

## TO FAX OR NOT TO FAX: ANALYSIS OF THE REGULATIONS AND POTENTIAL BURDENS IMPOSED BY THE JUNK FAX PREVENTION ACT OF 2005<sup>1</sup>

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### I. INTRODUCTION

In modern times, low-cost technology has made it relatively easy for telemarketing companies to solicit consumers.<sup>2</sup> The increasingly widespread use of telemarketing in recent years has led to the enactment of numerous laws aimed at curbing telemarketers' practices.<sup>3</sup> Recently, Congress has expressed concern over the current state of the law with respect to unsolicited commercial advertisements that are sent to fax machines, otherwise known as "junk faxes."<sup>4</sup> Since 1991, this area of law has evolved dramatically as Congress has sought to achieve a proper balance between the property interests and privacy concerns of junk fax recipients and the advertising interests of junk fax senders.<sup>5</sup> The difficulty lies in maximizing the efficiency of potential regulations in this area, while decreasing the burden imposed on the interests of the parties involved.

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<sup>1</sup> Pub. L. No. 109-21, 119 Stat. 359 (to be codified at 47 U.S.C. § 227).

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<sup>2</sup> Jennifer L. Radner, Comment, *Phone, Fax, and Frustration: Electronic Commercial Speech and Nuisance Law*, 42 EMORY L.J. 359, 376 (1993) ("In recent years, possibly due to the growing intrusiveness of new communications technology, it seems that regulating communications media has grown in popularity.").

<sup>3</sup> See Junk Fax Prevention Act of 2005; 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. §§ 7701-13 (Supp. IV 2004)); Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (codified as amended at 47 U.S.C. § 227 (2000 & Supp. III 2003)).

<sup>4</sup> The receipt of a junk fax is very similar to the receipt of spam e-mail, only transmitted through a fax machine.

<sup>5</sup> See Telephone Consumer Protection Act § 2(9) (reporting congressional findings); see also 137 CONG. REC. H11307, 11310-11315 (daily ed. Nov. 26, 1991) (discussing improvements in the law that would help to achieve the appropriate balance in this area).

Congress has attempted to achieve the appropriate balance with the Telephone Consumer Protection Act (TCPA) of 1991<sup>6</sup> and through subsequent modifications set forth in the Junk Fax Prevention Act (JFPA) of 2005.<sup>7</sup> However, the strict language of the TCPA required a sender to obtain “prior express invitation or permission” before any unsolicited advertising,<sup>8</sup> inappropriately tipping the balance in favor of the junk fax recipient while inadequately addressing the sender’s marketing concerns.<sup>9</sup> Although the JFPA was intended to improve upon the TCPA’s regulations by alleviating a portion of the junk fax sender’s burden,<sup>10</sup> the JFPA’s new “established business relationship” (EBR)<sup>11</sup> and “opt-out clause”<sup>12</sup> provisions fail to adequately protect the interests of those who are forced to bear the burden of unwanted faxes.

This Comment will focus on the regulatory efforts that have been imposed concerning junk faxes, the evolution of the various regulations in this area, and the possibility of establishing more efficient and balanced controls. Part II of this Comment will discuss the history of the TCPA, how the TCPA and its regulations came to fruition, and the importance of the various provisions dealing with junk faxes. Next, Part III will analyze the courts’ interpretation of the TCPA, mainly with respect to unsolicited faxes and telemarketing. Part III will briefly discuss how courts have interpreted the TCPA and its ban on unsolicited junk faxes in light of criticisms that it violates a person’s First Amendment right to commercial speech.<sup>13</sup> Part IV will address the recent changes set forth in the JFPA and the balance that the JFPA attempts to achieve with respect to junk faxes. In addition, Part IV.A will examine the ability of the Federal Communications Commission (FCC) under the JFPA to interpret and affect the dynamic landscape of junk fax law. Furthermore, Part IV.B will discuss the practical effects of the JFPA, along with the protections and exceptions provided by the JFPA. Finally, Part V will propose, and argue for, more balanced junk fax law regulations in order to tailor and

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<sup>6</sup> Pub. L. No. 102-243, 105 Stat. 2394 (codified as amended at 47 U.S.C. § 227 (2000 & Supp. III 2003)).

<sup>7</sup> Pub. L. No. 109-21, 119 Stat. 359 (to be codified at 47 U.S.C. § 227).

<sup>8</sup> 47 U.S.C. § 227(b)(1)(C) (2000 & Supp. 2003). The JFPA eliminated this provision. *See infra* note 68 and accompanying text.

<sup>9</sup> 151 CONG. REC. H5262, 5265 (daily ed. Jun. 28, 2005) (statement of Rep. Markey).

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

<sup>11</sup> 47 U.S.C.A. §§ 227(b)(1)(C)(i)–(ii) (West 2001 & Supp. 2006).

<sup>12</sup> *Id.* § 227(b)(2)(D).

<sup>13</sup> U.S. CONST. amend. I.

improve upon the current provisions in the JFPA. The proposals include a variety of different approaches designed to achieve Congress' ultimate objective.<sup>14</sup> The most notable approaches are (1) an opt-in approach for potential junk fax receivers and (2) more flexibility for the FCC to specify when an "established business relationship"<sup>15</sup> is created. These recommendations are intended to balance both the privacy and property concerns of junk fax recipients, while easing the burden imposed on junk fax senders and facilitating their marketing interests.

## II. HISTORICAL OVERVIEW OF THE REGULATION OF UNSOLICITED COMMERCIAL ADVERTISING AND THE TELEPHONE CONSUMER PROTECTION ACT OF 1991<sup>16</sup>

The recent technological advances available to marketers have helped to create a much more powerful and efficient telemarketing industry. Unfortunately, these advances have placed a substantial burden on potential consumers and their privacy interests.<sup>17</sup> These consumers have expressed concern over the lack of regulations imposed on the telemarketing industry, and many Americans have insisted that action be taken in order to relieve them from unwanted, irritable, and costly solicitations.<sup>18</sup> Most importantly, more stringent regulations were needed to control "automatic dialers, junk faxes, and unwanted telephone solicitations."<sup>19</sup>

In 1991, Congress responded to consumers' widespread criticisms by adding the TCPA to Title II of the Communications Act of 1934.<sup>20</sup> The primary purpose of the TCPA was "to prohibit certain

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<sup>14</sup> See *infra* notes 21–23 and accompanying text.

<sup>15</sup> 47 U.S.C. §§ 227(b)(1)(C)(i)–(ii).

<sup>16</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (codified as amended at 47 U.S.C. § 227 (2000 & Supp. III 2003)).

<sup>17</sup> 137 CONG. REC. H11307, 11310 (daily ed. Nov. 26, 1991) (statement of Rep. Markey) ("[T]he aim of [the TCPA] is not to eliminate the brave new world of telemarketing, but rather to secure an individual's right to privacy that might be unintentionally intruded upon by these new technologies."); see also Radner, *supra* note 2, at 377 (noting that although the use of technology to facilitate unsolicited commercial advertising has become quite a profitable industry, telephone and facsimile solicitation is a burden on the recipients of this advertising and has grown exponentially with recent technological advances).

<sup>18</sup> Adam Zitter, Note, *Good Lawus for Junk Fax? Government Regulation of Unsolicited Solicitations*, 72 FORDHAM L. REV. 2767, 2822 (2004).

<sup>19</sup> 137 CONG. REC. H11307, 11311 (daily ed. Nov. 26, 1991) (statement of Rep. Rinaldo).

<sup>20</sup> Pub. L. No. 102-243, 105 Stat. 2394. The TCPA amended Title II of the Communications Act of 1934, 47 U.S.C. §§ 201–231 (2000).

practices involving the use of telephone equipment”<sup>21</sup> by placing “restrictions on unsolicited, automated telephone calls to the home and by restricting certain uses of fax machines and automatic dialers.”<sup>22</sup> Congress felt that “[i]ndividuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade [should] be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.”<sup>23</sup> The TCPA was “the first significant step in curbing what many perceived as an onslaught of telemarketing that had invaded American homes.”<sup>24</sup> The regulations adopted by the TCPA attempted to control the burden imposed by a completely unrestricted telemarketing industry, while balancing the technological advances in telemarketing with the right to privacy that individuals are entitled to maintain in their homes.<sup>25</sup>

The TCPA makes it unlawful for a person “to make any call . . . using any automatic telephone dialing system or an artificial prerecorded voice” to a service where the receiving party would be charged for the call.<sup>26</sup> Also, the TCPA prohibits anyone from initiating a call to a “residential telephone line using an artificial or prerecorded

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<sup>21</sup> See 47 U.S.C. § 227.

<sup>22</sup> Edwin L. Klett & Rochelle L. Brightwell, *Telemarketing: Exercise in Free Speech or Just a Pain in the Neck?*, 24 PA. LAWYER 38, 39 (2002). The telemarketing industry has evolved into a booming business due to “the increased use of cost-effective telemarketing techniques.” Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, §§ 2(1), (4), 105 Stat. 2394, 2394 (reporting congressional findings).

<sup>23</sup> § 2(9), 105 Stat. 2394, 2394 (reporting congressional findings).

<sup>24</sup> Hillary B. Miller and Robert R. Biggerstaff, *Application of the Telephone Consumer Protection Act to Intrastate Telemarketing Calls and Faxes*, 52 FED. COMM. L.J. 667, 668 (2000).

