October 14, 2003

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Room TW-204B
Washington, DC 20554

Re: *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278

Dear Ms. Dortch:

On behalf of the Federal Election Commission, the Office of General Counsel offers these comments In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (CG Docket No. 02-278). We urge the Federal Communications Commission ("FCC") to adopt a regulation that expressly exempts political speech from the prohibition of faxing unsolicited advertisements. Such a regulation would be consistent with the plain language and the intent of the applicable statute and regulations, as well as with the expressed intent of the FCC.

The Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227 ("TCPA"), prohibits the use of "any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). The TCPA defines "unsolicited advertisement," in part, as material "transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4). The FCC determined in its initial regulatory implementation of the TCPA in 1992 that express invitation or permission can be inferred from an established business relationship. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CC Docket No. 92-90, Report and Order, ¶ 54 n.87, 7 F.C.C.R. 8752 (Oct. 16, 1992). Earlier this year, in making revisions to the TCPA rules, the FCC reversed its earlier determination so that an established business relationship will no longer constitute an express invitation or permission to send an unsolicited fax advertisement. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket

No. 02-278, Report and Order, ¶ 189, (July 3, 2003); *see also* 68 Fed. Reg. 44144, 44168 (July 25, 2003).[1]

Certain parties have raised a question as to whether the FCC intended to apply the TCPA's limits on unsolicited fax advertising to political speech.[2] The TCPA defines "unsolicited advertisement" to mean "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." 47 U.S.C. § 227(a)(4) (emphasis added). The FCC's regulatory definition incorporates the statutory definition. 47 C.F.R. 64.1200(f)(10). When the FCC first promulgated its TCPA rules, it gave no indication that it intended the definition of "unsolicited advertisements" to reach beyond commercial advertisements to cover political faxes. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CC Docket No. 92-90, Report and Order, ¶ 54, 7 F.C.C.R. 8752 (Oct. 16, 1992).[3] In its recent reexamination of the TCPA rules, the FCC restated with apparent agreement a court's observation that "TCPA's ban on unsolicited faxes applies to commercial speech *but not to noncommercial speech*." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278, Report and Order, ¶ 73 (July 3, 2003) (citing *Missouri v. American Blast Fax,* 323 F.3d 649, 656 n.4 (8th Cir. 2003))(emphasis added). As discussed below, we respectfully suggest that the FCC clarify in its rules that faxes that are political speech do not satisfy the TCPA's definition of "unsolicited advertisements" because they lack the requisite commercial purpose, even if unsolicited.

Faxes that are political speech can be sent in a variety of circumstances by various entities. Political faxes can advertise events, solicit contributions, or otherwise promote political party committees, political actions committees ("PACs"), or candidates' campaigns. They also might urge elected officials or members of the public to take a particular position on pending legislation or similar public policy issues. The political purpose of the communications is clear from the content of these communications, the identity of the sender and the recipient, and the nature of the relationship between them.

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1 The FCC has delayed the effective date of these changes until January 1, 2005. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278, Order on Reconsideration, FCC 03-208 (Aug. 18, 2003).

2 The National Association of Business Political Action Committees ("NABPAC") has raised this issue with respect to its member organizations. *See* NABPAC, Petition for Reconsideration or Clarification, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278, (Aug. 25, 2003). However, the issue affects all political speech, not just that subject to NABPAC's Petition.

3 A lower court has held that even some commercial speech is not covered by the TCPA's ban on unsolicited faxes. *See Lutz Appellate Servs., Inc. v. Curry,* 859 F. Supp. 180, 181-82 (E.D. Pa. 1994) (stating advertisement of job opportunities was not advertisement of availability of property subject to TCPA).

Political communications do not have a commercial purpose, even if some element of the communication might have a promotional aspect. For example, if a PAC hosts a fundraising event, the invitation may solicit a contribution to the PAC, in part, by promoting the fundraising event as an inducement to the potential contributor. While such a communication technically could be characterized as "advertising the … availability or quality of any … goods[] or services" when it describes the dinner or the entertainment at a fundraiser, it should not be characterized as "commercial," which is required to trigger the TCPA prohibition. 47 U.S.C. § 227(a)(4). This conclusion is based on the nature of the communication as political speech. With respect to this particular type of political speech, the conclusion that it is outside of TCPA's prohibition is further supported by Federal Election Commission rules that expressly treat the entire cost of the fundraiser as a contribution. *See* 11 CFR 100.53.

