

April 2006

TELECOMMUNICATIONS

Weaknesses in
Procedures and
Performance
Management Hinder
Junk Fax Enforcement



G A O

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Highlights of [GAO-06-425](#), a report to congressional committees

TELECOMMUNICATIONS

Weaknesses in Procedures and Performance Management Hinder Junk Fax Enforcement

Why GAO Did This Study

The Telephone Consumer Protection Act of 1991 prohibited invasive telemarketing practices, including the faxing of unsolicited advertisements, known as “junk faxes,” to individual consumers and businesses. Junk faxes create costs for consumers (paper and toner) and disrupt their fax operations. The Junk Fax Prevention Act of 2005 clarified an established business relationship exemption, specified opt-out procedures for consumers, and requires the Federal Communications Commission (FCC)—the federal agency responsible for junk fax enforcement—to report annually to Congress on junk fax complaints and enforcement. The law also required GAO to report to Congress on FCC’s enforcement of the junk fax laws. This report addresses (1) FCC’s junk fax procedures and outcomes, (2) the strengths and weaknesses of FCC’s procedures, and (3) FCC’s junk fax management challenges.

What GAO Recommends

GAO recommends that FCC revise its junk fax guidance for consumers, develop data management strategies, and implement recognized performance management practices in carrying out its junk fax responsibilities. FCC officials said they generally concur with the recommendations. FCC also provided technical comments that were incorporated throughout this report as appropriate.

www.gao.gov/cgi-bin/getrpt?GAO-06-425.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Mark L. Goldstein, (202) 512-2834, goldsteinm@gao.gov.

What GAO Found

FCC has procedures for receiving and acknowledging the rapidly increasing number of junk fax complaints, but the numbers of investigations and enforcement actions have generally remained the same. In 2000, FCC recorded about 2,200 junk fax complaints; in 2005, it recorded over 46,000. Using its procedures to review the complaints, FCC’s Enforcement Bureau (EB) issued 261 citations (i.e., warnings) from 2000 through 2005. EB has ordered six companies to pay forfeitures for continuing to violate the junk fax rules after receiving a citation. The six forfeitures totaled over \$6.9 million, none of which has been collected by the Department of Justice for various reasons. EB officials cited competing demands, resource constraints, and the rising sophistication of junk faxers in hiding their identities as hindrances to enforcement.

An emphasis on customer service, an effort to document consumers’ complaints, and an attempt to target enforcement resources efficiently are the strengths of FCC’s procedures; however, inefficient data management, resulting in time-consuming manual data entry, data errors, and—most important—the exclusion of the majority of complaints from decisions about investigations and enforcement, are weaknesses. FCC’s guidance to consumers does not provide them with all of the information they need to support FCC’s enforcement efforts.

FCC faces management challenges in carrying out its junk fax responsibilities. The commission has no clearly articulated long-term or annual goals for junk fax monitoring and enforcement, and it is not analyzing the junk fax data. Without analysis, FCC cannot explore the need for, or implement, changes to its rules, procedures, or consumer guidance that might help deter junk fax violations or give consumers a better understanding of the junk fax rules. Most important, without performance goals and measures and without analysis of complaint and enforcement data, it is not possible to explore the effectiveness of current enforcement measures.

Citations Issued to Junk Fax Violators, Complaints Resulting in a Citation, and Approximate Percentage of Total Annual Complaints Resulting in a Citation, 2000-2005

Year	Citations issued	Complaints resulting in a citation	Approximate percentage of total annual number of complaints resulting in a citation
2000	29	128	5.7%
2001	18	72	2.9
2002	120	639	8.4
2003	32	68	0.4
2004	38	230	0.7
2005	24	319	0.7
Total	261	1,456	1.3%

Source: FCC.

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Abbreviations

CAN-SPAM Act	Controlling Assault of Non-Solicited Pornography & Marketing Act of 2003
CGB	Consumer & Governmental Affairs Bureau
DOJ	Department of Justice
EB	Enforcement Bureau
EBR	established business relationship
FCC	Federal Communications Commission
FTC	Federal Trade Commission
GPRA	Government Performance and Results Act of 1993
ISP	Internet service provider
OGC	Office of General Counsel
SEC	Securities and Exchange Commission
TCPA	Telephone Consumer Protection Act of 1991
TSR	Telemarketing Sales Rule

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United States Government Accountability Office
Washington, D.C. 20548

April 5, 2006

The Honorable Ted Stevens
Chairman
The Honorable Daniel Inouye
Co-Chairman
Committee on Commerce, Science,
and Transportation
United States Senate

The Honorable Joe Barton
Chairman
The Honorable John Dingell
Ranking Minority Member
Committee on Energy and Commerce
House of Representatives

For more than a decade, it has generally been illegal to send unsolicited facsimile (fax) advertisements, commonly known as “junk faxes,” to consumers and businesses. This type of advertising burdens consumers and businesses because they incur costs associated with receiving the fax (paper and toner) as well as cause disruptions to their fax operations. The Telephone Consumer Protection Act of 1991 (TCPA)¹ prohibited a variety of telemarketing practices, including the faxing of advertisements without the recipient’s prior express permission. In 1992, the Federal Communications Commission (FCC) established rules for receiving junk fax complaints and taking enforcement actions. In July 2005, Congress enacted the Junk Fax Prevention Act of 2005 (2005 Act),² which amended certain provisions of TCPA. Specifically, the 2005 Act clarified an “established business relationship” exception, required specific opt-out procedures for consumers and businesses, and required FCC to report annually to Congress on junk fax complaints and enforcement actions. FCC is to adopt new rules implementing these changes by April 5, 2006.

The 2005 Act required GAO to report to Congress on FCC’s enforcement of the junk fax laws. Accordingly, we answered the following questions in this report: (1) What procedures has FCC established for taking action on junk

¹Pub. L. No. 102-243, § 3(a), 105 Stat. 2394, 2395 (1991).

²Pub. L. No. 109-21, 119 Stat. 359 (2005).

fax complaints—including procedures for receipt, acknowledgment, investigation, and enforcement—and to what extent has it taken such action? (2) What are the strengths and weaknesses of FCC’s junk fax procedures? and (3) What challenges do FCC face in carrying out its junk fax responsibilities? In addition, we provide in appendix I of this report information on enforcement measures and penalties that have been established to protect consumers from other types of unsolicited advertising.

To assess FCC’s procedures, implementation, and strengths and weaknesses, we reviewed the applicable statutes and FCC rules pertaining to junk fax enforcement. We interviewed FCC officials responsible for receiving junk fax complaints and taking enforcement actions. We obtained FCC data on junk fax complaints and enforcement actions and reviewed portions of the complaint database and enforcement spreadsheet. Although we discuss limitations to the complaint data in the report, we determined that these data were sufficiently reliable for us to present overall trends and approximate figures.³ To identify challenges, we compared FCC’s enforcement efforts with recognized performance management practices and reviewed applicable FCC performance goals, measures, and data analysis. Finally, we reviewed other statutes relevant to protecting consumers from unsolicited advertisements. We conducted our work from November 2005 through March 2006 in accordance with generally accepted government auditing standards. See appendix II for a more detailed explanation of our scope and methodology.

Results in Brief

FCC has applied its procedures for receiving and acknowledging junk fax complaints to the rapidly increasing number of complaints; however, the numbers of investigations and enforcement actions have generally remained about the same. In 2000, FCC recorded about 2,200 junk fax complaints; in 2005, it recorded over 46,000. FCC has never separately publicly reported the annual number of junk fax complaints. Yet, since 2003, consumers have complained more to FCC about junk faxes than about any other issue under FCC’s jurisdiction except indecency and obscenity in radio and television broadcasting. Both individual consumers and businesses can report junk fax complaints to FCC by e-mail, postal

³In particular, because of concerns over some missing data and data counting errors, we report only overall complaint numbers for 2000 through 2002, and approximate numbers at a more detailed level for complaints from 2003 through 2005.

mail, fax, or telephone or through an on-line complaint form. FCC's Consumer & Governmental Affairs Bureau (CGB) receives and records these complaints in a database, scans in any attachments, and acknowledges most complaints in a letter sent by postal mail that provides information on the complainant's enforcement rights. FCC's Enforcement Bureau (EB) handles junk fax investigations and enforcement. Because of the large number of complaints and limited resources, EB does not investigate each junk fax complaint received by FCC. Instead, EB officials said, they try to identify and take enforcement action against the major alleged violators and repeat offenders who, they believe, have had the greatest impact on consumers. EB's formal enforcement actions, as required by statute, consist of two sequential steps. First, EB may issue a citation that notifies the faxer of the complaint(s) against it and informs the faxer that its alleged activity is illegal. Second, if FCC receives further complaints against a faxer, EB may pursue a "forfeiture" action (i.e., a monetary penalty against the faxer). FCC has issued 261 citations covering 1,456 junk fax complaints, or just over 1 percent of the more than 108,000 junk fax complaints recorded by FCC from 2000 to 2005. EB officials said that they have identified eight repeat offenders from the 261 citations issued and have pursued forfeiture actions against each of them. Six of these eight repeat offenders have received forfeiture orders. The amounts of the monetary forfeitures have increased, and the six forfeiture orders total over \$6.9 million, but the Department of Justice has collected no forfeitures to date because, for example, violators were no longer in business or could not be located. EB officials identified competing demands, resource constraints, and the rising sophistication of junk faxers in hiding their identities as hindrances to enforcement.

An emphasis on customer service, an effort to document consumer complaints, and an attempt to target enforcement resources efficiently are the strengths of FCC's procedures. However, inefficient and uncoordinated data management, resulting in time-consuming manual data entry, data errors, and—most important—the exclusion of the majority of complaints from decisions about investigations and enforcement, are weaknesses. CGB has emphasized customer service by establishing multiple methods for consumers to report junk fax complaints to FCC, providing multiple sources of information about junk fax issues, and sending a letter in response to most complainants. However, these procedures are time-consuming and errors can occur when complaints are miscoded or not matched with supporting faxes. These errors may, to an unknown extent, affect the reliability of CGB's complaint counts. They may also impact the quality of the report that FCC is now required to provide to

Congress on the number of junk fax complaints received each year. In addition, CGB and EB have not coordinated their data needs. This has led to the development of a separate spreadsheet by EB because the CGB database does not meet its needs. As a result, EB analysts spend about half of their time on manual, redundant data entry. Furthermore, it is EB's practice to consider only complaints with an attached fax for enforcement action. For 2005, about 60 percent of the complaints—including almost all of the complaints reported via the Internet—did not have an attachment. Therefore, under EB's practice, the Internet complaints would not have been included in EB's enforcement spreadsheet. As a result, EB would not have included these complaints in its searches for major alleged violators or repeat offenders or have considered them in its decisions about investigation or enforcement. Compounding this problem is FCC's consumer guidance on submitting junk fax complaints. Some of this guidance encourages consumers to send in the junk faxes they have received. However, none of the guidance states that without a copy of the junk fax, EB analysts do not review a complaint, include it in their investigations, consider it for enforcement action, or include it in their searches for repeat offenders. Moreover, although about half of the junk fax complaints are now reported through FCC's Internet form, that form explains nothing about sending in the fax to FCC or how to do so.

FCC faces management challenges in carrying out its junk fax responsibilities. The Government Performance and Results Act of 1993 embodies recognized performance management practices that are to be applied to an agency's efforts in carrying out its various responsibilities. FCC does not appear to be applying these practices to its junk fax monitoring and enforcement efforts; therefore, it lacks an important tool in assessing and reporting its progress. For example, FCC has no clearly articulated long-term or annual goals for junk fax monitoring and enforcement. FCC is not using the information it collects through junk fax complaints to measure its performance, set priorities, or allocate resources. Additionally, FCC is not analyzing the nature and frequency of the principal types of junk fax problems that complainants are reporting. As a result, FCC has not fully addressed concerns that consumers are raising, such as the percentages of complainants who reported that they were continuing to receive junk faxes after calling the opt-out number or the impact of the National Do-Not-Call Registry on junk faxes. Furthermore, FCC cannot identify and monitor trends in complaints and enforcement; therefore, it cannot target its resources to complainants' greatest concerns or evaluate its own performance in addressing those concerns. Having information on the nature and frequency of problems

with opt-out numbers and FCC's success in addressing these problems is particularly important because Congress, in the 2005 Act, specified opt-out procedures to protect consumers and businesses from repeated unwanted faxes. Without analysis, FCC is limited in its ability to understand the need for changes to its rules, procedures, or consumer guidance that might help deter junk fax violations or give consumers a better understanding of the junk fax rules. For example, many comments in CGB's database indicated that consumers believed the National Do-Not-Call Registry that applies to telemarketers should protect them from junk faxes; however, FCC has only recently revised some of its guidance to clarify whether the National Do-Not-Call Registry applies to fax advertising. Most important, without establishing performance goals and measures and without analyzing complaint and enforcement data, it is not possible to explore the effectiveness of current enforcement measures. Without first gaining an understanding of the effectiveness of current enforcement measures, it is similarly not possible to determine whether additional enforcement measures are necessary to protect consumers.