<sup>25</sup> Howard E. Berkenblit, Note, *Can Those Telemarketing Machines Keep Calling Me?—The Telephone Consumer Protection Act of 1991 After Moser v. FCC*, 36 B.C. L. REV. 85, 96 (1994). More specifically, Congress found that “[o]ver 30,000 businesses actively telemarket goods and services to business and residential customers.” § 2(2), 105 Stat. 2394, 2394 (reporting congressional findings); see also *id.* § 2(5), 105 Stat. 2394, 2394 (“Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency telephone line is seized, a risk to public safety.”); *id.* § 2(8), 105 Stat. 2394, 2394 (“The constitution does not prohibit restrictions on commercial telemarketing solicitations.”); *id.* § 2(11), 105 Stat. 2394, 2394 (“Technologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer.”).

<sup>26</sup> 47 U.S.C. § 227(b)(1)(A)(iii) (2000 & Supp. III 2003). Although every call for which the receiving party would be charged is banned, certain calls are specifically mentioned by this section, such as those to a cell phone or paging service. *Id.* However, there is an exception if the call was made for emergency purposes or if it was made with the “prior express consent” of the party receiving the call. *Id.* § 227(b)(1)(A).

voice . . . *without the prior express consent* of the called party.”<sup>27</sup> Although the TCPA did not specifically address “live” unsolicited telephone calls, the TCPA enabled the FCC to establish a national do-not-call database for those who do not wish to receive such telephone solicitations.<sup>28</sup>

In addition, one of the primary goals of the TCPA was to prohibit unsolicited commercial advertisements sent to fax machines, known as “junk faxes.”<sup>29</sup> As the use of fax machines continued to grow, junk mail’s electronic equivalent, the “junk fax,” had also become prevalent.<sup>30</sup> Although junk fax advertising is similar to telemarketing calls in that it invades an individual’s privacy interest,<sup>31</sup> it imposes additional burdens on the recipients as well. One of the burdens that concerned Congress was the shifting of the sender’s costs to the recipient, who is inappropriately forced to bear the expenses associated with the receipt of the fax.<sup>32</sup> Representative Edward Markey of Massachusetts, quoting an article from the *Washington Post*, stated that “receiving junk fax is like getting junk mail with the postage due.”<sup>33</sup> In a 2003 case,<sup>34</sup> the United States Court of Appeals for the Eighth Circuit suggested that a junk fax recipient bore more than \$100 a year in direct costs “which came in the form of paper, toner, time required to recognize and discard unwanted faxes, and the temporary inability to send and receive faxes.”<sup>35</sup>

Moreover, junk faxes can inconvenience recipients for various reasons. The marketer’s ability to send out numerous unsolicited fax advertisements could extend to all hours of the day, and a recipient’s

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<sup>27</sup> *Id.* § 227(b)(1)(B) (emphasis added). There is also an exception here if the call was made for emergency purposes or if the call “is exempted by rule or order by the Commission under paragraph (2)(B).” *Id.*

<sup>28</sup> *Id.* § 227(c)(3). Though the power to create this national do-not-call registry was granted to the FCC, the registry was not put into effect until October 1, 2003. *In re* Rules and Regulations Implementing Tel. Consumer Prot. Act of 1991, 18 F.C.C.R. 14,014, 14,034 (2003).

<sup>29</sup> 47 U.S.C. § 227(b)(1)(C).

<sup>30</sup> 136 CONG. REC. H5818, 5820 (daily ed. July 30, 1990) (statement of Rep. Markey).

<sup>31</sup> 137 CONG. REC. S16204, 16208 (daily ed. Oct. 29, 1991) (statement of Sen. Bentsen).

<sup>32</sup> 136 CONG. REC. H5818, 5820 (daily ed. July 30, 1990) (statement of Rep. Markey).

<sup>33</sup> *Id.* (quoting Jerry Knight, *The Junk Fax Attack: Why Maryland May Outlaw Unsolicited Advertisements*, WASH. POST, May 23, 1989, at C3).

<sup>34</sup> *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003).

<sup>35</sup> Zitter, *supra* note 18, at 2807 (citing *Am. Blast Fax, Inc.*, 323 F.3d at 655); *see also* *Destination Ventures v. FCC*, 46 F.3d 54, 56–57 (9th Cir. 1995) (discussing the significant costs borne by a junk fax recipient).

phone line(s) could be tied up for a substantial period of time, effectively preventing the recipient from receiving any other faxes.<sup>36</sup> In addition, the recipient is forced to sort through and decipher between important faxes and those which can be discarded.<sup>37</sup> Unfortunately for these recipients, junk fax advertising is an extremely attractive marketing option for advertisers because of its cost-efficiencies.<sup>38</sup> For instance, the sender of the fax generally incurs only the cost of making a simple telephone call.<sup>39</sup>

To alleviate these problems, the TCPA set out to create a complete ban on unsolicited commercial faxes, making it “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.”<sup>40</sup> Furthermore, Congress defined the term “unsolicited advertisement”<sup>41</sup> in the TCPA 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.”<sup>42</sup> These provisions in the original TCPA were very protective of the junk fax recipient because they required his or her “express invitation or permission” before enabling a sender to transmit an unsolicited advertisement via fax.<sup>43</sup> Congress was careful to select this requirement of “express invitation or permission” in the TCPA over a potential alternative method that would require recipients to “opt-out” of any unsolicited faxes that they did not wish to receive:

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<sup>36</sup> 136 CONG. REC. H5818, 5820 (daily ed. July 30, 1990) (statement of Rep. Ritter).

<sup>37</sup> David E. Sorkin, *Unsolicited Commercial E-Mail and the Telephone Consumer Protection Act of 1991*, 45 BUFF. L. REV. 1001, 1011 (1997).

<sup>38</sup> Michael A. Fisher, Note, *The Right to Spam? Regulating Electronic Junk Mail*, 23 COLUM.-VLA J.L. & ARTS 363, 380 (2000) (“The involuntary shifting of costs onto fax recipients prompted Congress to include 47 U.S.C. § 227(b)(1)(C) as part of the Telephone Consumer Protection Act of 1991.”).

<sup>39</sup> Sorkin, *supra* note 37, at 1008.

<sup>40</sup> 47 U.S.C. § 227(b)(1)(C) (2000 & Supp. III 2003). Congress subsequently amended this section of the TCPA with the new provisions included in the JFPA. 47 U.S.C.A. §§ 227(b)(1)(C)(i)–(iii) (West 2001 & Supp. 2006).

<sup>41</sup> 47 U.S.C. § 227(a)(4).

<sup>42</sup> *Id.* This was the section in the original TCPA, Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified as amended at 47 U.S.C. § 227 (2000 & Supp. 2003)). Since the enactment of the JFPA, the definition has been modified. Under the new definition, the term “unsolicited advertisement” means “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, *in writing or otherwise.*” 47 U.S.C. § 227(a)(5) (2000 & Supp. III 2003) (emphasis added).

<sup>43</sup> 47 U.S.C. § 227(b)(1)(C).

The legislative history indicates that one of Congress' primary concerns was to protect the public from bearing the costs of unwanted advertising. Certain practices were treated differently because they impose costs on consumers. For example, under the TCPA, calls to wireless phones and numbers for which the called party is charged are prohibited in the absence of an emergency or without the prior express consent of the called party. Because of the cost shifting involved with fax advertising, Congress similarly prohibited unsolicited faxes without the prior express permission of the recipient. Unlike the do-not-call list for telemarketing calls, Congress provided no mechanism for opting out of unwanted facsimile advertisements. Such an opt-out list would require the recipient to possibly bear the cost of the initial facsimile and inappropriately place the burden on the recipient to contact the sender and request inclusion on a "do-not-fax" list.<sup>44</sup>

Therefore, when the TCPA went into effect on December 20, 1992,<sup>45</sup> the statute more than adequately addressed the concerns expressed by junk fax recipients, allowing them to sue the sender of an unsolicited junk fax if the fax was sent without their "prior express invitation or permission."<sup>46</sup>

### III. CHALLENGES TO THE TCPA AND JUDICIAL INTERPRETATION

Telemarketers have frequently argued that the TCPA unlawfully restricts their right to commercial speech,<sup>47</sup> which has traditionally been protected under the First Amendment to the United States Constitution.<sup>48</sup> In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,<sup>49</sup> the Supreme Court of the United States articulated a four-pronged test in order to determine whether commercial speech has been properly restricted.<sup>50</sup> The Court held that a regulation on commercial speech is permissible if: (1) the First

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<sup>44</sup> *In re* Rules and Regulations Implementing Tel. Consumer Prot. Act of 1991, 18 F.C.C.R. 14,014, 14,128 (2003) (footnotes omitted).

<sup>45</sup> Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified as amended at 47 U.S.C. § 227).

<sup>46</sup> 47 U.S.C. §§ 227(a)(4), (b)(3). Although this may have been the intended effect of the original TCPA, the FCC interpreted these provisions differently. *See infra* note 89 and accompanying text.

<sup>47</sup> *See, e.g.,* Missouri *ex rel.* Nixon v. Am. Blast Fax, Inc., 323 F.3d 649, 652 (8th Cir. 2003); Destination Ventures v. FCC, 46 F.3d 54, 55 (9th Cir. 1995); Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162, 1167 (S.D. Ind. 1997).

<sup>48</sup> U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

<sup>49</sup> 447 U.S. 557 (1980).

<sup>50</sup> *Id.* at 566.

