, *supra* note 5, § 2(g).

<sup>193</sup> S. REP. NO. 109-76, at 11-12.

<sup>194</sup> Junk Fax Prevention Act, *supra* note 5, § 2(a).

established business relationship is not a victory for consumers. To truly protect consumers from unwarranted costs, a ban on faxed advertisements sent without permission must be a complete ban, as it was when Congress passed the TCPA in 1991. Thus, Congress should eliminate the Junk Fax Prevention Act's statutory Fax EBR exemption.

A. *Future Congressional Review Under the Junk Fax Prevention Act*

Perhaps as a silent nod to the Junk Fax Prevention Act's inherent imbalance between business and consumer needs, Congress included an order in the legislation that there be future studies on the enforcement of junk faxing. This order required an annual FCC report<sup>195</sup> and a study by the Comptroller General of the United States to be completed nine months after enactment.<sup>196</sup> In the original TCPA, Congress did not include any annual review of faxing.<sup>197</sup>

The Junk Fax Prevention Act's future studies require several things. First, the annual FCC report requires the agency to report the number of complaints, citations and notices of apparent liability regarding the junk fax provision. Specifically, Congress is interested in considering how much time passes between a consumer's complaint and notice of liability,<sup>198</sup> as well as how effectively the FCC recovers monetary penalties.<sup>199</sup> The Junk Fax Prevention Act also requires the General Comptroller of the United States to complete a study on how the FCC handles its junk fax enforcement.<sup>200</sup> Specifically, the law requires the Comptroller to examine the impact and adequacy of existing statutory remedies on both senders and recipients of junk faxes.<sup>201</sup> By

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<sup>195</sup> *Id.* § 3(g).

<sup>196</sup> *Id.* § 4(a), (c).

<sup>197</sup> *See* 47 U.S.C. § 227.

<sup>198</sup> Junk Fax Prevention Act, *supra* note 5, § 3(g)(4)(c). This "time between" issue is very relevant to consumer protection because the longer the FCC waits to address the complaint, the greater number unsolicited faxes the complaining consumer is likely to receive, and thus, the higher the costs consumer is likely to incur.

<sup>199</sup> *Id.* § 3(g)(5)-(8).

<sup>200</sup> *Id.* § 4(a). The GAO will study how the FCC receives and investigates complaints, the level of enforcement success the FCC achieves, and whether the FCC is adequately enforcing complaints, among other things. *Id.* § 4(a)(1)-(3).

<sup>201</sup> *Id.* § 4(b). In April 2006, the General Comptroller's office released its first report to Congress. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, TELECOMMUNICATIONS: WEAKNESS IN PROCEDURES AND PERFORMANCE MANAGEMENT HINDER JUNK FAX ENFORCEMENT, GAO-06-425 (2006), available at <http://www.gao.gov/>

adding this additional level of supervision—the Comptroller will essentially be checking the FCC’s checking—Congress indicates an unease that the bill it passed might not be the most effective solution. While it is established jurisprudential rhetoric that Congress does not have to hit the bulls-eye perfectly when enacting legislation,<sup>202</sup> it seems Congress is passing off the tough work—finding a true balance between consumer and business needs in regards to junk fax regulation—to some future Congressional session down the line, all in exchange for helping lobbying businesses beat an FCC deadline.<sup>203</sup>

These Congressional studies on junk faxes are an ineffective solution to prohibit cost to consumers for two reasons. First, in order to see a trend in cost to consumers, Congress will likely need at least two annual reports to compare, which means any legislative adjustment based on these annual reports will probably not be a possibility in the near future. In the meantime, businesses will continue to expose consumers to unwarranted costs by faxing unsolicited advertisements pursuant to an established business relationship. Second, by ordering an annual report, there is simply no guarantee that the results of these reports will lead to legislative adjustment. Thus, consumer advocates cannot effectively rely on future Congressional studies to prevent cost-shifting.