To address the procedural and performance management weaknesses we have identified, we recommend that the Chairman of FCC (1) revise FCC's current guidance to alert complainants of the necessity, under current FCC practices, of submitting a copy of the junk fax(es) along with the complaint; (2) develop data management strategies to make the consumer complaint database more usable to enforcement staff and mitigate the amount of time spent on manual data entry, as well as possible errors resulting from this manual data entry; and (3) implement recognized performance management practices to improve the performance and accountability of FCC's junk fax enforcement efforts.

We provided a draft of this report to FCC for comment. Senior officials from the commission's Enforcement and Consumer & Governmental Affairs Bureaus provided oral comments. FCC generally concurred with our recommendations and noted that they have already begun taking steps to address our recommendations. FCC took issue with our conclusion that FCC's current process for prioritizing junk fax complaints for enforcement does not identify major alleged violators and repeat offenders. However, we reiterate that EB's spreadsheet contains less than half of the total number of junk fax complaints received and contains almost none of the Internet complaints. FCC has done no analysis to determine whether the complaints that have been excluded from enforcement consideration involve the same entities they have identified as major alleged violators. Moreover, EB relies on its spreadsheet to identify repeat offenders by

searching the spreadsheet for the names or telephone numbers of junk fax violators that have already been warned by FCC with a citation to cease their activities. Since EB is using a subset of all complaint information received for this search, it is likely repeat offenders are being missed. In addition, this limited search process is not as effective since even one additional violation makes the repeat offender subject to further enforcement action, including monetary forfeitures. FCC also provided technical comments that were incorporated throughout this report as appropriate.

Background

In 1991, Congress enacted TCPA to address a growing number of telephone marketing calls and certain telemarketing practices thought to be an invasion of consumer privacy and, in some cases, costly to consumers. Provisions of this law generally prohibit anyone from faxing unsolicited advertisements, or “junk faxes,” to consumers or businesses. An unsolicited advertisement under TCPA was defined 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.”⁴

In addition, there are three distinct enforcement mechanisms for violations of the junk fax provisions.⁵ First, persons or entities that believe they have been sent a fax in violation of the act have a private right of action—that is, they can sue the fax advertiser in an appropriate court for damages and/or injunctive relief.⁶ Second, a state attorney general (or another official or agency designated by the state) may bring a civil lawsuit for damages and/or injunctive relief when a case involves a pattern or practice of violations.⁷ Third, FCC is authorized to assess and enforce a “forfeiture” against those who violate the junk fax provisions—that is, a monetary

⁴As amended, 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)(4).

⁵The enforcement mechanisms apply to TCPA violations, which include sending an unsolicited advertisement to a fax machine.

⁶47 U.S.C. § 227(b)(3).

⁷47 U.S.C. § 227(f).

Consumer Complaints: Cost and Inconvenience of Junk Faxes



Source: FCC.

“For the past 6 months or so, I have been awakened in the middle of the night to a ringing phone, which turns out to be an unwanted, unsolicited fax.”

-Consumer from Sante Fe, NM, 12/2005

“We are a business and because of these faxes, my fax machine is constantly running out of ink & paper and causing me to have to call back customers to resend their faxes.”

-Business from Yorkville, NY, 11/2005

“It doesn’t cost them much to mass fax electronically, but it [costs] me 50 cents for each unwanted fax and this [costs] me hundreds of dollars each year....”

-Consumer from Hillsboro, OR, 11/2005

penalty against the faxer for violating the junk fax rules.⁸ Appendix I provides a brief overview of how unsolicited advertisements sent via telephone, the Internet, and cellular telephones are regulated and enforced.

In 1992, FCC adopted rules implementing TCPA, including restrictions on the transmission of junk faxes. In a footnote, the commission concluded that entities that have an “established business relationship” (EBR) with a recipient can conclude that they have the necessary invitation or permission of the recipient to receive the fax advertisement.⁹ The commission defined an EBR to mean the following:

“...a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.”¹⁰

In July 2003, FCC revised many of its telemarketing and fax advertising rules under TCPA. In part, the commission reversed its prior conclusion about an EBR, stating that its existence alone does not constitute the express permission required by TCPA. Instead, the commission concluded that a fax advertiser must first obtain written permission, including the recipient’s signature, before a fax can be sent. This requirement for written permission was stayed by FCC pending reconsideration and, to date, has not taken effect.¹¹

Congress has now settled the question of whether prior written consent is explicitly required with the Junk Fax Prevention Act of 2005. The act

⁸47 U.S.C. § 503.

⁹Although TCPA provided for an EBR exception for telephone solicitations, the act was silent with respect to fax solicitations. See, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd. 8752, 8779, para. 54 n. 87 (1992) (1992 TCPA Order).

¹⁰See, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Protection Act of 2005*, CG Docket No. 02-278, CG Docket No. 05-358, *Notice of Proposed Rulemaking and Order*, 2005 FCC 05-206, para. 3 (2005) (ref. Dec. 9, 2005) (Junk Fax NPRM).

¹¹Junk Fax NPRM at para. 32.

(1) amends TCPA and codifies the EBR by expressly permitting businesses or entities to fax unsolicited advertisements to those with whom they have an EBR and (2) provides that prior permission may be in writing or otherwise. The act does, however, impose new disclosure and opt-out requirements on advertisers. Businesses or entities sending fax advertisements must now include on the first page of the ad an opt-out notice, the date and time the fax was sent, the registered name of the company sending the fax, and the telephone number of the company sending the fax or the sending fax machine's telephone number. The opt-out notice should clearly state that the recipient may opt out of any future faxes and provide clear instructions for doing so. The opt-out telephone number must be domestic and free of charge to the recipient.¹²

Some businesses and individuals contract with fax broadcaster (also known as “fax blasters”) companies that transmit mass fax advertisements for others. This practice is legitimate if the fax broadcaster complies with the junk fax rules. In some instances, however, fax broadcasters fax unsolicited advertisements to parties that have no EBR with the advertising company. According to Verizon officials in an FCC filing, fax broadcasters often use automatic dialers on outbound fax servers to send large volumes of faxes in a short time, often in the middle of the night. Furthermore, their dialing lists may include primary residential telephone numbers as well as fax numbers. For example, according to these officials, one fax broadcaster transmitted 10,600 calls over Verizon's network within 10 minutes.

Two FCC bureaus—CGB and EB—are primarily responsible for developing and implementing rules and procedures to collect and analyze junk fax complaints and for conducting investigations and enforcement, among their other responsibilities. CGB develops and implements FCC's consumer policies. CGB also addresses consumers' informal inquiries and works to mediate and resolve complaints under FCC's jurisdiction.¹³ These include complaints about the commission's regulated entities, including common carrier, broadcast, wireless, satellite, and cable companies; complaints about unauthorized changes in telecommunications providers (slamming);

¹²FCC was required to implement the amendments by April 5, 2006. FCC released its Junk Fax NPRM on December 9, 2005.

¹³We were told by CGB officials that FCC's consumer centers responded to over 3 million calls in 2005.

complaints about unwanted e-mail messages on wireless devices such as mobile telephones (spamming); and six types of TCPA-related complaints, including junk faxes, violations of the do-not-call list, and time-of-day violations (marketing between 9 p.m. and 8 a.m).¹⁴

EB is responsible for enforcing TCPA's provisions and the commission's rules and orders. EB handles three major areas of enforcement: local competition, public safety and homeland security, and consumer protection. Enforcement officials said that they follow FCC's guidance on how to prioritize these responsibilities, and that these priorities can change as required by circumstances. EB's Telecommunications Consumers Division is responsible for considering junk fax complaints for investigation and enforcement.¹⁵

EB uses several procedures to select complaints for investigation and possible enforcement. EB's formal enforcement actions consist of several sequential steps. First, EB issues a citation, which notifies the faxer of the complaint(s) against it and informs the faxer that its alleged activity is illegal. The citation also states that further such activity could make the faxer subject to a forfeiture action.¹⁶ If FCC receives additional complaints against the faxer for violations of the junk fax rules and substantiates the complaints, EB may pursue the forfeiture action.¹⁷ This could lead to the involvement of the Department of Justice (DOJ), which is responsible for collection. Figure 1 depicts FCC's process for responding to junk fax complaints.

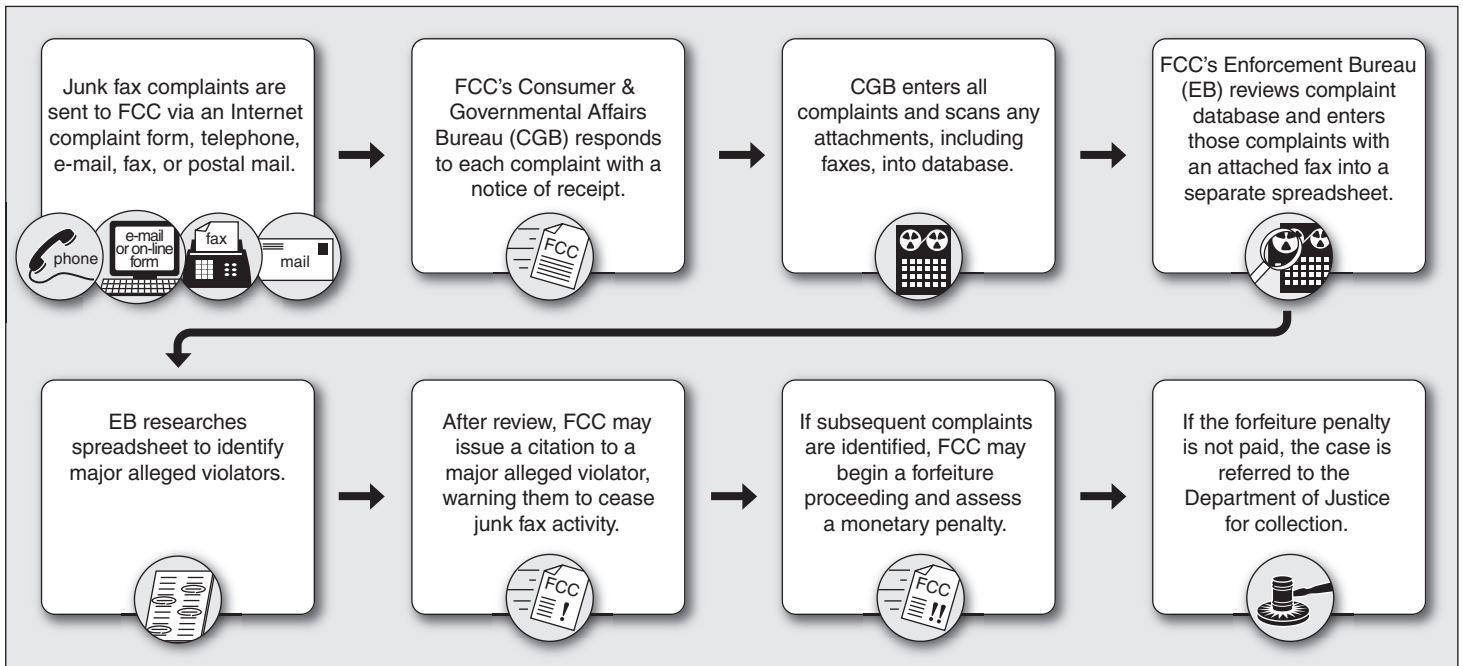
¹⁴The remaining three types of TCPA violations are using artificial or prerecorded voice messages; using a telemarketer's automatic dialer to simultaneously dial more numbers than the telemarketer can handle; and initiating a call for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services.

¹⁵Junk fax enforcement is only one part of the division's responsibilities, which includes resolving other TCPA-related complaints as well as disability and slamming complaints. TCPA-related complaints include reports of telephone solicitations after 9 p.m. and before 8 a.m. or requests to be removed from telephone solicitations not being honored.