Amendment protects the speech;<sup>51</sup> (2) a substantial governmental interest is asserted; (3) the regulation directly advances this asserted interest; and (4) the regulation is narrowly tailored to serve that interest.<sup>52</sup>

Furthermore, the Supreme Court has determined that commercial speech is entitled to substantial constitutional protection, although it should be afforded less protection than other forms of expression.<sup>53</sup> The Court also found that there must be a “reasonable fit” between the interest sought and the governmental regulations, but the regulations do not have to be the “least restrictive” means to achieve their desired interest.<sup>54</sup> Considering the Supreme Court’s interpretations, the TCPA has consistently withstood scrutiny in the federal courts under the *Central Hudson* test for First Amendment restrictions on commercial speech.<sup>55</sup>

In *Destination Ventures v. FCC*,<sup>56</sup> the United States Court of Appeals for the Ninth Circuit determined that the TCPA’s ban on unsolicited advertisements was justified because Congress’ intended goal was to prevent cost-shifting in advertising.<sup>57</sup> The circuit court held that the TCPA’s ban on unsolicited fax advertising was narrowly tailored to meet the government’s interest.<sup>58</sup> Similarly, the United States Court of Appeals for the Eighth Circuit<sup>59</sup> concluded that the TCPA’s restrictions were proportionate and narrowly tailored to the government’s interests because there were other forms of advertising still available to advertisers.<sup>60</sup> The court noted that unsolicited fax advertising caused significant interference and cost-shifting onto the recipients.<sup>61</sup> Despite these frequent challenges to the TCPA’s consti-

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<sup>51</sup> To satisfy this provision, according to the Court, commercial speech must not be misleading and must concern lawful activity. *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64–68 (1983); *see also* *Bd. of Trs. v. Fox*, 492 U.S. 469, 477 (1989) (“[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,’ and is subject to ‘modes of regulation that might be impermissible in the realm of noncommercial expression.’” (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (alteration in original))).

<sup>54</sup> *Fox*, 492 U.S. at 477–80.

<sup>55</sup> *See infra* notes 56–62 and accompanying text.

<sup>56</sup> 46 F.3d 54 (9th Cir. 1995).

<sup>57</sup> *Id.* at 56.

<sup>58</sup> *Id.*

<sup>59</sup> *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003).

<sup>60</sup> *Id.* at 659.

<sup>61</sup> *Id.*

tutionality,<sup>62</sup> the provisions of the TCPA regarding junk faxes had remained good law at the time of the JFPA's revisions.<sup>63</sup> Consequently, the prevalence of marketing through the use of junk faxes had experienced a dramatic decline.<sup>64</sup>

#### IV. THE JUNK FAX PREVENTION ACT OF 2005—THE MOST RECENT ADDITION TO THE TCPA

On July 9, 2005, President Bush signed the Junk Fax Prevention Act<sup>65</sup> into law.<sup>66</sup> The JFPA amended the TCPA by adding a few major provisions.<sup>67</sup> While the effects of these new provisions remain to be seen, they have the potential to dramatically alter the existing landscape of junk faxing. First, the JFPA eliminates the “prior express permission” provision set forth in the original TCPA.<sup>68</sup> The JFPA now enables junk faxes to be sent so long as there is an “established business relationship” (“EBR”)<sup>69</sup> between the sender and the receiver of the fax.<sup>70</sup> An EBR is currently defined by the JFPA as:

[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 the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or appli-

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<sup>62</sup> See, e.g., *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162 (S.D. Ind. 1997) (holding that the ban on junk faxes directly relates to the government's interest in protecting consumers from intrusion on their fax machines and from advertiser's cost shifting and that the ban is narrowly tailored). The *Kenro* court added that faxes were different from junk mail, newspaper ads, and television because of the costs and potential interference with legitimate business activity that faxes impose on unwilling consumers. *Id.* at 1168.

<sup>63</sup> Zitter, *supra* note 18, at 2774.

<sup>64</sup> *Id.*

<sup>65</sup> Pub. L. No. 109-21, 119 Stat. 359 (2005) (codified at 47 U.S.C. § 227 (2000 & Supp. 2006)).

<sup>66</sup> Press Release, The White House, President Signs Junk Fax Prevention Act of 2005 (July 11, 2005), available at <http://www.whitehouse.gov/news/releases/2005/07/20050711.html>.

<sup>67</sup> See, e.g., 47 U.S.C.A. § 227(a)(2) (West 2001 & Supp. 2006) (defining an EBR for purposes of the JFPA); *id.* §§ 227(b)(1)(C)(i)–(iii) (establishing exceptions to the general ban on junk faxes without “prior express permission”); *id.* §§ 227(b)(2)(D)–(G) (further enhancing the FCC's power to implement the requirements of the JFPA).

<sup>68</sup> *Id.* § 227(b)(1)(C). The JFPA added subsections (b)(1)(C)(i)–(iii) which provided new exceptions, such as the EBR, to the “prior express permission” requirement that did not previously exist under the TCPA.

<sup>69</sup> *Id.* § 227(b)(1)(C)(i).

<sup>70</sup> *Id.*

cation regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.<sup>71</sup>

However, the JFPA subjects the duration of an EBR's existence to any time limitations that the FCC determines appropriate.<sup>72</sup>

Furthermore, the JFPA enables a junk faxer to send these unsolicited faxes if the sender obtained the recipient's fax number through "a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution."<sup>73</sup> This provision significantly broadens the ability of senders to create an EBR with potential recipients, enabling the senders to freely and legally transmit a greater amount of junk faxes. Although Congress gave the FCC some flexibility in limiting the duration of an existing EBR,<sup>74</sup> it did not provide the FCC with any power to limit the relative ease of this initial EBR *creation*.

The JFPA does attempt to grant additional protections to help curb the potential prevalence of junk faxes due to the EBR. Junk fax senders are required to include notice of an opt-out opportunity for the receivers of their unsolicited advertisements.<sup>75</sup> This notice to opt-out must be contained on the first page of every junk fax in order for the receiver to determine whether he or she wishes to stop receiving the unsolicited advertisements.<sup>76</sup> The notice must also explicitly state that the recipient can request that the sender not send any future junk faxes.<sup>77</sup> Failure to comply with a proper request not to receive

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<sup>71</sup> 47 C.F.R. § 64.1200(f)(4) (2003). The JFPA does not specifically define an EBR. *See* 47 U.S.C.A. § 227(a)(2). Instead, the JFPA refers to the definition of the term as set forth by the *Code of Federal Regulations*, which went into effect on January 1, 2003. *Id.* However, the JFPA does provide two slight alterations for purposes of the Act. *Id.* §§ 227(a)(2)(A)–(B). First, an EBR "shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber . . ." *Id.* § 227(a)(2)(A). Second, the JFPA limits the duration of the EBR to a period that the FCC mandates. *Id.* § 227(a)(2)(B).

<sup>72</sup> 47 U.S.C.A. § 227(b)(2)(G)(i). Before the FCC can exercise this right, it must evaluate certain factors set forth by the JFPA and cannot commence a proceeding to determine whether the duration of an EBR's existence should be limited until three months after the JFPA is enacted (the JFPA was enacted on July 9, 2005). *Id.* §§ 227(b)(2)(G)(i)–(ii).

<sup>73</sup> *Id.* § 227(b)(1)(C)(ii)(II). When discussing this specific provision in this Comment, it will be classified as though it is part of the EBR exception of the JFPA.

<sup>74</sup> *Id.* § 227(b)(2)(G).

<sup>75</sup> *Id.* § 227(b)(2)(D).

<sup>76</sup> *Id.* § 227(b)(2)(D)(i).

<sup>77</sup> *Id.* § 227(b)(2)(D)(ii).

any further junk faxes “within the shortest reasonable time, as determined by the Commission,” is unlawful.<sup>78</sup> Moreover, the junk fax sender must provide a recipient with a cost-free means of transmitting a request to opt-out and an opportunity to make such a request “at any time on any day of the week.”<sup>79</sup>

When compared with the junk fax regulations in the TCPA,<sup>80</sup> the JFPA’s recently added provisions allow significantly more flexibility for the junk fax sender to market through fax machines.<sup>81</sup> However, the changes to the TCPA could have been expected considering the inordinate amount of restraints imposed by the TCPA on junk fax senders and its practical application with respect to junk faxing.<sup>82</sup> Congress recognized that a change was needed since legitimate fax communications had become substantially burdened by the then current law.<sup>83</sup>

Not only could the JFPA have been anticipated, but many businesses consider the new provisions to be a dramatic improvement in the junk fax field.<sup>84</sup> As a practical matter, the FCC interpreted the TCPA’s provision requiring “prior express invitation or permission” to send junk faxes much more broadly than what Congress seemingly intended pursuant to the plain language of the statute.<sup>85</sup> The FCC’s Rules and Regulations implementing the TCPA stated that “facsimile transmission[s] 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>86</sup> This finding effectively continued to allow junk faxes, minimizing the original intended effectiveness of the TCPA. The FCC’s interpretation that junk faxes were permissible as long as there was an “established business relationship” had con-

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<sup>78</sup> See 47 U.S.C.A. § 227(b)(2)(D)(ii).

<sup>79</sup> *Id.* §§ 227(b)(2)(D)(iv)(II), (v).

<sup>80</sup> See *supra* notes 40–46 and accompanying text.