### B. *A National Do-Not-Fax Registry*

For years, when challenging the constitutionality of TCPA’s strict prohibition on unsolicited faxed advertisements, defendants often pointed to creating a do-not-fax registry as a solution.<sup>204</sup> They argued that such a list would allow

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new.items/d06425.pdf. The report reveals that the immense increase in junk fax complaints—from 2,200 in 2001 to 46,000 in 2005—is outpacing the FCC’s ability to manage and address these complaints. *Id.* at 2.

<sup>202</sup> See, e.g., *United States v. Edge Broad. Co.* 509 U.S. 418, 434 (1993) (“Nor do we require that the Government make progress on every front before it can make progress on any front.”); *Moser v. FCC*, 46 F.3d 970, 975 (9th Cir. 1995) (“Congress may reduce the volume of intrusive telemarketing calls without completely eliminating the calls.”).

<sup>203</sup> See *supra* discussion in Part IV.A. See also 151 CONG. REC. H5264 (daily ed. June 28, 2005) (statement of Rep. Upton) (thanking the House for “expedite consideration” because June 30 is “when the sands of the hourglass were about to run out”).

<sup>204</sup> See, e.g., *Accounting Outsourcing, L.L.C. v. Verizon Wireless Pers. Commc’ns*, 329 F. Supp. 2d 789, 816-17 (M.D. La. 2004); *Minn. v. Sunbelt Commc’ns &*

consumers to control the messages sent via fax and would give legitimate marketers the ability to send *some* unsolicited messages via fax to consumers who have not signed their fax numbers to the registry.<sup>205</sup> As stated above, the Junk Fax Prevention Act's company-specific do-not-fax list, which requires consumers to contact each company individually to opt out of future unsolicited messages, does not prohibit costs to the consumers and unfairly shifts the burden to consumers.<sup>206</sup> In response, consumers are likely to push for a national do-not-fax registry.<sup>207</sup>

When shaping any future rules for a national do-not-fax registry, Congress and the FCC would likely consider the recent rules authorizing the enactment of a do-not-call registry.<sup>208</sup> The National Do-Not-Call Registry is a joint effort between the FCC and the Federal Trade Commission (FTC).<sup>209</sup> The registry allows consumers to register their residential

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Mktg., 282 F. Supp. 2d 976, 984 (D. Minn. 2002); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 2d 1162, 1167 (S.D. Ind. 1997).

<sup>205</sup> See *supra* note 204 and accompanying text.

<sup>206</sup> See *supra* discussion in Part IV.

<sup>207</sup> The strong, positive political response to the do-not-call registry led Congress to include a provision in the Can-Spam Act that would allow for the establishment of a national do-not-email registry. Adam Zitter, Note, *Good Laws for Junk Fax? Government Regulation of Unsolicited Solicitations*, 72 *FORDHAM L. REV.* 2767, 2770 (2004). But the FTC later ruled that it would not establish a federal do-not-email opt-out system due to problems with effectiveness and enforcement. *FTC Places "Do Not Email" Registry Plan on Hold*, *ELEC. COMMERCE NEWS*, Vol. 9, No. 13, June 21, 2004. Some commercial speech commentators note that this national registry trend continues to inhibit a marketer's ability to reach consumers in a cost-effective way. Kavita Amar and Bruce E.H. Johnson, *The Rights of Telemarketers, Faxes and Spammers are Subordinated to the Rights of Consumers*, 811 *PLI/Pat* 85 (November 2004).

<sup>208</sup> For a comprehensive examination of the issue, see 2003 FCC Memo, *supra* note 2, at 14-51. The TCPA as originally enacted authorized the FCC to consider a nationwide do-not-call registry. 47 U.S.C. § 227(c)(3) (2000). As part of its initial rule-making, the FCC declined to adopt a nationwide list. 1992 FCC Memo, *supra* note 20, at 7-10.