In its cornerstone opinion on commercial speech, *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557 (1980), the Supreme Court described commercial speech as "expression related solely to the economic interests of the speaker and its audience," 447 U.S. at 561, and as "speech proposing a commercial transaction," 447 U.S. at 562. The Court held: "The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." 447 U.S. at 562-63. In contrast to commercial speech, political speech enjoys the most vigorous protection of the First Amendment. The Supreme Court has stated that "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Committee,* 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272 (1971)); *see also FEC v. Colorado Republican Fed. Campaign Comm.,* 535 U.S. 431, 440 (2001) (stating: "[s]pending for political ends and contributing to political candidates both fall within the First Amendment's protection of speech and political association" (citing *Buckley v. Valeo,* 424 U.S. 1, 14-23 (1976)). The Supreme Court has also recognized that non-commercial speech may contain some commercial elements. *See Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 632 (1980) (stating: "because charitable solicitation does more than inform private economic decisions and is not *primarily* concerned with providing information about the characteristics and costs of goods and services, it has not been dealt with in our cases as a variety of purely commercial speech" (emphasis added)).

The United States Courts of Appeals for both the Eighth and Ninth Circuit upheld TCPA's ban on unsolicited faxes against a First Amendment challenge, and in so doing both courts noted that the ban applied only to commercial speech. *See Missouri v. American Blast Fax, Inc.,* 323 F.3d 649, 656 (8th Cir. 2003);[4] *Destination Ventures, Ltd.*

[4] Although the parties had agreed that the faxes at issue in that case were commercial speech, *Missouri v. American Blast Fax, Inc.,* 323 F.3d 649, 653 (8th Cir. 2003), the Eighth Circuit nonetheless upheld the "TCPA's distinction between commercial and noncommercial fax advertising." *Id.* at 656 (agreeing with *Destination Ventures, Ltd. v. FCC,* 46 F.3d 54 (9th Cir. 1995)).

v. FCC, 46 F.3d 54, 56 and 57 (9th Cir. 1995).[5] In fact, the Ninth Circuit accepted the characterization that TCPA prohibits "faxes containing advertising" but does not affect "other unsolicited faxes such as those containing political or 'prank' messages." 46 F.3d at 56. *See also Texas v. American Blastfax, Inc.,* 121 F. Supp. 2d 1085, 1092 (W.D. Tex. 2000) (providing "requests to attend a political rally" as an example of noncommercial solicitations unaffected by TCPA's unsolicited fax ban).

Notwithstanding that the plain language of the TCPA, its implementing regulations, judicial interpretations of the TCPA, and the FCC's own statements all support the view that faxes with a political purpose do not qualify as "unsolicited advertisements" under the TCPA, the FCC should amend its regulations to state explicitly this conclusion for three reasons. First, the FCC's recent reversal of the established business relationship exemption has given rise to uncertainty about the reach of the prohibition on unsolicited fax advertisements. Second, there appears to be heightened concern that the TCPA will be interpreted to apply beyond communications with a commercial purpose.[6] Third, an earlier Federal district court opinion considered the mix of commercial and non-commercial speech in a particular fax to determine if it constituted an unsolicited advertisement under TCPA, which suggests that senders of political faxes need to be concerned that the inclusion of any commercial appeal will transform the entire fax to a prohibited advertisement. *See Kenro, Inc. v. Fax Daily, Inc.,* 962 F. Supp. 1162, 1171 (S.D. Indiana 1997) (examining proportion of communication that was commercial to determine if it was subject to TCPA's ban on unsolicited fax advertisements).

In considering this suggested regulatory exemption, the FCC may wish to keep in mind that political faxes are already subject to comprehensive regulatory requirements at both the Federal and State levels. At the Federal level, the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-55 ("FECA"), regulates campaign finance, and the Federal Election Commission has exclusive jurisdiction over its civil enforcement.[7]

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[5] *See also Texas v. American Blastfax, Inc.,* 121 F. Supp. 2d 1085, 1091 (W.D. Tex. 2000) (noting that the TCPA's ban on unsolicited fax advertisements regulates commercial speech); *Kenro, Inc. v. Fax Daily, Inc.,* 962 F. Supp. 1162, 1167 (S.D. Indiana 1997) (same).

[6] In this regard, the American Society of Association Executives website advises that public comments of FCC staff support an extremely broad interpretation of commercial to include anything that involves money in any way. *See* ASAE, *Frequently Asked Questions,* (visited Sept. 26, 2003) http://www.asaenet.org/publicpolicy/FCC_FAX_FAQ/. While we do not know that the website's description is accurate, at the very least it reflects a concern about the FCC's interpretation of "commercial" in TCPA's definition of "unsolicited advertisements." *See also* Nat'l Ass'n of Bus. Political Action, Comms., Petition for Reconsideration or Clarification, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278, at 2-3 (Aug. 25, 2003).