<sup>81</sup> 151 CONG. REC. H5262, 5264–65 (daily ed. Jun. 28, 2005) (statement of Rep. Markey).

<sup>82</sup> The FCC interpreted the TCPA’s provisions on junk faxes to allow for an established business relationship exception, even though the language of the TCPA made no mention of an EBR. See *infra* note 89 and accompanying text.

<sup>83</sup> 151 CONG. REC. H5262, 5264 (daily ed. Jun. 28, 2005) (statement of Rep. Upton).

<sup>84</sup> See, e.g., *Junk Fax Bill, Hearing on S. 714 Before the S. Comm. on Commerce, Sci., and Transp.*, 109th Cong. (2005) [hereinafter *Hearing*] (testimony of Jon. E. Bladine, Region 9 Director, National Newspaper Association), available at <http://commerce.senate.gov/pdf/bladine.pdf>.

<sup>85</sup> 151 CONG. REC. H5262, 5264–65 (daily ed. Jun. 28, 2005) (statement of Rep. Markey).

<sup>86</sup> *In re* Rules and Regulations Implementing Tel. Consumer Prot. Act of 1991, 7 F.C.C.R. 8752, 8779 n.87 (1992).

fused courts, since this language was not explicitly stated in the TCPA itself.<sup>87</sup> In 2003, the FCC acknowledged that this interpretation conflicted with the original intentions of the TCPA<sup>88</sup> and planned on alleviating the problem:

Since 1992, the FCC has interpreted the general ban in the [TCPA] on facsimile transmissions of advertising messages to include an “established business relationship exception,” which allows businesses to send advertising faxes to customers. But the exception is not actually written into the statute, and the agency intend[ed] to revise its interpretation as of January 1, 2005.<sup>89</sup>

The FCC sought this revision to ensure that the EBR exception would no longer be implied and to re-establish the original intention of the TCPA, which was to require “prior express invitation or permission” before sending an unsolicited commercial fax.<sup>90</sup> The FCC noted that the TCPA’s interpretation failed to adequately consider the interests of the junk fax recipient:

We now reverse our prior conclusion that an established business relationship provides companies with the necessary express permission to send faxes to their customers . . . . [T]he EBR will no longer be sufficient to show that an individual or business has given their express permission to receive unsolicited facsimile advertisements. The record in this proceeding reveals consumers and businesses receive faxes they believe they have neither solicited nor given their permission to receive. Recipients of these faxed advertisements assume the cost of the paper used, the cost associated with the use of the facsimile machine, and the costs associated with the time spent receiving a facsimile advertisement during which the machine cannot be used by its owner to send or receive other facsimile transmissions.<sup>91</sup>

After considering the interference and cost-shifting involved in receiving an unwanted fax, the FCC reallocated the balance of priori-

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<sup>87</sup> See *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 135 S.W.3d 365, 394 (Tex. App. 2004) (“This notion of deeming permission is based on an inference and, as such, seems to conflict with the TCPA’s requirement that the invitation or permission be express . . . . Characterizing permission granted by implication as ‘express’ runs afoul of the plain meaning of the word.”).

<sup>88</sup> *In re Rules and Regulations Implementing Tel. Consumer Prot. Act of 1991*, 18 F.C.C.R. 14,014, 14,127–28 (2003).

<sup>89</sup> Richard E. Wiley & Rosemary C. Harold, *Contentious Times in a Shifting Landscape*, in COMMUNICATIONS LAW 2004 (PLI Patents, Copyrights, Trademarks, & Literary Prop., Course Handbook Series No. 2981, 2004), available at 811 PLI/PAT 109, 244 (November 2004).

<sup>90</sup> 151 CONG. REC. S3280, 3280 (daily ed. Apr. 6, 2005) (statement of Sen. Smith).

<sup>91</sup> *In re Rules and Regulations Implementing Tel. Consumer Prot. Act of 1991*, 18 F.C.C.R. 14,014, 14,127–28 (2003) (footnote omitted).

ties in order to favor junk fax recipients, noting that their interests far outweighed those of the senders who wished to advertise.<sup>92</sup>

The “prior express invitation or permission” provision in the TCPA, however, imposed an extraordinary burden on businesses that relied on junk fax advertising.<sup>93</sup> These businesses strongly advocated for some type of exemption, because they did not want to face the problem of obtaining customers’ prior written consent before sending each and every unsolicited fax.<sup>94</sup> For example, a broad EBR exemption is beneficial to the real estate industry because unsolicited advertising is commonly used to communicate in the normal course of business to respond to potential home-owner inquiries.<sup>95</sup> Faxes are used so frequently in this industry to communicate with clients because of their speed and cost effectiveness.<sup>96</sup> These types of concerns ultimately led to the adoption of the broad EBR exemption<sup>97</sup> in the JFPA,<sup>98</sup> which seems to have provided the flexibility necessary to relieve businesses of this onerous burden.<sup>99</sup> However, Congress reasoned that the intention of the JFPA was not to legalize junk faxes but, rather, to provide an exception to the complete ban while offering junk fax recipients additional protection in the form of an opt-out clause.<sup>100</sup>

A. *The Power of the FCC under the JFPA*

Currently, it is difficult to gauge how the JFPA will affect the future of junk faxing, and only time will tell how the new provisions will be implemented and enforced. Much of the changing landscape in this field will depend on the FCC’s interpretations and the extent of

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<sup>92</sup> Berk W. Washburn, *Facsimile Advertising and the Requirement to Get Signed, Written Consents*, 17 UTAH BAR J. 16, 19 (2004) (concluding that, as long as the public opinion supports the FCC’s balancing of priorities between junk fax senders and junk fax recipients, junk fax senders should prepare to get prior express permission to send these faxes or risk future liability under the TCPA).

<sup>93</sup> 151 CONG. REC. H5262, 5265 (daily ed. Jun. 28, 2005) (statement of Rep. Markey).

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

<sup>95</sup> *Junk Fax Prevention Act of 2005: Hearing on S. 714 Before the Subcomm. on Trade, Tourism, and Econ. Dev. of the S. Comm. on Commerce, Sci. and Transp.*, 109th Cong. (2005) (statement of David Feeken, on behalf of the National Association of Realtors), available at <http://commerce.senate.gov/pdf/feeken.pdf>.

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

<sup>97</sup> 47 U.S.C.A. §§ 227(b)(1)(C)(i)–(ii) (West 2001 & Supp. 2006).

<sup>98</sup> *Id.* § 227.

<sup>99</sup> 151 CONG. REC. H5262, 5264 (daily ed. Jun. 28, 2005) (statement of Rep. Upton).

<sup>100</sup> *Id.* (statement of Rep. Markey).

the limitations that the FCC chooses to impose on the JFPA. The FCC has the discretion to make some integral determinations with respect to the EBR and opt-out provisions in the JFPA.<sup>101</sup>

First, the Commission is authorized to make some of the provisions, such as the right to limit the “duration” of an existing EBR, more stringent to protect junk fax recipients.<sup>102</sup> However, before the FCC can establish any limits on the duration of the EBR, a few relevant factors must be evaluated.<sup>103</sup> Initially, the Commission must determine whether there have been a significant number of complaints over the existing EBR.<sup>104</sup> Next, the FCC must determine whether a significant number of these complaints deals with junk faxes that have been sent as a result of an EBR that the Commission believes is longer in duration than a consumer’s reasonable expectations.<sup>105</sup> Finally, after weighing both the senders’ costs in demonstrating that an EBR exists within a certain period of time and the recipients’ benefits in establishing a limitation on these EBRs,<sup>106</sup> the FCC must evaluate whether the costs would impose an undue burden on small businesses.<sup>107</sup>

Second, the FCC has the flexibility to adjust various critical requirements regarding the JFPA’s opt-out provision,<sup>108</sup> including the ability to determine the amount of time a junk fax sender has to comply with a recipient’s opt-out request.<sup>109</sup> In addition, the FCC has discretionary authority to exempt certain types of small-business senders from adhering to the opt-out rule if the costs are unduly burdensome.<sup>110</sup> The FCC may also waive the notice of an opt-out-opportunity requirement for tax-exempt nonprofit organizations that are furthering their association’s tax-exempt purpose through unsolicited advertisements.<sup>111</sup>

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<sup>101</sup> See, e.g., 47 U.S.C.A. § 227(b)(2)(G)(i) (setting forth the FCC’s ability to limit the duration of an EBR’s existence); *id.* § 227(b)(2)(D) (establishing the FCC’s discretionary authority relating to certain aspects of the JFPA’s opt-out provision).

<sup>102</sup> See *supra* note 72 and accompanying text.

<sup>103</sup> See 47 U.S.C.A. §§ 227(b)(2)(G)(i)(I)–(IV).

<sup>104</sup> *Id.* § 227(b)(2)(G)(i)(I).

<sup>105</sup> *Id.* § 227(b)(2)(G)(i)(II).

<sup>106</sup> *Id.* § 227(b)(2)(G)(i)(III).

<sup>107</sup> *Id.* § 227(b)(2)(G)(i)(IV).

<sup>108</sup> *Id.* § 227(b)(2)(D).

<sup>109</sup> See *supra* text accompanying note 78.

<sup>110</sup> 47 U.S.C.A. § 227(b)(2)(D)(iv)(II).

<sup>111</sup> *Id.* § 227(b)(2)(F).