<sup>209</sup> In 2003, the FTC amended its 1995 Telemarketing Sales Rule such that it was an abusive telemarketing practice for a commercial telemarketer to call an individual on a national do-not-call registry. Jack Gravelle, Note, *Hold the Phone: Making the Call For "Personal Exceptions" to the Do-Not-Call Registry*, 65 *OHIO ST. L.J.* 991, 1002 (2004). Many questioned the FTC's authorization to create such a registry. *Id.* at 1003. To quell this objection, Congress passed the National Do-Not-Call Implementation Act, which authorized the FTC to collect fees to implement and enforce a national do-not-call registry. Pub. L. No. 108-10, 117 Stat. 1006 (2003) (codified at 15 U.S.C. § 6101 (Supp. III 2003)). The bill also required the FCC to issue final rules regarding its Telephone Consumer Protection Act and to harmonize its do-not-call rules with the FTC. *Id.* President Bush signed the bill into law on March 11, 2003. *National Briefing Washington: Bush Signs Do-Not-Call Law*, *N.Y. TIMES*, Mar. 12, 2003, at A20.

telephone number, including wireless numbers.<sup>210</sup> Once on the list, businesses may not make any interstate or intrastate telemarketing calls to that number for the next five years. There are some exceptions to the ban on calls, including an established business relationship exception.<sup>211</sup> Once the five years have passed, a consumer may re-enter the number on the list.<sup>212</sup> A consumer can remove his or her number from the do-not-call registry at any time.<sup>213</sup>

One year after enacting the registry, the FTC reported that the registry had been effective in greatly reducing the number of telemarketing calls. For instance, one survey conducted by a market research firm found that ninety-two percent of adults who had signed up had fewer phone calls and that twenty-five percent of adults who had signed up received absolutely no phone calls.<sup>214</sup> Further, only less than one

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<sup>210</sup> 2003 FCC Memo, *supra* note 2, at 24 (“We conclude that the national database should allow for the registration of wireless telephone numbers . . .”).

<sup>211</sup> *Id.* at 29-32. Other exemptions include commercial calls from charities and political support groups. *Id.* at 53. This distinction between commercial calls based on the subject matter of the call led to a Colorado district court ruling that the Do-Not-Call registry violated the First Amendment. *Mainstream Mktg. Servs., Inc. v. FTC*, 283 F. Supp. 2d 1151, 1168 (D. Colo. 2003) (holding the Do-Not-Call registry is a content-based regulation and violates the First Amendment), *stay denied* by 284 F. Supp. 2d 1266 (D. Colo. 2003), *stay granted* by 345 F.3d 850 (10th Cir. 2003), *rev'd*, 358 F.3d 1228 (10th Cir. 2004). A few months later, the Tenth Circuit held the registry constitutional. *See* 358 F.3d 1228, 1242 (holding the registry to be narrowly tailored without over-regulating protected speech).

<sup>212</sup> *See* “Q&A: The National Do-Not-Call Registry,” <http://www.ftc.gov/bcp/online/pubs/alerts/dncalrt.htm>.

<sup>213</sup> *See id.* By creating an opt-out system, the government avoids First Amendment problems because the consumer becomes the censor, while the government is merely facilitating consumer choice. *See Mainstream Mktg.*, 358 F.3d 1228 at 1233 (“The national do-not-call registry offers consumers a tool with which they can protect their homes against intrusions that Congress has determined to be particularly invasive.”). *See also* Rodney A. Smolla, *The “Do-Not-Call List” Controversy: A Parable of Privacy and Speech*, 38 CREIGHTON L. REV. 743, 756 (2005). Many view the do-not-call registry as a triumph of consumer choice. *See, e.g., id.* at 757 (“Do-Not-Call is not a paternalistic usurping of consumer choice; it is an empowerment of consumer choice, in aid of the tranquility of the home.”). One commentator, however, argues that the facilitation of consumer choice theory is only relevant when the government “present[s] the public with a vast array of options,” something the commenter feels ‘opt-out’ systems that discriminate based on subject matter, such as the registry, do not provide because the registry does not allow consumers to opt-out of political and charity telemarketers. *See* Zitter, Note, *supra* note 207, at 2814-16 (2004).

