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Legislative Bulletin……………………………………..…………..……June 28, 2005

Contents:

Summary of the Bill Under Consideration Today:

Total Number of New Government Programs: 0

Total Cost of Discretionary Authorizations: $0

Effect on Revenue: $0

Total Change in Mandatory Spending: $0

Total New State & Local Government Mandates: 0

Total New Private Sector Mandates: 1

Number of *Bills* Without Committee Reports: 0

Number of *Reported* Bills that Don't Cite Specific Clauses of Constitutional Authority: 0

S. 714 — Junk Fax Prevention Act of 2004 (Senator G. Smith)

Order of Business: The bill is scheduled for consideration on Tuesday, June 28, 2005, under a motion to suspend the rules and pass the bill.

NOTE: S. 714 is almost identical to H.R. 4600, which passed the House last year, on Tuesday, July 20, 2004, by a voice vote. Differences between the two bills are noted in red, bold text below.

Summary: S. 714 would amend the Communications Act (47 U.S.C. 227) and regulations regarding unsolicited advertisements sent via telephone facsimile machine (so-called "junk faxes"). The bill directs the Federal Communications Commission (FCC), within 270 days following enactment, to issue regulations to control unsolicited advertisement sent via fax and establishes an opt-out requirement for senders of certain faxes. The bill makes it illegal under federal law, "to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—

(1) "the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(2) "the sender obtained the number of the number of the telephone facsimile though" —

- **"the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement; or**
- **"a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,**

"except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before the date of enactment of the Junk Fax Prevention Act of 2005 if the sender possessed the facsimile machine number of the recipient before such date of enactment;"

(3) the unsolicited advertisement contains a notice meeting the opt-out requirements specified in S. 714.

The bill concurs with the definition of "established business relationship" found in the FCC regulations of January 1, 2003, though it adds that "such term 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." **While the bill passed by the House in the 108th Congress authorized the FCC to limit such "relationship" to having occurred not shorter than 5 years ago and not longer than 7 years ago, S. 719 instead authorizes the FCC to limit "the duration of the existence of an established business relationship," after the Commission has made certain decisions regarding the established business relationship.**

Opt-out: To comply with the law, the bill requires senders to include an opt-out notice that is "clear and conspicuous and on the first page." The opt-out notice must include "a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and a cost-free mechanism for a recipient to transmit a request to the sender" to stop faxing. The cost-free mechanism might include either a toll-free or a local telephone number. The bill includes authority for the FCC to establish a nonprofit exception to this rule, for such groups as trade associations with members.

S. 714 requires an annual report from the FCC, and a study by the General Accounting Office on the effectiveness of these regulations.

Additional Information: As part of the Telecommunications Consumer Protection Act (TCPA), passed in 1991, Congress included language regulating unsolicited commercial faxes. The law prohibited anyone from faxing an "unsolicited advertisement," which is defined as "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." According to the House and Senate Committees, for 10 years rules to the TCPA junk fax prohibition were enforced under one interpretation, but in July 2003, the Commission amended its junk fax rules. These amended regulations, which were slated to take effect in January 2005 (and have been stayed until June 30, 2005), would require *written permission from recipients prior* to senders' transmission of any unsolicited fax advertisements. If this bill were enacted, it would eliminate the requirement to obtain written permission from customers but replace this requirement with the opt-out mechanism. This legislation, the House Committee noted, "is designed to permit legitimate businesses to do business without the unnecessary and expensive burden of collecting written permission to send faxes."

According to *National Journal* and the Committees, the sponsor has argued the financial costs of the new rules on small businesses and nonprofits would be enormous. A survey by the U.S. Chamber of Commerce reportedly suggested the cost of the pending FCC rule to the average small business would be at least $5,000 in the first year and more than $3,000 each year thereafter. The survey further found it would take an average of more than 27 hours of staff time to obtain the initial written consent from their customers and an additional 20 hours each year to keep the forms current. Another survey by the National Association of Wholesaler-Distributors revealed that its member companies expected to pay an average of $22,500 to obtain consent forms required under the pending rule. The National Association of Realtors estimated that it would have to collect over 67 million permissions to sustain the roughly 6 million home sales from last year.

Committee Action: S. 714 was introduced in the Senate on April 6, 2005, and passed by unanimous consent on June 24, 2005.

Cost to Taxpayers: According to CBO, S. 714 would not have a significant effect on revenues or spending. Any civil penalties collected for violations of these laws are recorded in the federal budget as revenues.

Constitutional Authority: the Senate does not have a rule that requires the citation of constitutional authority, though the House Committee on Energy and Commerce found authority in the 108th Congress under Article I, Section 8, Clause 3, which grants Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes.

Does the Bill Expand the Size and Scope of the Federal Government?: Yes, the bill creates a new federal FCC law that makes sending certain types of faxes illegal, and establishes federal procedures that must be followed if sending faxes to those with whom a company has an established business relationship.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: Yes, the bill imposes private-sector mandates on senders of unsolicited fax advertisements. Based on information from industry sources, CBO expects that the aggregate direct cost of mandates in the bill would be fully offset by savings from the bill (eliminating the written permission mandate) and thus would fall below the annual $123 million threshold established by UMRA for private sector mandates.

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