*B. Practical Considerations and Effects of the JFPA*

Although several essential determinations in the JFPA have yet to be made, the new Act severely frustrates the primary purpose of the TCPA, which sought to protect recipients' privacy and property rights by requiring their "prior express invitation or permission."<sup>112</sup> A story in the *San Francisco Chronicle*<sup>113</sup> summarized the effects of the JFPA, stating that it "[s]eems like a pretty fundamental right to both privacy and personal property that just got taken away so that businesses will be able to save a few bucks on advertising."<sup>114</sup> Although it remains to be seen how the JFPA will affect the overall landscape of junk faxing in general, much will depend on the interpretation and effectiveness of the new EBR<sup>115</sup> and opt-out<sup>116</sup> provisions.

As a practical matter, the implications and effects of the new provisions could adversely affect junk fax recipients more than Congress intended under the JFPA. First, the JFPA creates a rather broad definition of an EBR in order to facilitate a marketer's interests,<sup>117</sup> enabling a junk fax sender to easily create a legal relationship with a recipient.<sup>118</sup> In effect, this provision re-establishes junk-fax advertising as a viable marketing tool, which is what the TCPA had originally sought to ban.<sup>119</sup> Furthermore, any EBR exemption "heightens financial, safety, and privacy concerns when extended to mobile devices or other communication tools for which consumers bear a burden of cost for each advertisement or sales call received."<sup>120</sup> In the context of the JFPA, not only does the EBR provision essentially legalize a broad array of business relationships, but the statute fails to adequately protect those individuals who are forced to constantly receive unsolicited faxes.<sup>121</sup> Thus, the primary purpose of the JFPA,

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<sup>112</sup> See *supra* note 68 and accompanying text.

<sup>113</sup> Steve Kirsch, Letter to the Editor, *Your Right to Not Receive Junk Faxes*, S.F. CHRON., Jul. 17, 2005, at E2.

<sup>114</sup> *Id.*

<sup>115</sup> 47 U.S.C.A. §§ 227(b)(1)(C)(i)–(ii).

<sup>116</sup> *Id.* § 227(b)(2)(D).

<sup>117</sup> See *supra* notes 93–99 and accompanying text.

<sup>118</sup> See *supra* notes 70–71, 73 and accompanying text (discussing the breadth of the EBR provision in the JFPA).

<sup>119</sup> See *Hearing, supra* note 84 (testimony of Jon. E. Bladine, Region 9 Director, National Newspaper Association), available at <http://commerce.senate.gov/pdf/bladine.pdf>.

<sup>120</sup> Shannon D. Torgerson, Note, *Getting Down to Business: How the Established Business Relationship Exemption to the National Do-Not-Call Registry Forces Consumers to Pay for Unwanted Sales Calls*, 23 NW. J. TECH. & INTELL. PROP. 24, 32 (2004).

<sup>121</sup> See *infra* note 127 and accompanying text. Faxes are different than other telemarketing activities in that they are more costly to the recipient. Such a broad EBR

which was to balance the competing concerns of the junk fax senders with those of the junk fax recipients,<sup>122</sup> is jeopardized.

In addition, the relative ease with which a junk fax sender obtains a legal relationship with a recipient under the JFPA—and the breadth of such a relationship—could significantly impact the statute's interpretation in future litigation.<sup>123</sup> Although the FCC has the ability to limit the duration of an EBR,<sup>124</sup> the Commission's power in this area is substantially diminished if a junk fax sender is constantly able to re-establish a valid legal relationship simply by obtaining a recipient's fax number from a website, directory, or advertisement.<sup>125</sup> Therefore, these new provisions threaten to dismantle the bright-line distinctions that Congress had created in the original TCPA with respect to which senders' junk faxes were legally allowable.

Furthermore, it is unfair to place the burden of opting out on the recipient of the junk fax<sup>126</sup> while giving the junk-fax sender a certain amount of time to comply with any opt-out requests.<sup>127</sup> Not only are recipients forced to pay for the original fax(es) before the opportunity to opt-out is made available, but they may continue to see their privacy and property interests invaded for a period of time even after they have made an opt-out request. In the interim, many faxes can be sent, and much damage can be done.

The practical effects of the opt-out provision in the JFPA pose additional concerns. For instance, the JFPA provides that the junk fax recipient receive a cost-free method of opting-out of any unwanted faxes.<sup>128</sup> However, this provision is merely an illusion, since the recipient will always be forced to incur the cost of the time that it takes to opt-out.<sup>129</sup> In addition, the opt-out provision may not be use-

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provision, without a complementary system to adequately protect the interests of junk fax recipients, fails to take these increased costs to the recipient into account.

<sup>122</sup> 151 CONG. REC. S3280, 3280 (daily ed. Apr. 6, 2005) (statement of Sen. Smith).

<sup>123</sup> Michael P. Broadhurst, *New Law Allows Business to Communicate With Customers by Fax*, THE LEGAL INTELLIGENCER, Aug. 9, 2005, at 7.

<sup>124</sup> 47 U.S.C.A. § 227(b)(2)(G) (West 2001 & Supp. 2006).

<sup>125</sup> See *id.* § 227(b)(1)(C)(ii)(II). Although this exception is not actually called an EBR relationship, it acts like one in that it creates another loophole around the "prior express permission" requirement, enabling a marketer to continue sending junk faxes.

<sup>126</sup> *Id.* § 227(b)(2)(D)(ii).

<sup>127</sup> *Id.* The FCC is free to determine the amount of time that a junk fax sender has to comply with any opt-out requests. *Id.*

<sup>128</sup> *Id.* § 227(b)(2)(D)(iv)(II).

<sup>129</sup> Congress considered the importance of an individual's time in the CAN-SPAM Act. 15 U.S.C. § 7701(a)(3) (Supp. IV 2004). Congress wanted to prevent an individual from incurring costs in the form of time needlessly spent trying to access, review, and discard spam. *Id.* Similarly, under the JFPA, junk fax recipients are forced

ful to the average recipient. Many individuals feel as though the opt-out provisions with regard to spam e-mails do not work because any attempted opt-out request would either not be heeded by the sender or would open the receiver up to more spam by confirming the validity of his or her e-mail address.<sup>130</sup> Depending on the length of time that it takes for the recipients to complete their opt-out requests and the level of enforcement of any unfulfilled requests, recipients may be unlikely to utilize this opt-out protection.

#### V. ANALYSIS OF THE INTRUSIVENESS OF THE EBR AND OPT-OUT PROVISIONS

Many individuals are not even interested in receiving junk faxes from those who have established a legitimate business relationship with them.<sup>131</sup> The underlying issue regarding the JFPA is whether the EBR<sup>132</sup> and opt-out<sup>133</sup> provisions are sufficient to continue protecting the privacy and property concerns of these junk fax recipients, which is the issue that Congress intended to address with the original TCPA.<sup>134</sup> Under the JFPA, however, recipients must take the time to opt-out of every broad EBR that they may have inadvertently created with a junk fax sender or risk having their phone lines tied up, at any given point, with an infinite amount of junk faxes. By enabling this type of outcome, the JFPA fails to effectuate the TCPA's intent and inadequately shields a recipient from the intrusiveness caused by junk fax advertising.<sup>135</sup>

The primary purpose of the TCPA was to "protect the privacy interests" of individuals by restricting the fax machine to certain uses.<sup>136</sup> Part of the reason for the TCPA's complete ban on unsolicited faxes without "prior express invitation or permission" was due to junk fax recipients' privacy concerns.<sup>137</sup> In order to determine whether the new provisions of the JFPA impinge on these privacy interests, they

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to spend time reviewing junk faxes, and subsequently opting out of any unwanted EBRs. *Cf. Hernandez v. Kalinowski*, 146 F.3d 196, 200 (3d Cir. 1998) (noting Benjamin Franklin's famous phrase "time is money").

<sup>130</sup> Richard C. Balough, *The Do-Not-Call Registry Model is Not the Answer to Spam*, 22 J. MARSHALL J. COMPUTER & INFO. L. 79, 86-87 (2003).

<sup>131</sup> Kirsh, *supra* note 113, at E2.

<sup>132</sup> JFPA, 47 U.S.C.A. §§ 227(b)(1)(C)(i)-(ii) (West 2001 & Supp. 2006).

<sup>133</sup> *Id.* § 227(b)(2)(D).

<sup>134</sup> *See supra* notes 5, 23, 31-36 and accompanying text.

<sup>135</sup> *Id.*

<sup>136</sup> *Int'l Sci. & Tech. Inst. v. Inacom Commc'ns*, 106 F.3d 1146, 1150 (4th Cir. 1997) (citing S. REP. NO. 102-178, at 1 (1991), *as reprinted in* 1991 U.S.C.A.N. 1968, 1968).

<sup>137</sup> *See supra* notes 23, 31 and accompanying text.

must be analyzed alongside similar privacy regulations and within the context of Congress' original intentions under the TCPA.