<sup>214</sup> FTC, Annual Report to Congress for FY 2003 and 2004 Pursuant to the Do Not Call Implementation Act on Implementation of the National Do Not Call Registry 4 (2005), *available at* <http://www.ftc.gov/reports/donotcall/051004dncfy0304.pdf>. Another survey, conducted by Customer Care Alliance between February and April 2004, showed that sixty percent of respondents who had registered their primary home telephone number reported that they had experienced an eighty percent reduction in the number of telemarketing calls. *Id.*

percent of the numbers registered filed complaints about the registry's effectiveness.<sup>215</sup> By the end of the 2004 fiscal year, consumers registered sixty-four million numbers.<sup>216</sup> While consumers celebrated, telemarketing associations decried the national registry for its negative financial impact on the industry and the potential for abuse and misuse of the registry contents.<sup>217</sup>

Despite the positive consumer feedback for a federal do-not-call list, a similar national do-not-fax list is an inappropriate solution for faxed advertisements.<sup>218</sup> First, the do-not-call registry exempts calls based on established business relationships.<sup>219</sup> Faxing technology's unique cost-shifting features make established business relationship exemptions unfairly burdensome and costly on fax machine owners.<sup>220</sup> Second, the do-not-call registry allows only residential phone numbers to be listed.<sup>221</sup> This would not address the problems of junk faxes interfering with business owners' fax machines, which become unavailable for receiving and sending legitimate business faxes due to invading junk faxes. Finally, by creating a list of do-not-fax numbers, Congress would be sending the message that non-registered fax numbers are free targets for fax solicitations. Such a message would be contrary to the cost and privacy policies of the TCPA's original blanket ban on unsolicited faxed advertisements.<sup>222</sup> Thus, a national do-not-fax registry similar to the national do-not-call registry would not prevent cost-shifting.

### C. *State Response to the Junk Fax Prevention Act*

The junk fax fight started in the states,<sup>223</sup> so it is not surprising that is where the junk fax fight will continue. There

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Gravelle, Note, *supra* note 209, at 1007-09. For example, the telephone numbers of several executives of the Direct Marketing Association were fraudulently added to the list without the executives' knowledge. *Id.* at 1008.

<sup>218</sup> Courts have rejected defendants' arguments that a federal do-not-fax list is a better legislative solution than the TCPA junk fax ban. *Accounting Outsourcing, L.L.C. v. Verizon Wireless Pers. Comm'ns*, 329 F. Supp. 2d 789, 816-17 (M.D. La. 2004); *Destination Ventures Ltd. v. FCC*, 844 F. Supp. 632, 639 (D. Or. 1994).

<sup>219</sup> See FTC, OFFICE OF CONSUMER & BUS. EDUC., *supra* note 212, at 5-6.

<sup>220</sup> See *supra* discussion in Part V.B.

<sup>221</sup> See FTC, OFFICE OF CONSUMER & BUS. EDUC., *supra* note 212, at 3.

<sup>222</sup> See *supra* discussion in Part II.B.

<sup>223</sup> See *supra* notes 33-35 about pre-TCPA state laws.

is concern that the federal Junk Fax Prevention Act weakens state protection. California, for instance, recently enacted new legislation in response to the Junk Fax Prevention Act that would affect faxes coming into and out of the state.<sup>224</sup> State legislation, such as this, likely violates the Supremacy Clause,<sup>225</sup> and thus, is an ineffective solution for the junk fax problem.

In 1991, while the TCPA was being formed, the California legislature enacted a bill against intrastate junk faxes as a stop gap measure until a federal law emerged.<sup>226</sup> When the TCPA became law, it was more restrictive than the California bill,<sup>227</sup> so, per the TCPA, the federal law preempted the California law.<sup>228</sup> In 2002, realizing it had what was essentially a useless law on the books, the California legislature repealed its state junk fax law.<sup>229</sup> Thus, the state saw the TCPA's broad prohibition against faxing as sufficient protection.<sup>230</sup>

That protection significantly changed after the passing of the Junk Fax Prevention Act. California responded by introducing new legislation in 2005 that would reinstate the original level of protection found in the TCPA's strict ban on unsolicited faxed advertisements.<sup>231</sup> On October 7, 2005,

<sup>224</sup> 2005-667 Cal. Adv. Legis. Serv. 1 (Deering).