¹⁶The citation is released publicly, posted on the commission's Web site, and listed in the commission's Daily Digest. The citation gives the faxer a reasonable opportunity (usually 30 days) to request a personal interview with a commission official at the FCC field office nearest to the faxer's place of residence. 47 U.S.C. § 503(b)(5).

¹⁷If the alleged violator holds or has applied for a commission authorization or license (e.g., telephone companies or radio stations), the commission may initiate an investigation that may lead to the issuance of a forfeiture order without issuing a citation first.

Figure 1: FCC's Process for Responding to Junk Fax Complaints



Sources: GAO analysis of FCC data; clipart (GAO).

FCC Has Recorded a Growing Number of Junk Fax Complaints, but Has Taken Limited Enforcement Action to Date

In 2000, FCC recorded about 2,200 junk fax complaints; in 2005, that number had grown to more than 46,000. Despite this growth in junk fax complaints, the numbers of investigations and enforcement actions have generally remained the same.

FCC's Consumer & Governmental Affairs Bureau Has Received an Increasing Number of Junk Fax Complaints, Especially through Internet Forms

In 2000, CGB began using a new database to record the various types of consumer complaints under FCC's jurisdiction, including complaints about TCPA violations. For junk fax complaints, CGB staff accept the complaints; enter information into the database; and scan the materials submitted with the complaints, including copies of the alleged junk faxes. CGB staff mail a letter to the majority of complainants acknowledging FCC's receipt of their complaint. The letter states that FCC does not resolve individual complaints and cannot award monetary or other damages directly to the complainant. The letter also states that the complainant has the right to take private legal action against any junk fax violator.¹⁸

In 2000, FCC recorded about 2,200 complaints; in 2005, that number had grown to more than 46,000. Since 2002, FCC has reported quarterly on the number of consumer complaints received, consolidating all six types of TCPA complaints into one category. As a result, the number of junk fax complaints has never been separately reported. Using CGB data, we found that within the specific category of TCPA complaints, junk faxes represented over 85 percent of the complaints logged in 2005. In fact, when looking at all types of reported consumer complaints, junk fax complaints have ranked as the second most frequently reported since 2003—second only to complaints about indecency and obscenity in radio and television broadcasting.¹⁹ Appendix II lists the number of complaints reported publicly by FCC, by type, from 2003 through 2005 and details the percentage of the TCPA complaints that are junk fax complaints.

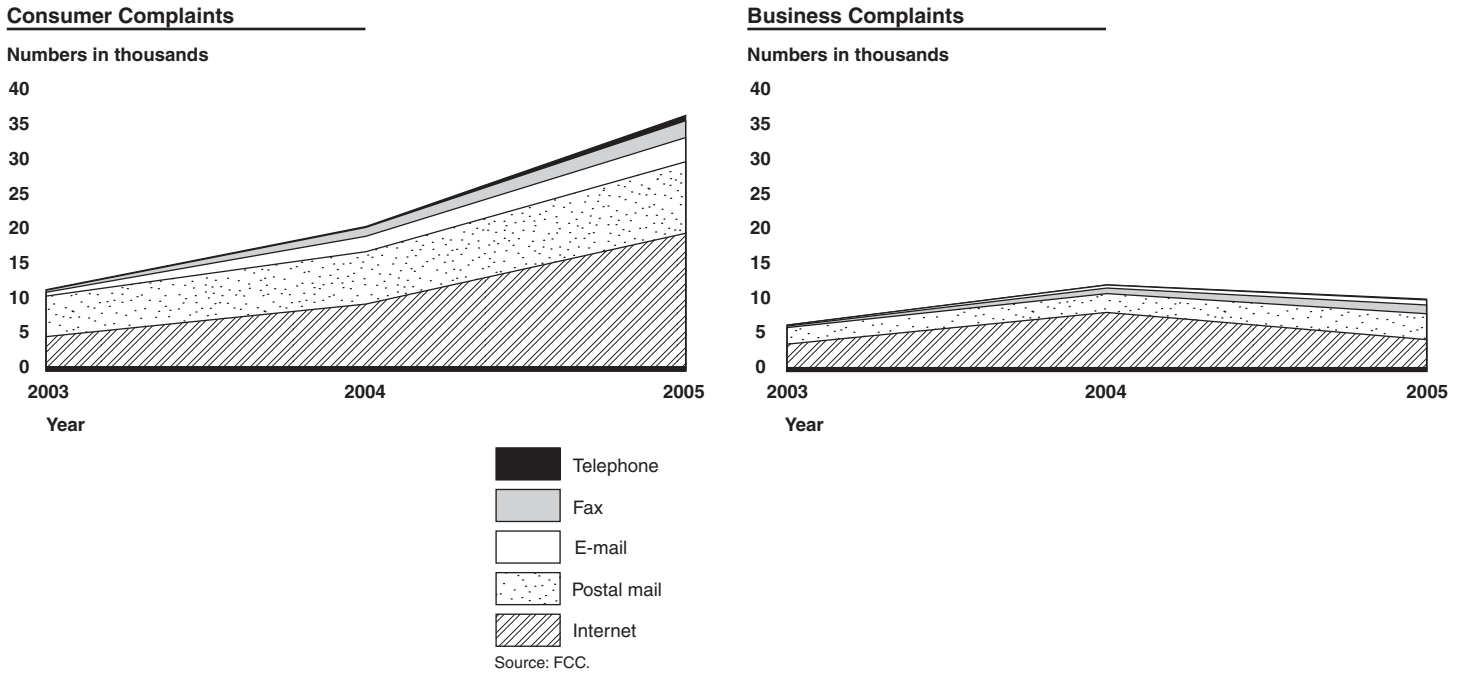
Both individual consumers and businesses can report junk fax complaints to the commission by e-mail, postal mail, fax, telephone, or the Internet (using an on-line complaint form—Form 475—that appears on FCC's Web site). FCC documents both the type of complainant (individual consumer or business) and the method of reporting (e-mail, postal mail, fax, telephone, or the Internet). Figure 2 shows the number of junk fax complaints that businesses and individuals reported through various methods from 2003 through 2005. As the figures indicate, the number of junk fax complaints reported by businesses dropped in 2005, but the

¹⁸The "private right of action" states that an individual may go to court and seek damages for up to \$500 for every unsolicited fax advertisement received. FCC staff said that they were not aware of any source that comprehensively tracks or documents such lawsuits.

¹⁹In 2005, for example, there were about four times as many consumer complaints about indecency and obscenity as there were about junk faxes.

number of complaints reported by individuals increased, bringing the total for both groups significantly higher in 2005 than in prior years. Additionally, the number of complaints reported using the on-line complaint form has increased, especially for individual consumers. In 2005, about half of all junk fax complaints were reported via the Internet.

Figure 2: Number of Individual Consumer and Business Junk Fax Complaints, by Method Submitted to FCC, 2003-2005



Consumer Complaints: Problems with the Opt-out Number



Source: FCC.

“We have repeatedly called the number to remove our fax number and we get a busy signal.”

-Consumer from Bethesda, MD, 12/2005

“When [the] opt out number is called a new opt out number is sent with the next fax.”

-Consumer from Aptos, CA, 12/2005

“A opt out number is provided and when called I find that the phone number is not in service.”

-Consumer from Burlingame, CA, 12/2005

“I have reported our number on the removal line several times, and the last 2 times [I heard] a recording: this number has already been removed. Yet we continue to receive faxes.”

-Consumer from Grand Rapids, MI, 12/2005

“When I call their fax removal system to get off their list an automated voice says ‘Welcome to our removal service,’ then says ‘Goodbye.’ You don’t ever have a chance to tell them your number.”

-Consumer from Glendale, WI, 11/2005

In their junk fax complaints to FCC, individuals and businesses often described the adverse effects of junk faxes. We looked at hundreds of complainant comments received from September through December 2005 and found complaints that cited the costs of toner and paper, the disruption of business activities during junk fax transmissions, and interruptions to personal lives. For example, the complainants expressed frustration about calls coming in the middle of the night and waking them up or causing panic. FCC has recently addressed this issue.²⁰ Some complainants noted problems with the opt-out number—that is, the telephone number that they should be able to call to stop receiving the faxes. For example, the opt-out number did not work, was always busy, or was connected to a prerecorded message.²¹ According to some complainants, calling the opt-out number seemed to increase the number of junk faxes they received. Additionally, some complainants expressed frustration with the commission’s response to their prior complaints.

²⁰FCC rules prohibit telephone solicitation calls to residential homes after 9 p.m. and before 8 a.m. In March 2006, FCC revised its consumer call center script to advise callers that these restrictions do not apply when an otherwise legal fax (e.g., when an EBR exists between the faxer and the recipient) is sent. In other words, if a consumer receives a fax at 2 a.m. from someone with whom there is an EBR, there is no violation.

²¹Inclusion of an opt-out telephone number on the faxed advertisement was required by Congress in the 2005 Act and is to be implemented into FCC’s rules by April 5, 2006. Previously, some faxers were already including an opt-out number on their faxes. TCPA requires that identifying information be placed on all fax transmissions.

Consumer Complaints: Junk Faxes Potentially Promoting Fraud



Source: FCC.

"Unsolicited fax from pump and dump promoters.... I am seeking to permanently bar them from sending faxes to me and to have them investigated by security regulators."

-Consumer from Summit, NJ, 12/2005

"We received 4 copies of the same fax over the weekend.... It is the scam about the money in South Africa that needs to be moved, they want a bank account number and we will get all these funds, and then give them their share."

-Consumer from Mankato, MN, 11/2005

"The faxes sometimes headline: 'Refinance Now,' 'FREE trip to Disney World,' and some fax[es] that [ask] for your bank account number so they can transfer funds to your account."

-Consumer from Frederick, MD, 12/2005

Some complainants described junk faxes they had received as unbelievable or potentially fraudulent. Among the frequently cited topics were hot stocks, cheap vacations, low-interest mortgages, and low-cost health care. We asked FCC officials whether they believed fraud was an issue with junk faxes. They said that, although enforcement related to fraud falls outside of FCC's jurisdiction, some of the faxes advertising stock tips could be fraudulent and come under the jurisdiction of the Securities and Exchange Commission (SEC). Federal Trade Commission (FTC) staff, whom we also asked about fraud in connection with junk faxes, said they believed it was a concern and they cited travel and mortgage offers. FTC staff also mentioned pump-and-dump marketing schemes, which they also noted would come under SEC's jurisdiction.²²

FCC's Enforcement Bureau Has Generally Issued a Limited Number of Citations Each Year since 2000 and Has Rarely Issued Forfeiture Orders

FCC's EB, established in November 1999, is responsible for investigating and determining the appropriate enforcement action for all types of TCPA complaints, including junk fax complaints. Currently, EB dedicates 11 staff (9 full-time analysts and 2 part-time attorneys) to work on junk fax enforcement. According to EB officials, the bureau's overall staffing levels have remained relatively stable over the years. As a result, the staffing level for junk fax enforcement has remained about the same over the past 5 years, even though the number of junk fax complaints has rapidly increased.

Because of the large number of complaints and limited resources, EB does not investigate each junk fax complaint. Instead, EB officials said, they try

²²"Pump-and-dump" schemes, also known as "hype-and-dump manipulation," involve the touting of a company's stock through false and misleading statements to the marketplace. After "pumping" the stock to inflate the prices, those involved will then sell, or "dump," their stock into the market at a profit.

to identify and take enforcement action against the major alleged violators and repeat offenders who, they believe, have had the greatest impact on consumers. EB defines a major alleged violator as a company, carrier, or individual that has sent a large number of junk faxes to complainants over a given period of time; it defines a repeat offender as a company, carrier, or individual that continues to violate the junk fax rules after receiving a citation from the commission.

To identify major alleged violators, the EB analysts responsible for responding to junk fax complaints first review CGB's complaint database to identify those complaints with an attached fax.²³ EB officials said they use only complaints with attached faxes because they contain the best evidence for starting an investigation. The analysts then transfer information from the complaint and the fax into an enforcement spreadsheet.²⁴ Periodically, the EB analysts sort the information in the enforcement spreadsheet to align matching telephone numbers and identify those that are repeated most often. According to enforcement officials, the most frequently repeated telephone numbers are indicative of the major alleged violators that are creating the most widespread problems for consumers.²⁵ In addition to using EB's spreadsheet to prioritize which complaints receive enforcement action, EB will also initiate enforcement action on the basis of complaints received from other sources, such as congressional offices, FCC commissioners, or state attorneys general. In the past year, about half of the citations issued by EB were based, at least in part, on referrals from outside sources—the majority of these outside sources were Members of Congress.