In *Missouri ex rel. Nixon v. American Blast Fax, Inc.*,<sup>138</sup> the United States Court of Appeals for the Eighth Circuit noted that Congress, when adopting the TCPA, intentionally treated junk faxes and automated calls differently than live telemarketer calls, which are allowed unless an individual objects in advance.<sup>139</sup> The court further noted that Congress distinguished between these methods because it found that live telemarketing solicitations were less invasive with respect to an individual's privacy and less of a nuisance than artificial or prerecorded telephone calls.<sup>140</sup> The court examined Congress' reasoning, stating that "[a]rtificial 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.'"<sup>141</sup>

Recently, nuisance and privacy concerns associated with electronic mail (e-mail) have become major issues as well. Although e-mail has quickly become an important and reliable form of communication, its convenience and efficiency have been severely threatened by the growing volume of unsolicited e-mail, commonly referred to as "spam."<sup>142</sup> A significant amount of an individual's time and money can be needlessly spent reviewing and storing this unwanted spam.<sup>143</sup> As a result, Congress passed the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act<sup>144</sup> of 2003, which went into effect on January 1, 2004, in order to impose limitations on spam.<sup>145</sup> The primary purpose of the CAN-SPAM Act is to:

- (i) prohibit senders of [e-mail] for primarily commercial advertisement or promotional purposes from deceiving intended recipients or Internet service providers as to the source or subject matter of their e-mail messages; (ii) require such e-mail senders to give recipients an opportunity to decline to receive future com-

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<sup>138</sup> 323 F.3d 649 (8th Cir. 2003).

<sup>139</sup> *Id.* at 657 (citing 47 U.S.C. § 227(c) (2000 & Supp. III 2003); 47 C.F.R. § 64.1200(e)(2)(iii) (2002)).

<sup>140</sup> *Id.* (citing S. REP. NO. 102-178, at 4 & n.4, 5 & n.5 (1991), as reprinted in 1991 U.S.C.C.A.N. 1968, 1972-73).

<sup>141</sup> *Id.* (quoting S. REP. NO. 102-178, at 4-5 (1991), as reprinted in 1991 U.S.C.C.A.N. at 1972).

<sup>142</sup> 15 U.S.C. § 7701(a) (Supp. IV 2004).

<sup>143</sup> *Id.* § 7701(a)(3).

<sup>144</sup> Pub. L. No. 108-187, 117 Stat. 2699 (codified at 15 U.S.C. §§ 7701-13 (Supp. IV, 2004)).

<sup>145</sup> *Id.*

mercial e-mail from them and to honor such requests; (iii) require senders of unsolicited commercial e-mail (UCE) to also include a valid physical address in the e-mail message and a clear notice that the message is an advertisement or solicitation; and (iv) prohibit businesses from knowingly promoting, or permitting the promotion of, their trade or business through e-mail transmitted with false or misleading sender or routing information.<sup>146</sup>

In addition, the CAN-SPAM Act also permits the Federal Trade Commission to establish and implement a nationwide “Do-Not-E-Mail” registry in the future.<sup>147</sup>

The originally proposed CAN-SPAM Act allowed commercial e-mail solicitations as long as an individual gave his express permission or implied consent.<sup>148</sup> The original “implied consent” provision was strikingly similar to both the EBR and opt-out provisions in the JFPA.<sup>149</sup> For the proposed “implied consent” provision to have applied, there must have been a business transaction between the individual and the solicitor within three years of the e-mail message along with notice of an opportunity not to receive the commercial e-mails, either at the time of the transaction or upon receipt of the first e-mail, which the recipient did not exercise.<sup>150</sup> In addition, visitation to a website, in which the recipient knowingly submitted his e-mail address, could be considered a business transaction under the proposed provision.<sup>151</sup> However, the implied consent exception was removed before the bill was passed, leaving only the “express permission” language as an acceptable means for permitting e-mail solicitations.<sup>152</sup> Congress decided to remove the “implied consent” exception upon its realization that the creation of “such a wide loophole would render the [A]ct ineffective.”<sup>153</sup>

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<sup>146</sup> S. REP. NO. 108-102, at 1 (2003), as reprinted in 2004 U.S.C.C.A.N. 2348, 2348.

<sup>147</sup> 15 U.S.C. § 7708.

<sup>148</sup> Michael P. Considine, Comment, *User Registration Websites: Possible E-Loopholes to the National Do-Not-Call Registry*, 53 EMORY L.J. 1951, 1968 (2004) (citing 149 CONG. REC. S13176, 13177 (daily ed. Oct. 23, 2003); 149 CONG. REC. S13012 (daily ed. Oct. 22, 2003)).

<sup>149</sup> See *id.* (discussing how the “implied consent” language was similar to the established business relationship exception).

<sup>150</sup> 149 CONG. REC. S13176, 13177 (daily ed. Oct. 23, 2003); see also Considine, *supra* note 148, at 1968 (discussing the originally proposed provisions of the CAN-SPAM Act).

<sup>151</sup> 149 CONG. REC. S13176, 13177 (daily ed. Oct. 23, 2003); see also Considine, *supra* note 148, at 1968.

<sup>152</sup> Considine, *supra* note 148, at 1968 (citing 15 U.S.C. § 7701 (Supp. 2004)).

<sup>153</sup> *Id.*

Congress also discussed the possibility that an EBR exception might undermine the effectiveness of the national do-not-call registry:

Congress understood that the established business relationship exception would possibly prove to be a detriment to the national do-not-call registry. In discussing the established business relationship exception, Senator Dodd noted that “[t]here are going to be people coming back, once they discover that any prior business relationship pretty much will allow the exception to occur . . . [that] are going to be asking us to come back and even close the loophole down further.”<sup>154</sup>

The inclusion of an EBR exception has repeatedly invoked widespread concern within Congress as to the provision’s potential to render an entire regulation ineffective. This potential seems to have been the driving force behind the ultimate exclusion of the EBR exception in the CAN-SPAM Act.<sup>155</sup>

Unlike bulk e-mail and junk faxing, however, which can be collected at the recipient’s leisure, telemarketing may be slightly more intrusive on an individual’s privacy rights because the “ring of the telephone demands immediate attention.”<sup>156</sup> This additional privacy concern may help account for the lack of an EBR with respect to unsolicited machine-based telemarketing.<sup>157</sup> But even though the privacy concerns associated with junk faxing may not, by themselves, be as strong as that of receiving an unwanted artificial or prerecorded telemarketing call, the total intrusiveness of the marketing effort must be taken into account when attempting to regulate.<sup>158</sup>

In addition to the privacy concerns that junk faxes impose upon an individual, much of the intrusiveness of the JFPA centers on the fact that the broad EBR provision enables potential senders to take recipients’ property without their express consent.<sup>159</sup> When determining the total intrusiveness of a particular marketing method, the unwanted invasion on another’s property interests has demanded

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<sup>154</sup> *Id.* at 1969 (citing 149 CONG. REC. S11957, 11964 (daily ed. Sept. 25, 2003) (statement of Sen. Dodd)) (alteration in original).

<sup>155</sup> Although the exclusion of an EBR had been discussed in connection with the national do-not-call registry, the provision was ultimately included. Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4634 (Jan. 29, 2003).

<sup>156</sup> *State v. Casino Mktg. Group*, 491 N.W.2d 882, 888 (Minn. 1992).

<sup>157</sup> 47 U.S.C.A. § 227(b)(1)(B) (West 2001 & Supp. 2006).

<sup>158</sup> See Considine, *supra* note 148, at 1968 (discussing how the existence of an EBR exception strongly depends on the intrusiveness of the marketing effort that Congress is attempting to curtail). “[T]he more intrusive the marketing effort, the less likely an [EBR] will be found.” *Id.*

<sup>159</sup> See *supra* notes 32–35 and accompanying text.

considerable attention. For instance, courts have recognized the affect that spam has on the property rights of Internet Service Providers (ISPs),<sup>160</sup> who are forced to bear the costs of these unwanted e-mails.<sup>161</sup> High volumes of unsolicited spam impair the value of an ISP's server capacity, ultimately diminishing the resources available to the ISP subscribers.<sup>162</sup>

Much like spam, junk faxes have similar effects on property rights, except that the individual user is the one who must endure the marketers' advertising costs.<sup>163</sup> In *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*,<sup>164</sup> the United States Court of Appeals for the Fourth Circuit noted the property concerns associated with the receipt of a junk fax:

It is obvious to anyone familiar with a modern office that receipt is a "natural or probable consequence" of sending a fax, and receipt alone occasions the very property damage the TCPA was written to address: depletion of the recipient's time, toner, and paper, and occupation of the fax machine and phone line.<sup>165</sup>

This is one of the major reasons why the FCC attempted to respond to junk faxes by requiring "express permission"<sup>166</sup> and by eliminating any EBR exception that may have applied.<sup>167</sup> In *Missouri ex rel. Nixon v. American Blast Fax, Inc.*,<sup>168</sup> the United States Court of Appeals for the Eighth Circuit discussed how the TCPA's provisions advanced the governmental interest and ultimate goal of protecting the public

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<sup>160</sup> According to PCMag.com, an Internet Service Provider is defined as "[a]n organization that provides access to the Internet . . . . Large ISPs, such as America Online (AOL) and Microsoft Network (MSN), also provide proprietary databases, forums and services in addition to Internet access." PCMag.com Encyclopedia of IT Terms, [http://www.pcmag.com/encyclopedia\\_term/0%2C2542%2Ct%3DISP&i%3D45481%2C00.asp](http://www.pcmag.com/encyclopedia_term/0%2C2542%2Ct%3DISP&i%3D45481%2C00.asp) (last visited Feb. 18, 2007).

<sup>161</sup> The personal property of an ISP is infringed upon when unwanted spam is processed and stored on their servers. *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1017–18 (S.D. Ohio 1997); *see also* *Am. Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444, 452 (E.D. Va. 1998) (holding that the personal property of an ISP was invaded when the defendant used its computer network to transmit unsolicited bulk e-mails).