<sup>225</sup> See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

<sup>226</sup> 1992-564 Cal. Adv. Legis. Serv. 1 (Deering).

<sup>227</sup> The 1992 California statute allowed junk faxing "as long as the sender provided a toll-free number on the fax and honored any request by a recipient to be removed from the fax advertising list." *Unsolicited Fax Advertising: Hearing on SB 833 Before the Senate Judiciary Comm.* 2 (Cal. 2005), available at [http://www.leginfo.ca.gov/pub/bill/sen/sb\\_0801-0850/sb\\_833\\_cfa\\_20050408\\_165850\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/bill/sen/sb_0801-0850/sb_833_cfa_20050408_165850_sen_comm.html) [hereinafter Senate Bill Analysis]. By contrast, the TCPA as enacted strictly prohibited the sending of unsolicited advertisements via fax, whether or not a toll-free opt-out number was included on the fax. 47 U.S.C. § 227(b)(1)(C) (2000).

<sup>228</sup> See 47 U.S.C. § 227(e).

<sup>229</sup> 2002-700 Cal. Adv. Legis. Serv. 1 (Deering); Senate Bill Analysis, *supra* note 227, at 2 ("Although it took the Legislature almost 10 years to repeal California's weaker opt-out junk fax advertising law, the opt-in TCPA has been the law in the state since 2002.").

<sup>230</sup> 2002-700 Cal. Adv. Legis. Serv. at 1.

<sup>231</sup> Senate Bill Analysis, *supra* note 227, at 2 (noting that Congress was considering "a loophole in the TCPA [that] . . . [t]he author believes . . . if enacted would reinstate the opt-out approach to junk faxing [in the 1991 California fax law] and make the federal law nearly impossible to enforce. . . . In this way no matter what Congress does to [the] TCPA, California citizens will be protected").

Governor Arnold Schwarzenegger signed into law SB 833, which prohibited all unsolicited faxed advertisements—with or without an established business relationship.<sup>232</sup> The bill defined an unsolicited advertisement as an ad sent without a recipient's "prior express invitation or permission."<sup>233</sup> What made this bill remarkable, though, is the fact that the strict prohibition applied if either the recipient *or* the sender is located in California.<sup>234</sup> Thus, California essentially enacted a bill affecting both intrastate and *interstate* communication of faxes entering or leaving the state. The legislature sent a clear message to Congress that interstate protection under the Junk Fax Prevention Act is too weak to protect the state's consumers.<sup>235</sup> Ironically, the federal government's key reason for establishing a federal telemarketing law in 1991 was to protect states.<sup>236</sup>

Critics of the California law soon questioned whether the Junk Fax Prevention Act would preempt the law's restrictions on interstate faxes.<sup>237</sup> A week before the California law's enactment date of January 1, 2006, the U.S. Chamber of Commerce, in conjunction with a blast-fax service company, filed a federal lawsuit to oppose the law.<sup>238</sup> The U.S. Chamber of Commerce sought a declaratory judgment that the federal junk fax law preempted the unconstitutional California junk

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<sup>232</sup> *Governor Puts a Wrap on Legislation*, L.A. TIMES, Oct. 9, 2005, at B4.

<sup>233</sup> 2005-667 Cal. Adv. Legis. Serv. 1 (Deering).

<sup>234</sup> *Id.* ("It is unlawful for a person or entity, if either the person or entity or the recipient is located within California, to use any telephone facsimile machine, computer, or other device to send . . . an unsolicited advertisement to a telephone facsimile machine.") (emphasis added).