The next step in the investigation is for the EB analysts to identify the major alleged violators associated with the most frequently repeated

²³If complainants send copies of the associated faxes by postal mail or e-mail, CGB staff scan the copies into the complaint database. However, if the complainant sends in more than 10 pages of faxes, CGB staff do not scan all of this information into the database because of the amount of time required to scan the documents and the amount of space required in the database. According to FCC officials, beginning on May 1, 2006, all faxes will be received by Right Fax, which is a personal computer-based fax software that will eliminate the need for CGB staff to scan faxes into the database.

²⁴EB staff began using this spreadsheet in July 2005. Previously, analysts sorted faxes by hand.

²⁵EB staff also sort the opt-out numbers to identify major fax broadcasters. Fax broadcasters send out, for a fee, fax advertisements and notices for other businesses and individuals.

telephone numbers. Finding their names and addresses involves contacting carriers to learn who was paying for the telephone numbers from which the alleged junk faxes were sent on the dates the faxes were sent. Waiting for this information from the carriers can take several days. According to enforcement officials, identifying and locating major alleged violators is the most challenging aspect of junk fax enforcement. They said that obtaining this information is becoming increasingly more challenging because violators have become more adept at hiding their identity. As a result, the officials said, the analysts have to spend more time on each investigation.

Once a major alleged violator is identified, the analysts can decide whether to begin the formal, two-step enforcement process of citation and possible forfeiture action. EB officials said they consider the citation to be their most efficient enforcement action because many, perhaps the majority, of the violators are unaware that their activities are illegal and could lead to monetary forfeitures. As a result, the officials said, most violators that receive a citation do cease their junk fax activities. However, EB officials could not provide data to support this assertion.²⁶

EB officials have issued a limited number of citations over the past 6 years, and the annual number did not change substantially, except in 2002.²⁷ As table 1 indicates, FCC issued 261 citations covering 1,456 junk fax complaints from 2000 through 2005. EB officials cited competing demands, personnel reductions, and the increasing skill of violators in concealing their identity as reasons for the limited number of citations issued.

²⁶EB officials also stated that citations are relatively easy to issue. Citations may not require a copy of the associated fax, and there is no time limit on issuing a citation.

²⁷According to EB officials, the number of citations increased in 2002 because of the activities of one fax broadcaster, Fax.Com, Inc. Of the 120 citations issued in 2002, 104 were associated with this fax broadcaster.

Table 1: Citations Issued to Junk Fax Violators, Complaints Resulting in a Citation, and Approximate Percentage of Total Annual Complaints Resulting in a Citation, 2000-2005

Year	Number of citations issued	Number of complaints resulting in a citation	Approximate percentage of total annual number of complaints resulting in a citation
2000	29	128	5.7%
2001	18	72	2.9
2002	120	639	8.4
2003	32	68	0.4
2004	38	230	0.7
2005	24	319	0.7
Total	261	1,456	1.3%

Source: FCC.

EB officials also noted that in 2005 the average number of complaints that each citation covered increased. They believe this demonstrates EB has successfully targeted the major alleged violators. However, as shown in table 1, the percentage of the total annual number of complaints resulting in a citation has been less than 1 percent since 2003.

To identify repeat violators, EB analysts enter citation information into their enforcement spreadsheet, including the telephone numbers of the citation recipients, and search the information in the spreadsheet to identify any complaints sent after the citation date against these recipients. If any such complaints are found, the analysts decide whether to take the second formal enforcement step—a forfeiture action—which begins with the issuance of a notice of apparent liability. This notice informs the alleged repeat violator that its actions make it liable for forfeiture of a specific dollar amount.²⁸ The notice must

- be issued within 1 year of the alleged violation(s) that forms the basis for the notice;

²⁸Before initiating forfeiture, EB staff contact complainants and obtain signed declarations that attest, under penalty of perjury, to the apparently unlawful junk faxes and to whether the complainant granted permission to, or had an EBR with, the faxer.

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- identify each specific statute, rule, order, term, or condition that allegedly has been violated;
 - explain how the alleged repeat offender's activities have violated the junk fax rules and the dates of the violations; and
 - specify the amount of the proposed monetary forfeiture.²⁹

According to EB officials, their enforcement efforts are hampered by the requirement that a notice of apparent liability be issued within 1 year of an alleged repeat violation. For example, FCC's notice of apparent liability against Fax.Com, Inc., stated that although FCC received some consumers' correspondences and related declarations detailing additional unsolicited advertisements received from Fax.Com, FCC was unable to include these violations in the forfeiture action because they were beyond the 1-year statute of limitations. This statute of limitations is problematic, they said, because it takes time, after identifying a repeat violation, to prepare the notice and obtain a sworn statement from the complainant verifying that there was no EBR with the sender of the fax. FTC staff said that they have a statute of limitations of at least 5 years to enforce various telemarketing rules by seeking civil penalties, and they agreed with FCC that a 1-year statute of limitations was restrictive.

Within a reasonable period of time, usually within 30 days of receiving the notice, the alleged repeat offender must either pay the proposed forfeiture in full or file a written response requesting that the proposed forfeiture be rescinded or be reduced. If the proposed forfeiture penalty is not paid in full in response to the notice, the commission, upon considering all relevant information available to it, will issue an order (1) canceling or reducing the proposed forfeiture or requiring that it be paid in full and (2) stating the date by which the forfeiture must be paid. If the recipient of the order fails to pay the fine within 30 days from the date it is due, EB staff will refer the case to the commission's Office of General Counsel (OGC).³⁰

²⁹47 C.F.R. § 1.80(c)(3),(f).

³⁰The recipient can file a petition for reconsideration or an application for review, prompting the commission or EB to issue an order addressing the recipient's arguments and deciding whether to uphold, reduce, or rescind the forfeiture amount.

If the recipient ignores OGC's request for payment, the commission refers the forfeiture order to DOJ for collection.³¹

EB officials stated that they have identified eight repeat offenders from the 261 citations issued from 2000 through 2005, and that they have pursued forfeiture actions against all of the repeat offenders they have identified. Six of the eight repeat offenders have received forfeiture orders, as detailed in table 2. The amounts of the monetary forfeitures have increased, but no forfeitures have been collected to date. For various reasons, five of the six forfeitures will never be collected. The sixth forfeiture order accounts for about 78 percent of the fines FCC has levied.³²

Table 2: Status of Forfeitures Issued for Repeat Junk Fax Violations, 2000-2005

Company	Date of forfeiture order	Number of violations	Amount of fine	Status
Get-Aways, Inc.	March 2000	19	\$85,500	Referred to FCC's OGC and DOJ. DOJ closed this case because the company filed for bankruptcy.
Tri Star Marketing, Inc.	October 2000	8	47,000	Referred to both OGC and DOJ. DOJ closed this case because litigation was not cost-effective considering the amount of potential recovery. Also, collection was questionable since Washington State had already received a judgment in excess of \$2 million dollars against the company.
Carolina Liquidators, Inc.	November 2000	34	230,000	Referred to both OGC and DOJ. DOJ closed this case because the company or its principal could not be found.
U.S. Notary, Inc.	October 2001	26	90,000	Referred to both OGC and DOJ. DOJ closed this case because the company was out of business and unable to pay its debt.
21 st Century Faxes	January 2002	152	1,107,500	Referred to both OGC and DOJ. DOJ closed this case because faxes were transmitted from outside the United States. ^a
Fax.Com, Inc.	January 2004	489	5,379,000	Referred to both OGC and DOJ. Litigation is ongoing. FCC staff is assisting DOJ to seek collection of the forfeiture.

Source: FCC.

^aIn 2003, Congress extended the reach of TCPA to violations by persons outside of the United States if the recipient is within the United States. Pub. L. No. 108-187, § 12, 117 Stat. 2717 (2003).

³¹The matter is referred to DOJ after it has become final and the order is no longer an appealable order or after the appropriate court has entered final judgment in favor of FCC.

³²EB officials stated they are currently working with DOJ to collect the \$5,379,000 forfeiture against Fax.Com, Inc.

Two additional enforcement actions were taken in early 2006, outside the scope of our review. The remaining two forfeiture actions that EB began are against Elf Painting and Wallpaper (Elf) and First Choice Healthcare, Inc. (First Choice). FCC issued a notice of apparent liability to Elf in December 2004 for continuing to send junk faxes after receiving a citation in February 2003. The notice proposed a penalty of \$22,500 for five specific violations of the junk fax rules. A final forfeiture order issuing a fine of \$22,500 was released by FCC against Elf on March 10, 2006. In February 2006, FCC issued a notice of apparent liability against First Choice, proposing a fine of \$776,500 against the company for sending at least 98 unsolicited fax advertisements after receiving a citation in July 2004.

FCC's Procedures Have Emphasized Customer Service and Documentation, but Enforcement Is Hampered by Multiple Factors

The strengths of FCC's junk fax procedures are that CGB has emphasized both customer service and documentation of consumers' complaints; however, these processes are resource-intensive and susceptible to error. Additionally, CGB's database contains detailed information about complaints, but does not present the information in a way that meets EB's enforcement needs. While EB's approach to making investigation and enforcement decisions is designed to make efficient use of limited enforcement resources, it does not consider or factor in the majority of complaints.

Focus on Customer Service and Documentation Is Time-consuming, and Data Entry Errors May Occur

CGB has emphasized customer service by establishing multiple methods for consumers to report junk fax complaints to FCC, providing multiple sources of information about junk fax issues, and sending a letter in response to the majority of the junk fax complaints. As previously discussed, consumers can report junk fax complaints by postal mail, telephone, fax, e-mail, and the Internet. FCC also staffs two consumer centers to handle consumer inquiries and provide junk fax guidance. This guidance is located in several places, including FCC's Web page, a consumer fact sheet, and the Internet consumer complaint form (Form 475). The letter that FCC sends in response to complaints further advises consumers of their legal options for addressing their complaints.

CGB consolidates and maintains information about complaints in its database, together with any attachments. According to CGB officials, the database has improved CGB's coding and counting of TCPA complaints. However, entering complaint information into the database is time-consuming. Data from complaints reported by postal mail, e-mail, fax,

and telephone must be entered manually, while data reported on FCC's Internet complaint form (Form 475) can be electronically transferred from the form to the database. However, CGB staff still have to review the complaint summary from the consumer's complaint (by opening a text box from the Form 475) to determine what type of TCPA violation is being reported. As figure 3 shows, the form includes a text box that asks the complainant, among other things, to describe the type of violation.³³ CGB staff then have to analyze the consumer's comment and manually code the type of TCPA violation into the database.

³³CGB officials have revised the Internet complaint form several times; the most recent revision was in November 2005. While previous versions of the form made it easy for complainants to identify the type of TCPA violation, the most recent version does not.

Figure 3: FCC Form 475: Internet Complaint Form for General-Communications Related Issues

Approved by OMB
3060-0874
Estimated time per response: 30 minutes

**Federal Communications Commission
Washington, DC 20554**

FCC Form 475 – General-Communications Related Issues

This form can only be used for complaints related to: 1) wireless and wireline telecommunication services; 2) non-programming related cable, broadcasting and satellite services; and 3) communications accessibility issues. For example, use Form 475 for general telephone complaints such as billing disputes, cramming, telephone company advertising practices, paging services, unsolicited telephone marketing calls and unwanted faxes, and accessibility by persons with disabilities to telecommunications equipment and services. If you are complaining that your telephone company was changed to another telephone company without your permission (SLAMMING), you must use Form 501 to file the complaint. If you are complaining about the allegedly obscene, profane, or indecent content of a radio or television program, you must use Form 475B.

*** Required Information**

g. For Telephone Consumer Protection Act violations such as an unsolicited telephone call in violation of your do-not-call preference; a pre-recorded message; or an unsolicited advertisement sent to your fax machine, please provide:

1. the telephone number of the individual or company who called or faxed you: _____
- *2. your telephone number(s) on which the call or fax was received: _____
- *3. a description of the telemarketing call, pre-recorded message, or unsolicited fax, including an identification of the company whose products or services were being advertised, and any phone numbers that were included in the call or fax: _____
- *4. the opt-out” number(s) provided in the call(s) or, on the fax(es): (List number(s) given in the calls(s) or fax(es) for you to contact if you do not want to receive any additional calls or faxes.) _____
- *5. Have you: (a) purchased anything from the company being advertised in the call or fax; (b) made an inquiry or application to that company; or (c) given consent to the company to send you the call or fax? If so, please describe and state when you had such contact with the company. _____

Source: FCC.