<sup>162</sup> *CompuServe*, 962 F. Supp. at 1022–23. This also indirectly hurts the individual user who loses the efficiencies created by an e-mail service. *Id.* at 1023.

<sup>163</sup> *See supra* note 32 and accompanying text.

<sup>164</sup> 407 F.3d 631 (4th Cir. 2005).

<sup>165</sup> *Id.* at 639.

<sup>166</sup> *See supra* note 91 and accompanying text.

<sup>167</sup> *Res. Bankshares*, 407 F.3d at 639. The FCC response, requiring only "express permission" facilitated the enactment of the JFPA. *See supra* notes 89–91 and accompanying text.

<sup>168</sup> 323 F.3d 649 (8th Cir. 2003).

from unwanted advertising costs.<sup>169</sup> The circuit court stated: “Because of the cost shifting of fax advertising, it was consistent for Congress to treat unsolicited fax advertisements differently than live telemarketing calls.”<sup>170</sup> Although the TCPA bans telemarketers from making phone calls to wireless numbers using an “artificial or prerecorded voice,”<sup>171</sup> the FCC has allowed “live” unsolicited telemarketers to call wireless cell phones, despite any charges to the recipient for receiving the call.<sup>172</sup> The total intrusiveness of a “live” telemarketer versus that of an “artificial or prerecorded voice” played an integral role in the FCC’s determination as to how each of these marketing methods should operate.

Since the EBR exception creates such a wide loophole, its application should be limited to fairly unintrusive marketing efforts in order to perpetuate a regulation’s intended effect. Upon regulating e-mail solicitations in the CAN-SPAM Act,<sup>173</sup> Congress determined that an EBR exemption would hinder the effectiveness of the statute’s

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<sup>169</sup> *Id.* at 657.

<sup>170</sup> *Id.*

<sup>171</sup> 47 U.S.C. § 227(b)(1)(A)(iii) (2000 & Supp. III 2003).

<sup>172</sup> *In re* Rules and Regulations Implementing Tel. Consumer Prot. Act of 1991, 68 Fed. Reg. 44,144, 44,165 (July 25, 2003) (to be codified at 47 C.F.R. pts. 64, 68). Even though the recipient may be charged for a solicitation call to a wireless number and the same economic and safety concerns are applicable to both live and artificial or prerecorded solicitations, “the Commission has determined not to prohibit all live telephone solicitations to wireless numbers.” *Id.* However, artificial or prerecorded messages to wireless numbers are banned. *Id.* (citing 47 U.S.C. § 227(b)(1)(A)(iii)). Congress has determined that these artificial or prerecorded messages are costly, inconvenient and “a greater nuisance and invasion of privacy than live solicitation calls.” *Id.* The FCC does point out that the TCPA prohibits any “live solicitation calls to wireless numbers using an autodialer.” *Id.* (citing 47 U.S.C. § 227(b)(1)). Furthermore, the national do-not-call database allows for an individual to register his or her wireless telephone number to enable the potential recipient to avoid receiving any “live” telemarketing phone calls to these wireless phones. *Id.* at 44,165–66. Thus, the FCC determined that these individuals with wireless numbers are equipped with the relatively simple means to prevent the majority of “live” telemarketers from calling. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 68 Fed. Reg. at 44,166. However, simply registering on the do-not-call database does not prevent any calls from those with whom the wireless subscriber has an EBR. *Id.* The wireless subscriber can still make a “company-specific do-not-call request” if he wishes to terminate this EBR. *Id.* By controlling, through the use of the do-not-call database, “live” telephone solicitations where there is an EBR, the FCC determined that a prohibition on these calls to a wireless number would “unduly restrict telemarketers’ ability to contact those consumers who do not object to receiving telemarketing calls and use their wireless phones as either their primary or only phone.” *Id.*

<sup>173</sup> 15 U.S.C. §§ 7701–13 (Supp IV 2004).

provisions.<sup>174</sup> Although unsolicited e-mail messages can be easily discarded by the recipient, they are extremely easy and cost-efficient for a marketer to send.<sup>175</sup> This creates a potentially intrusive form of advertising since the receiver may be forced to incur storage costs and time spent “accessing, reviewing, and discarding” the spam.<sup>176</sup> The JFPA deals with a similar sender-friendly form of marketing,<sup>177</sup> which can result in the majority of a marketer’s advertising costs being pushed onto the recipient.<sup>178</sup> This cost-shifting, coupled with the invasion of a junk fax on a recipient’s privacy rights, is comparable to the intrusiveness imposed upon an individual receiving spam.<sup>179</sup> For this reason, the broad EBR provision in the JFPA fails to adequately accommodate a junk fax recipient’s interests, and is an inappropriate solution to the overall balance sought by the TCPA.<sup>180</sup>

Although the JFPA’s opt-out clause<sup>181</sup> may help to mitigate some of the intrusiveness of junk fax advertising, this provision does not adequately compensate a recipient for the extraordinary burden imposed by the Act’s EBR provision.<sup>182</sup> The opt-out clause may not effectively control junk faxing since a “significant amount of harm can be done very rapidly” before the recipient can actually opt-out.<sup>183</sup> In addition, many recipients are unaware of their rights under the opt-out system, and even though they do not wish to receive the messages, they will incur significant costs.<sup>184</sup> Furthermore, the opt-out system in the JFPA is similar to the opt-out provision that was discussed in connection with the unsolicited e-mail regulations in the CAN-SPAM Act.<sup>185</sup> Despite the presence of this opt-out provision, Congress still apparently found that the provisions in that statute would be ineffective due to the EBR’s wide loophole.<sup>186</sup>

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<sup>174</sup> See *supra* note 153 and accompanying text. It was not called an EBR in the CAN-SPAM Act. Rather, it was referred to as the “implied consent” provision, although it had the same basic effect as the EBR provision in the JFPA. See *supra* note 150 and accompanying text.

<sup>175</sup> 15 U.S.C. § 7701(a)(1).

<sup>176</sup> *Id.* § 7701(a)(3) (discussing the costs of spam to recipients).

<sup>177</sup> See *supra* notes 38–39 and accompanying text.

<sup>178</sup> See *supra* notes 32–35 and accompanying text.

<sup>179</sup> See *supra* notes 32–39 and accompanying text.

<sup>180</sup> See *supra* note 23 and accompanying text.

<sup>181</sup> 47 U.S.C.A. § 227(b)(2)(D) (West 2001 & Supp. 2006).

<sup>182</sup> *Id.* §§ 227(b)(1)(C)(i)–(ii).

<sup>183</sup> Fisher, *supra* note 38, at 381.

<sup>184</sup> *Id.* Therefore, “a complete ban is likely to be the only reasonable solution when the cost to the consumer massively exceeds the cost to the solicitor.” *Id.*

<sup>185</sup> See *supra* notes 148–153 and accompanying text.

<sup>186</sup> See *supra* note 153 and accompanying text.

## VI. RECOMMENDATIONS TO BETTER BALANCE THE INTENTIONS OF BOTH THE JFPA AND THE TCPA

Since the regulations imposed in the original TCPA seemed to weigh heavily in favor of protecting the junk fax recipient at the expense of the sender,<sup>187</sup> Congress determined that the JFPA was necessary in order to secure an appropriate balance between each side's competing interests and concerns.<sup>188</sup> The JFPA's provisions, however, have tipped the scales decidedly in favor of the junk fax sender. Although those who wish to advertise through fax machines should be afforded First Amendment commercial speech protection,<sup>189</sup> a slightly different approach concerning the EBR<sup>190</sup> and opt-out<sup>191</sup> provisions could provide this protection and enhance the practical effects of the JFPA at the same time. Due to the intrusiveness of junk faxes,<sup>192</sup> the current interplay between the EBR and opt-out provisions seems to render any junk fax regulations ineffective. The following are a few of the possible solutions that will achieve a more even balance among these competing concerns.

### A. *Creation of an EBR*

Instead of imposing the burden to "opt-out" of junk faxes on the recipients, Congress should appropriately shift the burden to the senders through the use of an "opt-in" provision. Although the FCC's revised interpretation of the original TCPA<sup>193</sup> may have stymied the marketing attempts of junk fax senders,<sup>194</sup> the "prior express permission" requirement before each and every fax<sup>195</sup> would have afforded a significant amount of protection for junk fax recipients.<sup>196</sup> By permitting the creation of an EBR merely through public knowledge of a recipient's fax number,<sup>197</sup> however, the JFPA eliminates this protec-

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<sup>187</sup> See 151 CONG. REC. H5262, 5264-65 (daily ed. Jun. 28, 2005) (statement of Rep. Markey).

<sup>188</sup> See *supra* note 23 and accompanying text.

<sup>189</sup> U.S. CONST. amend. I.

<sup>190</sup> 47 U.S.C.A. §§ 227(b)(1)(C)(i)-(ii) (West 2001 & Supp. 2006).

<sup>191</sup> *Id.* § 227(b)(2)(D).

<sup>192</sup> See *supra* notes 31-33, 35-37, 44 and accompanying text.

<sup>193</sup> See *supra* notes 87-92 and accompanying text.

<sup>194</sup> See *supra* notes 93-94 and accompanying text.

<sup>195</sup> See *supra* note 91 and accompanying text.

<sup>196</sup> See *supra* note 43 and accompanying text.

