

Client newsletter

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Highlights of the Junk Fax Prevention Act of 2005

On July 9, 2005, President Bush signed the Junk Fax Prevention Act of 2005 (the "Fax Act") into law. The Fax Act made several important amendments to the Telephone Consumer Protection Act of 1991 ("TCPA"), including codifying the "existing business relationship" ("EBR") exemption, thereby permitting businesses and others to send advertisements and other marketing materials via facsimile to entities and persons based upon prior dealings in certain circumstances. On April 6, 2006, the Federal Communications Commission ("FCC") issued new rules implementing the Fax Act ("Fax Rules"). Any business that seeks to market to prior or existing customers via fax advertising must comply with the Fax Act and the FCC's new rules.

Under the Fax Act and Fax Rules, unsolicited facsimile advertisements may be sent to recipients with whom the sender has:

- obtained prior written consent;
- an established business relationship;
- obtained the recipient's fax number from either:
 - the recipient, during the course of a voluntary communication of the number within the context of the EBR; or
 - a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available

its facsimile number for public distribution; or

- possessed a fax number of a recipient before July 9, 2005, and has an EBR (grandfathered in).

Opt-out Notice

To be lawful, such unsolicited advertisements must contain a "clear and conspicuous" opt-out notice. To be clear and conspicuous, the FCC has concluded that an opt-out notice must:

- state that the recipient is entitled to request that the sender not send any future unsolicited advertisements and that "failure to comply, with such opt-out request, within the shortest reasonable time (as determined by the FCC), is unlawful";
- be separate from the advertising copy or other disclosures and placed at the top or bottom of the first page of the fax;
- be distinguishable from the advertising material through the "use of bolding, italics, different font, or the like";

In addition, the opt-out notice must:

- specify a cost-free opt-out mechanism – such as a website address, email address, toll-free telephone or fax number;

- include a domestic contact telephone number and a domestic fax number (Note: if a toll-free telephone or fax number is used for the cost-free mechanism, a third number need not be provided);

- be accepted at the opt-out numbers provided on a 24 hour/7 day a week basis;
- be implemented within 30 days; fax senders with the capability to honor opt-out requests in less than 30 days must do so;

Opt-out Requests

There are also certain requirements that a request not to send future unsolicited facsimile advertisements must meet. The opt-out notice must set forth the requirements for such a valid request. These requirements are:

- the request must identify the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;
- the request must be made to the telephone or facsimile number of the sender of the unsolicited advertisement, or by other methods allowed by the FCC; and
- the person making the request has not, subsequent to the request, provided express invitation or

permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine.

Interplay between Opt-out request and EBR

The FCC has concluded that an opt-out request should be honored regardless of whether the recipient continues to do business with the sender. Thus, under the Fax Rules, a opt-out request supersedes the EBR exemption. Once a recipient has opted-out of such communications, sending facsimile advertisements to the recipient by facsimile is prohibited, irrespective of an EBR, unless the sender subsequently provides an express invitation or permission. The burden of establishing consent rests with the sender.

Third Party Senders

It is important to note that the Fax Rules clarify that the underlying sender (the business on whose behalf the fax is transmitted) is responsible for complying with the opt-out notice requirements and

for honoring opt-out request. This applies even if a third party receives the opt-out request sent by the sender. However, where a third party sender demonstrates a “high degree of involvement” in, or actual notice of, unlawful activity and fails to prevent it (failing to include the required opt-out notice information, etc), the third party sender and the underlying sender may be held jointly and severally liable for violations of the opt-out notice requirements.

Express Consent

In the absence of an EBR, a person or entity may give express consent to receive fax advertisements from a sender. The permission must be express, may be given orally or in writing and must include the fax number to which advertisements may be sent. The burden to prove express consent resides with the sender. All opt-out notice requirements continue to apply.

Transactional Messages

Messages that are intended to facilitate, complete, or confirm a commercial

transaction that the recipient has previously agreed to enter into with the sender are not deemed “unsolicited advertisements” under the Fax Rules. To fall outside the definition of an unsolicited advertisement, such messages must relate specifically to existing accounts and ongoing transactions. Any message that relates to new or additional business or promotes other products or services (even at no cost) will turn a transactional message into an unsolicited advertisement. However, a *de minimus* amount of advertising material (e.g., company logo) does not convert a transaction message into a fax advertisement.

Private Right of Action

Violations of the Fax Act are subject to an injunction, recovery of actual monetary loss or up to \$500 for each violation, whichever is greater. In instances where the court finds the violation to be made willfully or knowingly, the court may increase the amount of the award up to three (3) times the amount otherwise available.

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