Consumer Complaints: CGB Errors in Classifying Complaints as Junk Fax Complaints



Source: FCC.

"I received an unsolicited text message... offering ringtone download service for \$5.99/month. I was charged 5 cents to receive this unsolicited message."

-Consumer from Pittsburgh, PA, 8/2005

"...has been calling our phone number ...for the past month for marketing purposes. I have requested on 2 occasions to remove my name, and phone number from their marketing database. Each time they state they will do so, but the calls continue..."

-Consumer from Chicago, IL, 8/2005

"Today I called to dispute the charges on my phone bill; [their] Customer Service [tried] to give me a run around about calling my local phone company first."

-Consumer from Apopka, FL, 11/2005

Besides being time-consuming, CGB's data entry processes may cause errors in the database, despite the periodic supervisory review that CGB officials told us takes place. For example, errors can occur in coding complaints, matching complaints with associated attachments, and dating complaints. These problems may, to an unknown extent, affect the reliability of CGB's complaint counts. They also may impact the quality of the report that FCC is now required to provide to Congress on the number of junk fax complaints received each year. Given the large numbers of complaints, we do believe that overall trends can be reported, but the specific numbers may not be accurate.

Errors in coding complaints can occur if the complainant's comments on the Form 475 do not provide CGB staff with sufficient information to determine what type of violation should be coded in the database, or if the CGB staff simply miscode a comment. In a cursory review of 2005 complaint data, we found several instances in which an Internet complaint was miscoded. For example, CGB's database incorrectly identified one Internet complaint as a junk fax complaint, even though the complainant was asking for assistance in having charges removed that resulted from unsolicited advertisements sent as text messages to the complainant's cellular telephone.

Errors may also occur in matching complaints submitted by telephone, e-mail, or the Internet with the associated faxes sent to FCC separately by postal mail. Unless the consumer writes on the fax the unique identifier that CGB assigns to every complaint on the fax and CGB staff scan the fax into the database with the original complaint, the fax may be entered into the database as a new complaint. CGB officials acknowledged that these types of errors could be occurring, but they could not estimate the extent of the problem.

CGB's Database Does Not Meet EB's Enforcement Needs, Leading to Duplicate Data Entry and Demonstrating Limited Coordination

Although CGB's database contains detailed information about complaints, the database does not present the information in a way that meets EB's enforcement needs. According to EB officials, CGB's database does not meet EB's enforcement needs because it does not contain separate fields for all of the information EB requires, and not all fields of the database can

be easily searched.³⁴ For example, the database does not contain separate fields for the names of the businesses or individuals that may have sent the junk faxes or for their telephone numbers.³⁵ Most of this information, if included in the complaint, has been entered into a comment field manually by CGB staff or transferred electronically from a text box on the Form 475. To find the most frequently reported businesses or individuals (major alleged violators), EB staff would have to use the “Find” feature to search the comment fields for one name or telephone number at a time.

Because CGB’s database does not contain the data fields that EB needs for enforcement, EB has developed a separate spreadsheet that contains the requisite data fields and allows the data to be searched and sorted to support EB’s enforcement activities. This spreadsheet is not linked in any way to CGB’s database. Consequently, EB analysts manually enter the data they need from CGB’s database and from the faxes scanned in as attachments to CGB’s database. Furthermore, since the type of attachment is not identified in the database, EB analysts have to open each attachment to determine whether it is a fax. According to EB officials, the 9 EB analysts who work on junk fax complaints spend about half their time on data entry and the remainder of their time on enforcement activities.

This duplication of data management activities demonstrates that limited coordination has taken place between CGB and EB in determining how best to manage junk fax complaint data. For example, CGB staff currently have no follow-up procedures to obtain any additional information from junk fax complainants that may assist in investigations and enforcement.³⁶ In addition, EB staff acknowledged that maintaining a separate spreadsheet takes resources away from investigation and enforcement.

³⁴In addition, CGB staff may not enter any of the information contained in a copy of an alleged junk fax submitted by a complainant because the fax has been scanned and attached to the database.

³⁵The database does include separate fields for the date the complaint was received; the name, address, and telephone number of the complainant; and the method by which the complaint was sent to FCC.

³⁶CGB officials said they are currently working on follow-up procedures for junk fax complaints, but they could not provide any information on what these procedures would cover or when they would be completed.

Practice of Limiting Consideration for Enforcement to Complaints with Attached Faxes Has Excluded the Majority of Reported Complaints

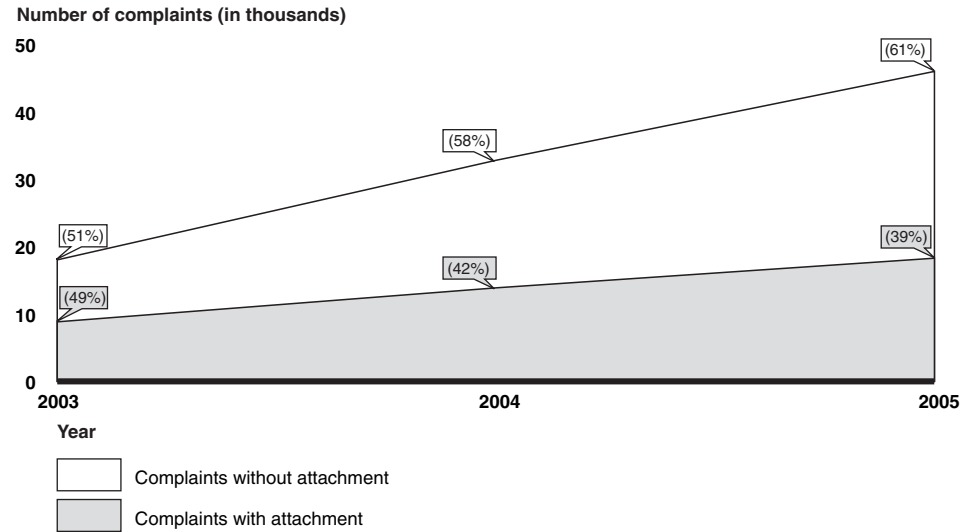
EB's practice is to investigate and consider taking enforcement action only when a fax is provided with a complaint. As previously noted, according to EB officials, a fax is not needed to issue a citation but may be needed for other formal enforcement actions. EB staff enter data into their spreadsheet only for those complaints from CGB's database that have an attached fax. As figure 4 indicates, the majority of the junk fax complaints in CGB's database for every year from 2003 through 2005 did not have an attachment.³⁷ The remaining complaints had an attachment that may or may not have been a fax.³⁸ For 2005, about 60 percent of the complaints—including almost all of the complaints reported via the Internet—did not have an attachment and, therefore, under EB's practice, would not have been included in EB's enforcement spreadsheet. As a result, EB would not have included these complaints in its searches for major alleged violators or repeat offenders or considered them in its decisions about investigation or enforcement.³⁹

³⁷CGB officials said they generally do not maintain complaint data that are over 2 years old, but they were able to provide total junk fax complaint numbers as far back as 2000.

³⁸Enforcement analysts cannot determine from the consumer database if an attachment to a complaint record is the associated fax, a copy of the complaint letter, or a copy of the Internet complaint form. Therefore, analysts have to open each attachment, and if it is the associated fax, they transfer the information to the enforcement spreadsheet. If it is not, they skip the complaint and move on to the next record.

³⁹Some of these complainants that used an Internet complaint form may have separately mailed, faxed, or e-mailed a copy of the unsolicited fax associated with their complaint to the commission. In these cases, CGB staff may have counted the submission as a new complaint in the database if the complainant had not included the original FCC-assigned complaint number.

Figure 4: Number of Junk Fax Complaints with an Attachment That Could Be a Fax, 2003-2005



Source: FCC.

With the majority of reported complaints excluded from EB’s review, the chances of identifying repeat offenders—those who have already received a citation or a notice of apparent liability from FCC but have continued to send junk faxes—are more limited.⁴⁰ We searched CGB’s 2005 complaint data for selected company names and telephone numbers from issued citations, using the “Find” feature, and found several complaints alleging violations by citation recipients dated after the citations were issued. However, none of these complaints had an attachment, and we did not find these repeat offenders when we searched EB’s spreadsheet. In addition, we found six complaints of violations by Elf Painting and Wallpaper that postdated the notice of apparent liability issued to this firm in December 2004. The most recent complaint was dated November 2005. However, these complaints were all reported via the Internet and lacked an attachment; therefore, like the 2005 complaints we found against the other

⁴⁰Consumer and enforcement officials said they currently do not search CGB’s complaint database for the names or telephone numbers of businesses or consumers that previously received junk fax citations. In addition, CGB officials said they could not flag this information in complaints being entered into CGB’s database to help identify repeat violators.

citation recipients, they may not have been found in a search of EB's spreadsheet.

Compounding this problem is FCC's consumer guidance on submitting junk fax complaints. Some of this guidance encourage consumers to send in the junk faxes they have received. However, none of the guidance state that without a fax, EB analysts do not review a complaint, include it in their investigations, consider it for enforcement action, or include it in their searches for repeat offenders.

For example, FCC's junk fax fact sheet and consumer center staff guidance both encourage complainants to send in the fax if possible, as the following excerpt from both documents indicates:

"If you have received unsolicited faxes, you are encouraged to contact the FCC regarding the incident(s). You may need to provide documentation in support of your complaint, such as copies of the fax(es) you received... Your complaint should include:...a copy of the fax advertisement, if possible, or confirmation that you have retained a copy of the fax..."

Consumer Complaints: FCC Form 475 Does Not Explain How to Send Fax



Source: FCC.

"I have copies of all the faxes listed below that can be sent to you, but there is no way to attach them through this form."

-Consumer from Chipley, FL, 9/2005

"I don't know how to send you a copy of these faxes using this form, but I will keep the faxes if you want me to send them to you."

-Consumer from Reno, NV, 9/2005

"I can't attach the fax to this online submission."

-Consumer from Bartlett, IL, 10/2005

By contrast, the form for reporting complaints via the Internet says nothing about sending in a copy of the fax to FCC and does not tell complainants how to do so. As shown in figure 2, the Form 475 is designed for consumers to report a wide variety of telephone complaints. As a result, much of the information the form provides, as well as the information it seeks from consumers, does not apply to junk fax complaints. Only the last section of the form applies to junk fax complaints.

Our review of a portion of CGB's 2005 complaint data revealed that several consumers who reported junk fax complaints via the Internet were frustrated because they could not attach the faxes they had received to the form and could not find any guidance on how to send the faxes to FCC. For example, some consumers said they had kept copies of the faxes but did not know how to send them to FCC. Other consumers asked FCC to contact them to let them know how to send the faxes.

Both CGB and EB officials said they do not explicitly state that a fax is needed for enforcement because they do not want to discourage consumers who no longer have the fax from sending in a complaint. In some instances, consumers who received a junk fax may not have kept the fax. In addition, CGB officials said the Form 475 asks for all of the information from the fax that is useful for EB to consider for possible investigatory action or to issue a citation, such as the telephone number of the company or individual that sent the fax and the "opt-out" numbers

provided on the fax. However, enforcement officials will not see this information because, under current practice, they are only looking for complaints that have an attached fax to transfer to the EB spreadsheet, regardless of how complete the information is on the Form 475.

FCC Faces Management Challenges in Carrying Out Its Junk Fax Responsibilities

Congress passed the Government Performance and Results Act of 1993 (GPRA)⁴¹ to require federal agencies to take specific steps to improve their performance. In general, GPRA sets forth recognized performance management practices that agencies can apply in carrying out their governmental responsibilities. These practices include establishing long-term strategic goals and annual goals, measuring performance in meeting these goals, and reporting publicly on the agency's progress.⁴² These performance management practices are critical in helping an agency determine how well it is achieving intended outcomes. FCC does not appear to be applying this model to its junk fax monitoring and enforcement activities and, therefore, lacks an important tool for assessing and reporting its progress.