<sup>197</sup> 47 U.S.C.A. §§ 227(b)(1)(C)(ii)(I)-(II) (West 2001 & Supp. 2006). A marketer can send junk faxes to a recipient if the recipient voluntarily communicates his number in the context of an EBR, or if the sender finds the number in "a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its [fax] number for public distribution." *Id.*

tion and enables an EBR to be created much too easily. Thus, in order to further balance the competing interests of both the junk fax receivers and the senders, a receiver should be required to sign a one-time, signed, and written consent in order to originally “opt-in” for these junk faxes. The sender can then use this written consent to establish an EBR with the receiver; thus narrowing down the ability to create an EBR in the first place.

There are two possible ways to adopt this “opt-in” system, both of which grant significantly more protection to the junk fax receiver than the current EBR provision while still considering the interests of the junk fax sender. First, a strict “opt-in” provision could be used where the one and only way to create an EBR, and thus allow senders to transmit junk faxes to a particular recipient, is to require the recipient to “opt-in.” For example, a sender would *only* be able to transmit junk faxes to those receivers who have signed a one-time, prior written consent agreement. Once the one-time “opt-in” is signed by the recipient, an EBR is created and the sender can freely transmit junk faxes to that recipient without his or her “prior written consent.”

Second, if Congress feels that the current EBR provision should be narrowed without completely eliminating it, a modified “opt-in” approach should be taken. Under this approach, the current EBR under the JFPA is still completely eliminated unless a recipient decides to either opt-in under the one-time “opt-in” consent provision *or* the recipient falls within a few special categories of relationships which could automatically establish an EBR, even without the recipient purposely deciding to “opt-in.” Under this modified approach, Congress could define certain “special” relationships that would automatically qualify as EBRs. For example, Congress may determine that one of these “special” categories is the relationship between a customer and a business from which a product or a service has been purchased by the consumer within a specific time period, such as the previous three months. However, in order to decrease the wide loopholes that are apparent in the JFPA’s current EBR relationship,<sup>198</sup> these “special” categories should be fairly limited in scope and defined much more narrowly. This way, it would still be significantly harder for a particular relationship to qualify as an EBR under the “modified opt-in” approach than under the current broad EBR qualifications in the JFPA.<sup>199</sup> Under this “modified opt-in” approach, any

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<sup>198</sup> Id. §§ 227(b)(1)(C)(i)–(ii).

<sup>199</sup> *Id.*

relationship that does not fall within one of these “special” categories is not an EBR, and the receiver must then provide the sender with the one-time “opt-in” consent in order to create a valid EBR.

Importantly, this additional opt-in feature would not replace or eliminate the current opt-out provision in the JFPA. Rather, the opt-out clause in the JFPA could be modified to apply to those who have given their express written permission or implied permission through a “special” relationship but later decide to terminate the EBR and discontinue junk fax receipt. Once an EBR is created, the burden would then appropriately fall on the receiver to “opt-out” of the EBR relationship.<sup>200</sup>

Both of these systems should withstand any challenges that they unlawfully restrict commercial speech,<sup>201</sup> since the TCPA frequently withstood such First Amendment challenges,<sup>202</sup> and these provisions are more narrowly tailored to serve Congress’ interest<sup>203</sup> in preventing cost-shifting in fax advertising.<sup>204</sup> In addition, with either system in place, the interests and goals of the junk fax sender and the junk fax receiver would be taken into account. Junk fax senders, such as those in the real estate industry, would be able to realize cost-efficiencies because they would not have to be burdened with constantly obtaining a consumers’ prior written consent before sending *each and every* fax.<sup>205</sup> Furthermore, the broad loophole that the EBR exception created is eliminated. A junk fax receiver who does not wish to receive these faxes could adequately protect his or her privacy and property interests from those senders who may be able to establish some type of attenuated EBR under the current system.

#### B. *The FCC’s Power*

A second possible improvement to the JFPA deals with the FCC’s ability to influence the development of an EBR.<sup>206</sup> Although the FCC may currently limit the *duration* of a viable EBR’s existence,<sup>207</sup> Congress should grant the FCC sole discretion to enhance or restrict the ability of a marketer to *create* a viable EBR with a junk fax recipient in

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<sup>200</sup> This opt-out provision could work much like the “opt-out” provision in the JFPA. *Id.* § 227(b)(2)(D).

<sup>201</sup> U.S. CONST. amend. I.

<sup>202</sup> See *supra* notes 55–64 and accompanying text.

<sup>203</sup> See *supra* notes 49–52 and accompanying text.

<sup>204</sup> See *supra* notes 32–33 and accompanying text.

<sup>205</sup> See *supra* notes 95–99 and accompanying text.

<sup>206</sup> See *supra* notes 102–107 and accompanying text.

<sup>207</sup> See *supra* notes 72, 102, 107 and accompanying text.

the first place.<sup>208</sup> While this type of FCC power is not necessary under a “strict opt-in” system, such as the one discussed above,<sup>209</sup> under the “modified opt-in” approach, this power would enable the FCC to establish or remove any “special” automatic EBRs that prove helpful or ineffective when compared to the overall intentions of the Act.<sup>210</sup> Even under the current EBR approach taken in the JFPA,<sup>211</sup> granting the FCC the ability to narrow the creation of an EBR would permit it to significantly enhance the practical effects of the Act.

Much like the current provisions in the JFPA, in either of the two new approaches that this Comment proposes,<sup>212</sup> the FCC can still continue imposing any necessary limits on the duration of an EBR<sup>213</sup> created through either “prior express written consent” or through a “special” automatic EBR. For example, the FCC may determine that the recipient’s one-time “opt-in” to receive junk faxes is not sufficient to create an indefinite EBR. Rather, the FCC may require the recipient to renew his or her “opt-in” consent every 12 months in order to re-establish a valid legal relationship with the junk fax sender for the following year. Thus, the FCC could continually monitor the various legal relationships and increase or decrease their duration depending on the practical effects of the legal relationship on the interests of all the parties involved.

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<sup>208</sup> In defining an EBR, the JFPA refers to 47 C.F.R. § 64.1200 of the *Code of Federal Regulations* that went into effect as of January 1, 2003. See *supra* note 71 and accompanying text. Furthermore, the JFPA specifically permits certain other EBRs, aside from the one that can be created pursuant to the definition provided by the *Code of Federal Regulations*. See *supra* note 73 and accompanying text. The JFPA’s provisions, however, do not grant the FCC the ability to continuously monitor and change what constitutes a viable EBR.

<sup>209</sup> See *supra* Part VI.A.

<sup>210</sup> Granting the FCC the ability to limit or enhance the potential creation of an EBR in the first place may not matter if the “opt-in” limitation was adopted because, under the “opt-in” scenario, the sole means for creating an EBR is through the one-time prior written consent of the recipient. Under the “modified opt-in” scenario, however, Congress may define certain “special” relationships as automatic EBRs, even without the prior express written permission of the recipient. Under this scenario, the FCC could eliminate any automatic “special” EBRs that are too burdensome on the junk fax recipient. Likewise, the FCC could create new automatic “special” EBRs if the junk fax sender is being unduly burdened.

<sup>211</sup> 47 U.S.C.A. §§ 227(b)(1)(C)(i)–(ii) (West 2001 & Supp. 2006).

<sup>212</sup> This refers to both the “strict opt-in” approach and the “modified opt-in” approach.

<sup>213</sup> 47 U.S.C.A. § 227(b)(2)(G).

## VII. CONCLUSION

One of the primary reasons for the JFPA was to alleviate the onerous burden that the FCC sought to impose on junk fax senders.<sup>214</sup> In addition, the JFPA set out to fulfill one of the main intentions of the TCPA,<sup>215</sup> which was to accommodate, align, and balance the competing interests of the junk fax sender with the interests of the junk fax recipient.<sup>216</sup> However, the JFPA has tipped the scales in favor of the junk fax sender, forcing the recipients to bear a fairly intrusive burden on their privacy and property interests, even though they may not wish to receive the sender's message. Not only are recipients intruded upon in the form of an initial fax before receiving an opt-out opportunity, but they are then forced to bear the burden of opting-out of each broadly created EBR<sup>217</sup> in order to prevent any future solicitations.<sup>218</sup> Contrary to other forms of marketing, the approach taken by the JFPA forces unwilling recipients to bear the marketers' initial advertising costs. While someone must incur these initial costs, this onerous burden should not fall on the innocent recipient. Rather, this cost, much like other marketing costs, can only fairly be pushed onto the senders who are seeking to market or promote their products or services through unsolicited advertisements.<sup>219</sup> Therefore, the adoption of a junk fax method, such as the "strict" or "modified" opt-in approach,<sup>220</sup> would properly align these initial burdens while appropriately balancing each party's overall interests and concerns.

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<sup>214</sup> See *supra* notes 99–100 and accompanying text.

<sup>215</sup> See *supra* note 23 and accompanying text.

<sup>216</sup> 151 CONG. REC. S3280 (daily ed. Apr. 6, 2005) (statement of Sen. Smith).

<sup>217</sup> 47 U.S.C.A. §§ 227(b)(1)(C)(i)–(ii).

<sup>218</sup> *Id.* §§ 227(b)(2)(D)–(E).

<sup>219</sup> Gary Miller, *How to Can Spam: Legislating Unsolicited Commercial E-Mail*, 2 VAND. J. ENT. L. & PRAC. 127, 131 (2000) (“[N]o one should be required to subsidize someone else's advertisements. After all, speech is only free if you do not force someone else to pay for it.”).

<sup>220</sup> See *supra* Part VI.A.