<sup>235</sup> For California Senator Debra Bowen's remarks to the *American Chronicle*, see *President Bush to Junk Faxers: Start Your Engines*, AM. CHRON., July 11, 2005, available at <http://www.americanchronicle.com/articles/viewArticle.asp?articleID=1093> ("Thanks to Congress and the President, marketers can now legally hijack people's fax machines and turn them into their own personal printing presses. . . . The silver lining of the new law is it doesn't prevent states from passing stronger laws and we need to take advantage of that opening. We need a strong state junk fax ban to prevent Californians from getting stuck paying for sales pitches they didn't ask for and don't want.").

<sup>236</sup> See *supra* notes 34-36 and accompanying text.

<sup>237</sup> The Junk Fax Prevention Act did not affect the TCPA provision that stated the federal law had no preemptive effect on more restrictive state laws. See generally *Junk Fax Prevention Act*, *supra* note 5.

<sup>238</sup> Lynda Gledhill, 'Wasted Year' Laws Take Effect; Measures on Faxes, Video Games Held Up by Court Decisions, S.F. CHRON., Jan. 1, 2006, at B1. The U.S. Chamber of Commerce won an injunction that stayed the state law until a judge could consider the Chamber of Commerce's case. *Id.*

fax law.<sup>239</sup> In February 2006, an Eastern District of California judge ruled that the California law's interstate junk fax restriction violated the Supremacy Clause and was preempted by federal law. The law died before ever taking effect. Thus, protecting consumers through stronger state junk fax laws affecting interstate faxes is an ineffective solution due to their questionable constitutionality.

Therefore, future Congressional studies, a national-do-not-fax registry and stronger state laws affecting interstate faxes offer inadequate protection for consumers against cost-shifting. If Congress truly wants to prevent economic injury, then it should eliminate the Fax EBR and reinstate its complete ban on unsolicited fax advertisements sent without express permission, as set out in the TCPA as enacted.

## VII. CONCLUSION

In conclusion, the Junk Fax Prevention Act undermines the strict prohibition against junk faxing set out in the TCPA. In rushing to meet the FCC's expiration of the Fax EBR, Congress overlooked well-established consumer protection policies of privacy and cost-shifting. Additionally, Congress disregarded the FCC's experience with studying TCPA fax issues and effectively weakened strong state protection against junk faxing already in place. In order to sufficiently protect consumers from unwarranted costs, Congress should reinstate a complete ban on unsolicited faxed advertisements sent without permission or consent.

It is an understatement to assert that there is a lot of consumer dissatisfaction with telemarketing methods. In an informative—but completely unscientific—online survey, Time Magazine asked its website readers to nominate “The 100 Worst Ideas” of the twentieth century.<sup>240</sup> Telemarketing was ranked fourth on the list, behind only prohibition, the computer programming choice that led to the Y2K bug and Geraldo Rivera's decision to open the vault of Al Capone.<sup>241</sup> Despite these strong feelings against telemarketing, it is extremely

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<sup>239</sup> Chamber of Commerce of the U.S. v. Lockyer, No. 2:05-CV-2257-MCE-KJM, 2006 U.S. Dist. LEXIS 8324, at \*1-2 (E.D. Cal. Feb. 27, 2006).

<sup>240</sup> *The 100 Worst Ideas of the Century*, TIME, Jan. 19, 2000, <http://www.time.com/time/time100/worstideas.html>.

<sup>241</sup> *Id.* Telemarketing held a clear victory over other suggested worst ideas of the century, including appetite-suppressant Fen-Phen, the crop chemical DDT, and *Ishtar*, the much maligned Warren Beatty-Dustin Hoffman comedy. *Id.*

important to remember that advertisers have First Amendment protection, limited though it may be. This Note does not challenge a legitimate marketer's ability to share a commercial message with consumers. It simply questions the wisdom of doing so by a method that, due to its unique technological architecture, shifts costs to consumers and interrupts legitimate business with each unsolicited commercial message sent. By passing the Junk Fax Prevention Act and codifying the established business relationship for faxes, Congress has authorized marketers to do just that.

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