The agency has not indicated, for example, whether its focus is to decrease the number of junk fax complaints received, increase the number of formal enforcement actions, or improve consumer guidance on how to stop junk faxes. FCC's strategic goal includes a target for reducing the amount of time it takes to respond to consumer complaints; however, this goal may be encouraging FCC to shift its focus from monitoring and enforcement to customer service. CGB officials maintained, for example, that they generally send a letter to complainants within 2 to 3 days acknowledging that FCC has received their complaint. While this letter provides complainants with information on alternative enforcement mechanisms under the law—that is, their private right of action and a civil action brought by their state attorney general—it does not seek additional information from them, if needed, to pursue an FCC enforcement action. Furthermore, once CGB has responded to a complaint with the acknowledgment letter, it codes the complaint as a closed case for CGB purposes, meaning that these data can be purged from the database after

⁴¹Pub. L. No. 103-62, 107 Stat. 285 (1993).

⁴²For additional details on GPRA and its requirements, see GAO, *Results Oriented Government: GPRA Has Established a Solid Foundation for Achieving Greater Results*, GAO-04-38 (Washington, D.C.: Mar. 10, 2004).

2 years. As a result, these data are no longer available for use in identifying major alleged violators and repeat offenders or for identifying and monitoring trends in complaints and assessing the effects of enforcement actions.

FCC is not using the information on junk fax complaints that it collects to measure its performance in carrying out its junk fax responsibilities. Although CGB allocates considerable staff and other resources to entering complaint data into its database, FCC is not analyzing these data and using the results of its analyses to set priorities and allocate resources. For example, it is not monitoring the number of junk fax complaints recorded each year. Thus, FCC's quarterly reports identify the total number of TCPA complaints, but do not break out the total for each of the six types of TCPA complaints.⁴³ As a result, the quarterly reports mask the magnitude of the junk fax problem, which, as our analysis indicates, accounts for about 85 percent of all TCPA complaints received in 2005. In addition, the reports do not indicate that junk fax complaints are the second most frequently recorded type of consumer complaint overall. Without analyzing the data it collects to determine the relative frequency of junk fax and other types of complaints, FCC is limited in its ability to determine whether its staff and other resources are appropriately aligned to address the problems consumers are experiencing.

Additionally, FCC is not analyzing the nature of the principal types of junk fax problems complainants are reporting. This information appears in a comment field, where CGB staff enter comments provided by complainants, but the information cannot be analyzed electronically. As a result, FCC may not be able to fully address concerns such as the percentages of complainants who reported that they were continuing to receive junk faxes after calling the opt-out number or who were receiving junk faxes in the middle of the night. Furthermore, FCC cannot identify and monitor trends in complaints and enforcement and, therefore, cannot target its resources to complainants' greatest concerns or evaluate its own performance in addressing those concerns. Having information on the nature and frequency of problems with opt-out numbers and FCC's success in addressing these problems is particularly important because Congress, in the 2005 Act, required the opt-out number to protect consumers from

⁴³See the Background section of this report for descriptions of all six TCPA-related violations.

Consumer Complaints: Confusion over Do-Not-Call Registry



Source: FCC.

“My number is a private residence number and is registered with ‘Do Not Call Registry’ but the company in charge of the fax solicitations ignores it.”

-Consumer from Fuquay-Va, NC, 9/2005

“Unsolicited fax’s received at 2am and 7am. This phone number...is listed on the National Do Not Call Registry.”

-Consumer from Cape Cora, FL, 9/2005

“Despite being on the National do not call list, we continue to receive faxes from these people. Please prosecute as soon as possible.”

-Consumer from Marmora, NJ, 9/2005

“These faxes are unwanted, unsolicited and very annoying. We have listed our fax number on the National and State Do Not Call List. I don’t know whether that does any good or not.”

-Consumer from Lawton, OK, 11/2005

repeated unwanted faxes. FCC officials stated that these issues will be addressed once the new junk fax rules are implemented.

Without analysis, FCC cannot explore the need for, or implement, changes to its rules, procedures, or consumer guidance that might help deter junk fax violations or give consumers a better understanding of the junk fax rules. We found, for example, from our review of comments in CGB’s database from 2005, that many complainants seemed to believe the National Do-Not-Call Registry applies to fax numbers as well as their home telephone numbers. Repeatedly, complainants reported that they had asked to have their fax numbers placed on this list, and they did not understand why they were still receiving junk faxes. FTC, together with FCC, implemented this list in 2003 to protect consumers from unwanted telemarketing calls. FTC staff explained that the list does not apply to fax numbers—that is, telemarketers must consult this list before placing covered calls to consumers, but senders of fax advertisements are not required to consult the list before faxing. FTC has provided guidance to consumers that fax numbers are not covered under the National Do-Not-Call Registry. Despite the many comments in CGB’s database indicative of complainants’ misunderstanding, FCC has not considered this issue in a rulemaking context or revised all of its guidance to clarify whether the National Do-Not-Call Registry is applicable to fax advertising.⁴⁴

Most important, without establishing performance goals and measures and without analyzing complaint and enforcement data, it is not possible to explore the effectiveness of current enforcement measures. Without first gaining an understanding of the effectiveness of current enforcement measures, it is similarly not possible to determine whether additional enforcement measures are necessary to protect consumers.

Conclusions

Consumer frustration with junk faxes is evident in the rapidly increasing number of complaints and in the time that consumers are willing to take to seek relief from this type of unsolicited advertising. FCC has provided consumers with several methods to submit their complaints about junk faxes and several sources of consumer information about junk faxes, and it

⁴⁴In March 2006, FCC revised its consumer call center script to advise callers that fax senders are not obligated to access the National Do-Not-Call Registry and “scrub” their fax number lists. However, other consumer guidance, including FCC’s junk fax “Fact Sheet,” has not yet been revised.

promptly acknowledges receipt of most of the complaints. However, despite collecting thousands of junk fax complaints, including the information submitted with them, FCC has taken formal enforcement actions against relatively few junk faxers. More important, FCC is simply not considering the majority of complaints or any of the information contained in those complaints when making decisions about investigations and enforcement.

We acknowledge that FCC cannot be expected to take enforcement action against every junk fax complaint received. The growth in complaints, together with limited resources, would make such an effort both impossible and impractical. However, FCC has put in place data collection and management processes that contain clear inefficiencies and limit its ability to target major alleged violators and repeat offenders. Overall, there has been limited collaboration between CGB and EB to ensure that FCC's data processes are efficient, make the fullest use of the data collected, and fully support the needs of EB.

FCC is not making use of performance management tools to improve its junk fax enforcement. There are no goals or measures of success for handling complaints or for investigating them and taking enforcement action. More fundamentally, FCC has not done the analysis that would help it to establish such goals and measures. Without analyzing the complaint data, FCC does not know if it could be doing more to better target its limited resources to address the concerns of consumers, such as seeking out faxers that may be providing fake opt-out numbers or providing clearer guidance to consumers on the impact of time restrictions and the National Do-Not-Call Registry on junk fax concerns. FCC also has not established what it needs to do to be able to completely and accurately report the number of complaints it has received in carrying out its junk fax responsibilities as required under the 2005 Act. Because FCC's junk fax enforcement efforts have data management issues, lack data analysis, and lack performance goals and measures, it is not possible to determine whether any additional enforcement measures would better protect consumers and businesses from receiving junk faxes. FCC simply cannot say whether its junk fax enforcement efforts are successful in combating junk fax advertising. However, the steady number of citations issued from year to year should be cause for concern in the face of the rising number of junk fax complaints.

Recommendations for Executive Action

FCC's current consumer guidance does not alert consumers to the necessity, under FCC's current practice, of submitting a copy of the junk fax(es) along with the complaint. Because this impacts the number of complaints that FCC takes into consideration when searching for major alleged violators and repeat offenders, we recommend that the Chairman of the Federal Communications Commission direct staff to take the following two actions:

- Revise consumer complaint guidance to make it clear to consumers that they need to include a copy of the fax in order to make it possible for any investigation or enforcement action to take place. This includes revising the wording of the Consumer Fact Sheet, the Internet complaint form (Form 475), the consumer center script, and any other junk fax guidance provided to consumers.
- Revise the Form 475 so that it includes clear instructions for complainants on how to submit a copy of the fax. This may include developing procedures and instructions to let consumers know how to electronically attach a scanned copy of the fax so that it accompanies their complaint form.

FCC's current data collection and management processes contain inefficiencies and adversely affect FCC's procedures for targeting major alleged violators and repeat offenders. To begin to address these problems, we recommend that FCC take the following action:

- Direct consumer and enforcement staff to develop data management strategies to (1) make the consumer complaint database more usable for FCC's staff and (2) mitigate the amount of time spent on manual data entry, as well as possible errors, resulting from this manual data entry. For example, these efforts could include, but not be limited to, revising the Form 475 so that consumers identify through checked boxes, or another similar method, the type of complaint they are filing. This could enhance accuracy and improve staff efficiency by eliminating the need for FCC staff to read a text box to identify the type of complaint and then enter that information into the database. In addition, staff should develop strategies that would enable enforcement staff to search all consumer complaint information contained in the database to identify major and repeat violators.

Finally, FCC should introduce recognized performance management practices into its operations in order to improve the performance of its junk fax enforcement efforts. Toward this effort, FCC should take the following three actions:

- Establish goals and performance measures for receiving, acknowledging, investigating, and taking enforcement actions on junk fax complaints.
- Use the information in the complaint database to analyze the nature and scope of the complaints. FCC can then begin to determine whether its current enforcement efforts are sufficient in combating junk faxers, and whether any additional enforcement mechanisms might be needed to protect consumers.
- Evaluate whether its staff and other resources are appropriately aligned to carry out its junk fax responsibilities. This could include, but not be limited to, evaluating the benefits of targeting staff resources to issue more citations that could prompt more violators to cease their offending behavior.

Agency Comments and Our Evaluation

We provided a draft of this report to FCC for comment. Senior officials from the commission's Enforcement and Consumer & Governmental Affairs Bureaus provided oral comments. FCC generally concurred with our recommendations and noted that they have already begun taking steps to address our recommendations. For example, FCC officials stated staff have been working to implement a new data management system that will in part consolidate all inquiry and complaint data into a new database by May 2006. FCC officials said this new database will identify possible duplicate complaint records and increase the efficiency of processing junk fax inquiries and complaints. They also said discussions on developing additional modifications to the new database are now under way, including modifications that would eliminate the need for EB to have its own enforcement spreadsheet. In the interim, FCC officials said CGB and EB staff are planning to link the EB spreadsheet to the new database, but the officials could not provide a workplan describing how and when this linkage would be accomplished.

FCC officials said they take issue with our conclusion that FCC's current process for prioritizing junk fax complaints for enforcement may not identify the major alleged violators and repeat offenders. FCC believes that

the number of complaints transferred to EB's spreadsheet for review, although only a portion of the total number of complaints received, is large enough to identify the major alleged violators and repeat offenders. We reiterate that EB's spreadsheet contains less than half of the total number of junk fax complaints received and contains almost none of the Internet complaints. FCC has done no analysis to determine whether the complaints that have been excluded from enforcement consideration involve the same entities they have identified as major alleged violators. Moreover, searching for repeat offenders (junk fax violators that have already been warned by FCC to cease their activities) using a subset of the complaints received is not as effective since even one additional violation makes the entity subject to further enforcement action, including monetary forfeiture.

Since FCC is beginning to explore changes to its database to eliminate the need for a separate EB spreadsheet, as previously noted, it is possible for FCC to also explore changes to the database that would improve EB's ability to analyze all complaint data to better identify the major alleged violators, as we have recommended. Improved search functions within the database would also aid in identifying the repeat offenders.

FCC officials also said the agency had included a consumer protection goal that covered junk fax issues in the agency's 2004 performance summary. FCC officials also provided us with 2004 and 2005 CGB goals. However, after reviewing these documents, we maintain that FCC does not have goals or measures specifically related to junk fax enforcement. We reiterate that the introduction of recognized performance management practices into FCC's operations could improve the performance of its junk fax enforcement efforts. FCC also provided technical comments that were incorporated throughout this report as appropriate.

We are sending copies of this report to interested congressional committees and the Chairman, FCC. We will make copies available to others upon request. The report is available at no charge on GAO's Web site at <http://www.gao.gov>.

If you or your staff have any questions concerning this report, please contact me on (202) 512-2834 or goldsteinm@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on

the last page of this report. Key contributors to this report were Faye Morrison, Assistant Director; Kimberly Berry; Elizabeth Eisenstadt; Edda Emmanuelli-Perez; Chad Factor; Michele Fejfar; Mike Mgebroff; Josh Ormond; Terri Russell; and Mindi Weisenbloom.