[7] Last year, Congress adopted sweeping amendments to FECA in the Bipartisan Campaign Reform Act of 2002, Pub. Law No. 107-155, 116 Stat. 81 (2002) ("BCRA"), and a Constitutional challenge to BCRA is pending before the Supreme Court. *See McConnell v. FEC, prob. juris. noted,* 123 S.Ct. 2268 (U.S. argued Sept. 8, 2003).

Candidates for Federal office and political committees are subject to FECA in several ways. Candidates (including their authorized committees) are limited in the amount of contributions they may receive from any person. 2 U.S.C. §§ 441a and 441a-1. Candidates may not accept any contributions from prohibited sources, including corporations, labor unions, government contractors, or contributions in the name of another, 2 U.S.C. §§ 441b, 441c, and 441f. Minors may not contribute to candidates or political party committees. 2 U.S.C. § 441k. Foreign nationals may not contribute in connection with any Federal, State or local election. 2 U.S.C. 441e. Candidates' authorized committees must disclose all receipts and disbursements. 2 U.S.C. 434. Candidates are required to include disclaimers in any general public political advertising (including faxes that are of more than 500 pieces and are of an identical or substantially similar nature within any 30-day period) stating that the advertisements were paid for by an authorized committee of a candidate. 2 U.S.C. 441d. Thus, any faxes sent by a Federal candidate or by an authorized committee of a Federal candidate must be financed in accordance with FECA's requirements.

FECA imposes similar contribution limits and prohibitions on national political parties. *See* 2 U.S.C. § 441a, 441b, 441c, and 441f. National political parties must also disclose all receipts and disbursements. 2 U.S.C. § 434. National political parties must include similar disclaimers in any mass faxes they send. 2 U.S.C. § 441d. If a candidate authorized the fax, the disclaimer must specify that and state that it was paid for by the national political party. If no candidate authorized the fax, the disclaimer must clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the fax and that the communication is not authorized by any candidate.

BCRA requires that State, district, and local committees of political parties make expenditures or disbursement for "Federal election activity" from funds subject to the limitations, prohibitions, and reporting requirements of FECA, subject to certain exceptions. 2 U.S.C. § 441i(b). BCRA defines "Federal election activity" to include a variety of activities that a State, district, or local political party committee undertake in connection with a Federal election that include, *inter alia*, mass faxes of more than 500 pieces of an identical or substantially similar nature within any 30-day period that promotes, supports, attacks or opposes a clearly identified Federal candidate. 2 U.S.C. §§ 431(20), (22), and (23).

A core provision of FECA prohibits corporations and labor organizations from using their general treasury funds for contributions and expenditures in connection with Federal elections. 2 U.S.C. § 441b. Corporations and labor organizations may establish and administer their own PACs, known as separate segregated funds ("SSFs"). Subject to certain conditions, corporations and labor organizations may use faxes to solicit corporate shareholders and officers, employees, and union members for contributions to the SSFs or candidates they support. The Federal Election Commission has

comprehensive regulations that prescribe who may be solicited by corporations, labor organizations, membership organizations, trade associations, or cooperatives. *See* 11 CFR 114.5 -- 114.8. These regulations encompass faxed solicitations.

Persons that make independent expenditures that expressly advocate the election or defeat of a clearly identified Federal candidate in excess of $250 during a calendar year must file statements providing information about the disbursement and any funds received to pay for it. 2 U.S.C. § 434(c). If any mass faxing of these types of communications exceeds the cost threshold, the maker of those expenditures would trigger this reporting requirement. In addition, certain faxed communications coordinated with a candidate, authorized committee, or political party committee are in-kind contributions, and are subject to reporting as such. Individuals as well as other entities may also organize a Federal political committee, which is then subject to contribution limitations, prohibitions, and reporting requirements.

We hope this information about the campaign finance regulation at the Federal level is of use to the FCC as it considers the suggested regulatory exemption. We urge you to clarify in your regulations that faxes with a political purpose are not subject to TCPA's ban on unsolicited fax advertisements. The Federal Election Commission appreciates the opportunity to provide comments at this time.[8]

Sincerely,

Lawrence H. Norton
General Counsel

[8] This Office and the Federal Election Commission take no position on the issues raised in the many Petitions for Reconsideration filed in this matter, other than those issues specifically addressed herein.