A handwritten signature in black ink, appearing to read 'M. Goldstein', with a long horizontal flourish extending to the right.

Mark L. Goldstein
Director, Physical Infrastructure Issues

Statutes Protecting Consumers from Unsolicited Advertisements

This appendix provides a brief description of how unsolicited advertisements provided through commercial telephone calls and e-mails are regulated and how the regulations are enforced.

Regulating Unsolicited Telephone and E-mail Advertisements

In response to consumer frustration and dissatisfaction with advertising via unsolicited telephone calls and e-mails, Congress has passed several statutes directing the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC) to regulate unsolicited advertisements delivered by telephone or e-mail. The Telephone Consumer Protection Act of 1991 is FCC's basic statutory mandate with respect to telemarketers and applies to unwanted telemarketing calls and facsimile (fax) solicitations.¹ The Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 is FTC's specific statutory mandate regarding telemarketing.² The Controlling Assault of Non-Solicited Pornography & Marketing Act of 2003 (CAN-SPAM Act) provides FTC with the authority to regulate commercial e-mails whose "primary purpose" is the "commercial advertising or promoting of a commercial product or service."³ FCC has authority under the CAN-SPAM Act to regulate unsolicited commercial messages on wireless devices.⁴ Thus, FCC's and FTC's enforcements are based upon different statutory authority.

FCC's enforcement efforts are generally accomplished through an administrative process. FTC's enforcement actions are usually filed in federal district court and seek injunctive relief; consumer redress; and, in some circumstances, civil penalties. The latter actions are filed by the Department of Justice (DOJ) on behalf of FTC. Both commissions can obtain civil penalties up to \$11,000 per violation.

FCC - The Telephone Consumer Protection Act of 1991

The Telephone Consumer Protection Act of 1991 (TCPA) was created in response to consumer concerns about the growing number of unsolicited telemarketing calls to their homes and the increasing use of automated and

¹Pub. L. No. 102-243, 105 Stat. 2394 (1991) (to be codified at 47 U.S.C. § 227).

²Pub. L. No. 103-297, 108 Stat. 1545 (1994) (codified at 15 U.S.C. §§ 6101 et seq.).

³Pub. L. No. 108-187, 117 Stat. 2699 (2003) (codified at 15 U.S.C. §§ 7701 et seq.).

⁴Pub. L. No. 108-187, § 14 (2003) (codified at 15 U.S.C. § 7712).

prerecorded messages. FCC's rules under that act prohibit telephone solicitation calls to homes between the hours of 9 p.m. and 8 a.m. Also, under the rules, anyone making a call to a home, must provide his or her name, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. These telemarketing rules do not apply to calls or messages placed with a consumer's prior expressed permission, by or on behalf of a tax-exempt nonprofit organization, or from a person or organization with whom the consumer has an established business relationship (EBR). TCPA telephone solicitation violations are enforced in the same manner as TCPA junk fax violations.

FTC - The Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994

The purpose of the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 was to combat telemarketing fraud by providing law enforcement agencies with new tools and to give consumers new protections. The act directed FTC to issue a rule prohibiting deceptive and abusive telemarketing acts or practices, and specified, among other things, certain acts or practices FTC's rule must address, including "...unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy."⁵

FTC issued its original Telemarketing Sales Rule (TSR) in 1995. TSR requires certain disclosures and prohibits misrepresentations. Some of the provisions of the rule will include the following: (1) the rule restricts calls to the hours between 8:00 a.m. and 9:00 p.m.; (2) the rule forbids telemarketers from calling consumers if they have been asked not to call; and (3) the rule requires certain prompt disclosures, prohibits certain misrepresentations and lying to get consumers to pay, and makes it illegal for a telemarketer to withdraw money directly from a checking account without the account holder's specific, verifiable authorization. The TSR rule was amended in 2003. The amended TSR established the National Do-Not-Call Registry. In addition, the amended TSR places restrictions on unauthorized billing, reduces abandoned calls, and requires caller identification transmissions.⁶

⁵15 U.S.C. § 6102(a)(3)(A).

⁶16 C.F.R. § 310.

Several types of calls are expressly exempted from TSR coverage, including calls initiated by consumers in response to direct mail (provided certain disclosures are made), calls initiated by consumers in response to advertisements in the general media (such as newspapers or media), and business-to-business calls.⁷ Catalog sales calls also are exempt.

Under the statute, violations of TSR are treated as “unfair or deceptive acts or practices in violation of the FTC Act.”⁸ FTC’s enforcement actions generally are accomplished by seeking injunctive relief and consumer redress. Under some circumstances (e.g., do-not-call violations), injunctions and sometimes civil penalties (up to \$11,000 per violation) are sought. Actions seeking civil penalties are filed by DOJ on behalf of FTC and are less common. FTC itself files and litigates its actions seeking injunctive relief and consumer redress.

States, through their attorneys general, may bring civil actions on behalf of their residents to enjoin the violation; enforce compliance with TSR; obtain damages, restitution, or other compensation on behalf of residents; and obtain such other relief as the court may deem appropriate.⁹ Private parties may also bring a civil action within 3 years after discovery of the violation, if the amount in controversy exceeds the sum or value of \$50,000 in actual damages for each person adversely affected by such telemarketing. Such an action may be brought to enjoin such telemarketing, enforce compliance with any rule, obtain damages, or obtain such additional and other relief as the court may deem appropriate.¹⁰

⁷Certain entities, including banks, credit unions, savings and loans, common carriers engaged in common carrier activities, nonprofit organizations, and companies engaged in the business of insurance regulated by state law, are not covered by TSR because they are specifically exempt from coverage under the Federal Trade Commission Act. 15 U.S.C. § 45(a)(2). A number of entities, and individuals associated with them, that sell investments and are subject to the jurisdiction of the Securities and Exchange Commission or the Commodity Futures Trading Commission are exempt from TSR. 15 U.S.C. § 6102(d)(2)(A); 6102(e)(1).

⁸15 U.S.C. § 57a.

⁹15 U.S.C. § 6103.

¹⁰15 U.S.C. § 6104.

The National Do-Not-Call Registry

In January 2002, FTC proposed a National Do-Not-Call registry. One year later, FTC amended its TSR to create the national registry and prohibit covered telemarketing calls to consumers who registered their telephone numbers. FCC revised its regulations pursuant to TCPA in June 2003, requiring telemarketers under its jurisdiction to comply with the requirements of the national registry.

In March 2003, Congress passed the Do-Not-Call Implementation Act, which authorized FTC to establish fees “sufficient to implement and enforce” the national registry.¹¹ In September 2003, in response to legal challenges to the national registry and requirements, Congress passed additional legislation (1) expressly authorizing FTC to implement and enforce a National Do-Not-Call Registry under the Telemarketing and Consumer Fraud and Abuse Prevention Act and (2) ratifying the National Do-Not-Call Registry regulation as promulgated by FTC in 2002.¹²

Under FTC’s and FCC’s rules, the registry covers both traditional (wired) and mobile (wireless) telephones. The registry is national in scope, applies to all telemarketers (with the exception of certain nonprofit organizations), and covers both interstate and intrastate telemarketing calls. Commercial telemarketers are not allowed to call a consumer if his or her telephone number is on the registry, unless there is an EBR between the seller and the consumer or the consumer has given prior written consent to be called.¹³ Nontelemarketing calls, such as political fundraising, market research surveys, or debt collection, are not prohibited by the registry’s provisions. The national registry started accepting consumer telephone number registrations in late June 2003,¹⁴ and telemarketers began accessing the national registry to obtain registered consumer telephone numbers in September 2003. FTC and FCC began enforcing the provisions of the national registry in October 2003.

¹¹Pub. L. No. 108-10, 117 Stat. 557 (2003).

¹²Pub. L. No. 108-82, 117 Stat. 1006 (2003). The United States Court of Appeals for the 10th Circuit also ruled that, on the basis of FTC’s existing statutory responsibilities prior to the September 2003 legislation, FTC had the authority to create the national registry. *Mainstream Marketing Services, Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004), cert. denied 543 US 812 (2004).

¹³Once a number is registered on the National Do-Not-Call Registry, telemarketers have up to 31 days (starting Jan. 1, 2005) to stop calling that number.

¹⁴Consumers can sign up for the National Do-Not-Call Registry at www.donotcall.gov.

FTC and FCC have different but overlapping jurisdiction over the activities of entities that make telemarketing calls. FTC's authority under its telemarketing law is limited to entities engaged in interstate telemarketing, while FCC's authority covers both intrastate and interstate entities. In addition, by statute, certain entities are wholly or partially exempt from FTC jurisdiction but remain subject to FCC jurisdiction. These entities include common carriers, banks, credit unions, saving and loans institutions, airlines, nonprofit organizations, and insurance companies.

FTC and FCC do not take action on every complaint alleging a violation of the national registry provision; rather, they consider a number of factors—such as the number and persistence or duration of complaints filed against a telemarketer, the nature of the claims made by the telemarketer, and any past history of complaints or law violations—to determine whether to take action against a telemarketer for violations of the national registry provision.

The CAN-SPAM Act of 2003

The CAN-SPAM Act of 2003 establishes requirements for those who send commercial e-mail, spells out penalties for spammers and companies whose products are advertised in spam if they violate the law, and gives consumers the right to ask e-mailers to stop spamming them.¹⁵ The law covers e-mail whose primary purpose is advertising or promoting a commercial product or service. A “transactional or relationship message” (e.g., an e-mail that facilitates an agreed-upon transaction or updates a customer in an EBR) may not contain false or misleading routing information, but otherwise is exempt from most provisions of the CAN-SPAM Act. State laws specifically related to commercial e-mail are preempted. However, state laws that are not specifically applicable to e-mail, such as trespass, contract, tort law, or state laws that relate to fraud or computer crimes, are not preempted.¹⁶

Under the CAN-SPAM Act's major provisions, false or misleading header information is prohibited. An e-mail's “From,” “To,” and routing information (including the originating domain name and e-mail address) must be accurate and identify the person who initiated the e-mail. The law prohibits

¹⁵Pub. L. No. 108-187, 117 Stat. 2699 (2003) (codified at 15 U.S.C. 7701 et seq., 18 U.S.C. § 1037, and 28 U.S.C. § 994).

¹⁶15 U.S.C. § 7707 (b).

deceptive subject lines and requires that the e-mail give recipients an opt-out method. Specifically, the sender must provide a return e-mail or another Internet-based response mechanism that allows a recipient to request that the sender not send future e-mails to the e-mail address. Senders must honor opt-out requests. Additionally, the act requires that the commercial e-mail be identified as an advertisement and include the sender's valid physical postal address.

FTC (and various other agencies) is authorized to enforce the CAN-SPAM Act. Each violation is subject to fines of up to \$11,000 per violation. FTC also responds to deceptive commercial e-mail as a violation of the FTC act. State attorneys general, state law enforcement agencies, and Internet service providers (ISP) may also bring suit under CAN-SPAM for statutorily set damages.¹⁷ In a December 2005 report to Congress, FTC stated that the commission had brought 20 cases alleging violation of the act.¹⁸ The report also noted that at the state level, three attorneys general have filed a total of three actions—one with FTC as a coplaintiff—in federal court, naming 15 defendants under the CAN-SPAM Act. In addition, the report stated that ISPs have also filed CAN-SPAM Act suits initially against more than 100 known defendants and more than 580 unknown (John Doe) defendants.

DOJ has the authority to enforce the criminal penalties established under the act.¹⁹ Criminal penalties may include fines or imprisonment. According to the legislative history of the act, aggressive civil and criminal enforcement actions were needed to curb the growth of spam on all fronts. The criminal provisions were targeted to those who use fraudulent and deceptive means to send unwanted e-mail messages. The need for these criminal provisions was based, in part, on a study by FTC that found that 66 percent of spam contained some kind of false, fraudulent, or misleading information, and one-third of all spam contained a fraudulent return e-mail

¹⁷The maximum per-violation statutory damage figures are \$250 for state attorneys general and \$100 for ISPs.

¹⁸Federal Trade Commission Report, *Effectiveness and Enforcement of the CAN-SPAM Act: A Report to Congress* (December 2005) (FTC CAN-SPAM Report).

¹⁹In addition to FTC and DOJ, federal entities with enforcement authority under the act are FCC, the Office of the Comptroller of the Currency, the Federal Reserve Board, the Federal Deposit Insurance Commission, the Office of Thrift Supervision, the National Credit Union Administration, the Security and Exchange Commission, the Department of Transportation, the Department of Agriculture, and the Farm Credit Administration. 15 U.S.C. § 7706(b).

address that was included in the routing information, or header, of the e-mail message.²⁰

Section 4 of the CAN-SPAM Act criminalized five types of activities in connection with e-mail, set forth the maximum penalties for each type, and called for the U.S. Sentencing Commission to consider new sentencing guidelines.²¹ Specifically, the five types of activities are as follows:

- accessing a protected computer without authorization to send multiple commercial e-mail messages,
- using open relays with intent to deceive in sending multiple commercial e-mail messages,
- using materially false header information in sending commercial e-mail messages,
- falsely registering e-mail accounts or domain names in connection with sending multiple commercial e-mail messages, and
- falsely claiming to be the registrant of Internet protocol addresses for sending spam.²²

The criminal penalties fall into three tiers. First, a 5-year statutory maximum applies when the CAN-SPAM violation is in furtherance of any felony under state or federal law, or when the defendant has previously been convicted of an offense under 18 U.S.C. § 1037.²³ Second, a 3-year maximum applies for convictions of hacking into a computer, or to use a computer system that the owner has made available for other purposes, as a conduit for bulk commercial e-mail or for other violations of

²⁰149 Cong. Rec. S13028, 13029 (daily ed. June 18, 2002) (statement of Sen. Hatch).

²¹The Sentencing Guideline revisions applicable on November 1, 2004, implement the relevant CAN-SPAM provisions.

²²18 U.S.C. § 1037(a)(1)-(5). 15 U.S.C. § 7704(d) contains the only other criminal provisions in the CAN-SPAM Act, providing up to 5 years in prison for unlawful transmission of sexually oriented spam.

²³A prior conviction under 18 U.S.C. § 1030—a similar criminal section concerning fraud and related activity in connection with computers—may also lead to the 5-year statutory maximum. 18 U.S.C. § 1037(b)(1)(B).

18 U.S.C. § 1037 (a) when one of several additional conditions apply. The conditions relate to the measure of the economic gain or loss, the volume of e-mail sent, the number of false registrations used, or whether the defendant had a leadership role in the offense. Finally, a 1-year statutory maximum applies for any other violation of 18 U.S.C. § 1037. In addition, 18 U.S.C. § 1037(c) allows DOJ to seek the criminal forfeiture of both property obtained from spamming profits and the computers used to send the spam. In December 2005, FTC reported to Congress that DOJ had brought four criminal prosecutions under the CAN-SPAM Act, and that numerous other nonpublic investigations were ongoing.²⁴

Lastly, the CAN-SPAM Act supplements some consumer protections that were already established by TCPA for regulating unwanted text messages and e-mail on mobile devices. Together, the two laws impose limitations on both unsolicited telephone marketing calls and any other calls to a paging service, cellular telephone service, other radio common carrier service, or any service for which the person being called would be charged for the call. Under TCPA rules, a “call” includes text messaging if the messaging is sent to a telephone number rather than an e-mail account. Electronic messages can be sent to mobile devices using a variety of methods. The type of technology used to send the electronic message determines how the electronic message is regulated.

The CAN-SPAM Act required that FCC adopt rules to protect consumers from receiving unsolicited mobile service commercial messages.²⁵ Under the act, a mobile service commercial message is a commercial e-mail message that is transmitted directly to a wireless device that is utilized by a subscriber of commercial mobile service in connection with that service. The act defines an e-mail message as a message having a unique e-mail address that includes a reference to an Internet domain. FCC issued rules in August 2004.

FCC adopted a general prohibition on sending commercial messages to any address referencing an Internet domain name associated with wireless subscriber message services. To assist the senders of such messages in identifying those subscribers, FCC requires commercial radio service providers to submit those names to the commission, for inclusion on a

²⁴FTC CAN-SPAM Report, p. A-2.

²⁵15 U.S.C. § 7712(b).

public list. FCC pursues violations of both CAN-SPAM and TCPA as it relates to wireless devices under its general enforcement authority.

As part of our study, we considered whether additional enforcement measures might be necessary to protect consumers from junk faxes, and whether establishing junk fax penalties and enforcement actions for repeat violators or abusive violations similar to the criminal penalties under CAN-SPAM would have a greater deterrent effect. As explained in the letter of this report, without FCC establishing performance goals and measures and analyzing complaint and enforcement data, it is not possible to explore the effectiveness of current enforcement measures. Without first gaining an understanding of the effectiveness of current enforcement measures, it is similarly not possible to determine whether additional enforcement measures are necessary to protect consumers. We did, however, ask federal government officials, representatives of the state attorneys general, consumer advocates, and business associations for their opinions regarding whether additional enforcement measures are currently necessary to enforce junk fax violations. Those with whom we spoke generally did not believe that additional measures were necessary at this time and did not support imposing criminal sanctions on junk fax violators similar to those imposed on spammers under CAN-SPAM.²⁶ A few of those with whom we spoke thought that the role of the telephone companies might be expanded, similar to the role of ISPs under the CAN-SPAM Act, so that telephone companies could bring suit against junk faxers using their networks.

²⁶One consumer advocate noted that criminal penalties could be beneficial, but that the real issue was enforcement of the junk fax rules.

Scope and Methodology

The Junk Fax Prevention Act of 2005 required GAO to report to Congress on FCC's enforcement of the junk fax laws. Accordingly, we answered the following questions: (1) What procedures have FCC established for taking action on junk fax complaints—including receipt, acknowledgment, investigation, and enforcement—and to what extent has it taken such action? (2) What are the strengths and weaknesses of FCC's junk fax procedures? and (3) What challenges do FCC face in carrying out its junk fax responsibilities?

To determine FCC's procedures for taking action on junk fax complaints, we reviewed provisions of TCPA as well as FCC's rules and procedures for implementing the provisions of the act. We interviewed officials from FCC's Consumer & Governmental Affairs Bureau (CGB)—whose responsibilities include developing FCC rules and accepting and acknowledging complaints—and FCC's Enforcement Bureau—whose responsibilities include junk fax enforcement. Additionally, we reviewed FCC's guidance to complainants for submitting junk fax complaints as well as FCC's procedures for receiving and documenting these complaints. Finally, we obtained and reviewed FCC's procedures for determining which complaints would receive further investigative and enforcement actions.

To determine the extent to which FCC has taken action on junk fax complaints, we obtained and analyzed FCC's database for documenting junk fax complaints and the spreadsheet used for determining investigatory and enforcement actions. We obtained summary data on the number of complaints received from 2000 through 2005, by source and method. We also obtained detailed information on the amount of formal enforcement actions taken against junk faxers since the formation of FCC's Enforcement Bureau. Further, to determine the type of concerns expressed by consumers and businesses, we reviewed some individual consumer and business comments submitted to FCC as part of the junk fax complaints and contained in FCC's database.

To assess the reliability of FCC's complaint data, we interviewed FCC officials responsible for the database regarding data entry and control procedures and reviewed existing documentation about the system. We conducted limited electronic tests on 2005 data to determine missing data and duplicative complaint identification numbers; these tests revealed only minor problems. We also conducted manual reviews to identify any discrepancies in the database. For example, we reviewed a portion of the comment fields in the database and found that some complaints that were coded as junk fax complaints should not have been. Since this type of

review requires reading the comments for each complaint entered, which is resource-intensive, we did not review all of the comments to determine the extent of this problem. CGB officials acknowledged limitations of the data, including reliability problems in previous years of tracking complaint information, possible inaccuracies in coding, and continual changes to more recent data as additional complaints are added. We determined that the data were sufficiently reliable to present overall trends and approximate figures. Specifically, we report only overall complaint numbers for 2000 through 2002, and approximate numbers at a more detailed level for complaints from 2003 through 2005.

To determine the strengths and weaknesses of FCC's junk fax procedures, we analyzed these procedures, including those used to determine which junk fax complaints would be considered for further investigatory and enforcement actions. In addition, we reviewed business and consumer comments submitted to FCC during junk fax rulemaking and reconsideration of existing rules. We also analyzed all junk fax consumer complaint guidance provided by FCC to determine if the guidance was consistent with the enforcement procedures.

To determine the challenges FCC faces in carrying out its junk fax responsibilities, we reviewed provisions of the Government Performance and Results Act of 1993, as well as documents and records used by FCC to establish goals and performance measures—that is, budget justifications, performance summaries, and strategic plans. We also reviewed FCC's quarterly complaint reports to determine the level of analysis being conducted on junk fax complaints.

Finally, we used existing statutes and regulations to provide information on additional enforcement measures and penalties that have been established to protect consumers from other types of unsolicited advertising. We interviewed FTC staff, representatives from the National Association of Attorney's General, and representatives from industry groups to obtain more information on different enforcement rules and actions.

We conducted our work from November 2005 through March 2006 in accordance with generally accepted government auditing standards.

Consumer Complaints Reported to FCC

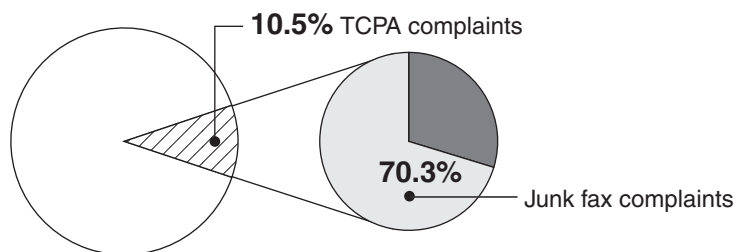
Table 3: Number of Complaints Reported Publicly by FCC, by Type, 2003-2005

Type of complaints	Complaints, by calendar year		
	2005	2004	2003
Cable and satellite services			
Billing and rates	290	289	256
Cable modem services	148	93	113
Connections to cable TV system	0	0	0
Satellite home viewer improvement act	0	0	0
Accessibility issues	75	63	88
Programming issues	600	152	137
Service-related issues	264	145	425
Radio and television broadcasting			
Accessibility issues	86	102	337
Loud commercial	0	0	24
Howard Stern commentary	0	20	0
Programming - general criticism	1,071	615	351
Programming - indecency/obscenity	233,471	1,405,419	166,683
Programming - religious	0	0	4
Other programming issues	106	136	260
Wireless telecommunications			
Billing and rates	13,065	14,546	10,592
Carrier marketing and advertising	3,080	3,104	2,133
Contract - early termination	3,956	3,958	2,386
Cramming	0	0	0
Number portability	0	4,839	3,447
Equipment	1,832	0	633
Service quality	4,009	3,031	2,166
Wireline telecommunications			
Billing and rates	13,562	14,775	17,956
Carrier marketing and advertising	433	1,952	2,834
Cramming	1,761	526	2,450
Service quality	2,093	1,487	470
Slamming	1,932	4,535	6,052
Telephone Consumer Protection Act	54,932	37,702	25,674

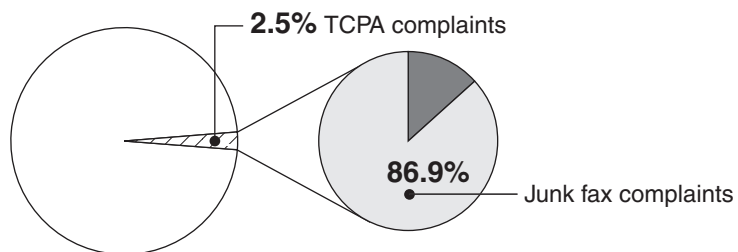
Source: FCC.

Figure 5: Percentage of TCPA Complaints Reported in FCC Quarterly Reports That Are Junk Fax Complaints, 2003-2005

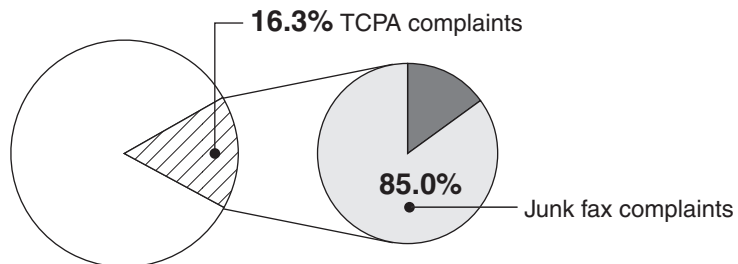
2003



2004



2005



Source: GAO analysis of FCC CGB Quarterly Reports.

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