

# Junk Faxes: Are You in Compliance?

In 2005, Congress amended the so called, “Junk-fax” Act preventing certain advertisements. In 2006 the FCC clarified the restrictions. Learn about the new changes to avoid being fined for sending “junk” faxes.

**I**f you advertise your title insurance, escrow, or closing services by fax, are you aware that Congress amended the Act preventing certain advertisements by fax on July 9, 2005? Are you also aware that as of August 1, 2006, the Federal Communications Commission’s rules allegedly clarifying the restrictions on advertisements by fax are in effect? If the answer to either or both of these questions is “no,” you should pay particular attention to the information that follows.

Companies who have previously advertised incorrectly by fax have not only been dealt blows through class actions commenced by recipients of unwanted faxed advertisements but also through enforcement actions by attorneys general of several states. Indeed, some of the companies in

these actions have been forced out of business due to their improper use of faxed advertisements in marketing their goods or services.

## **The Federal Telephone Consumer Protection Act as Amended in 2005**

In December 1991, Congress enacted the federal Telephone Consumer Protection Act of 1991, (TCPA), which, among other things, made it unlawful for “any person within the United States, or any person outside the United States . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.” In contrast to other TCPA prohibitions, Congress drafted the unsolicited fax transmission prohibition to apply both to personal and to

commercial recipients of unsolicited faxed advertisements.

The TCPA defined an “unsolicited advertisement” 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.” As originally drafted, the TCPA provided that a party accused of violating the TCPA by sending junk faxes only had one substantive defense – that the party had received prior consent to send faxes to the recipient. In the absence of specific evidence that the recipient had provided such prior consent, at least some courts held that a prior established business relationship between the sender and the recipient was insufficient to permit the faxing of ads. This holding, however, seemed to contradict a 1992 Federal Communications Commission (FCC or Commission) finding that a prior established business relationship with the recipient provided a sender with the necessary express permission to send faxed advertisements to the recipient.

To resolve this conflict between certain courts and the Commission, Congress amended the TCPA in 2005 to formally adopt the FCC’s prior “established business relationship” exemption. These amendments became effective on July 9, 2005. Among other things, the TCPA was amended to prohibit the use of a fax machine, computer, or other device to send an unsolicited advertisement

to another fax machine unless three requirements were met:

(1) the unsolicited advertisement is from a sender with an established business relationship with the recipient; (2) the sender obtained the recipient's fax number either through: (a) the recipient voluntarily providing the fax number as part of the established business relationship or (b) a directory, an advertisement, or an Internet site in which the recipient voluntarily makes its fax number available for public distribution; and (3) the sender's unsolicited advertisement contains a "clear and conspicuous" notice satisfying the requirements of the Act.



A sender has an established business relationship with the recipient if the sender and the recipient have a prior or existing voluntary two-way communication with each other, with or without the exchange of any consideration. The communication has to have been part of the recipient's purchase or transaction with the sender, or on the basis of the

recipient's inquiry or application regarding products or services provided by the sender. Moreover, the relationship cannot have been terminated by either party. Congress provided that the Commission could limit the duration of this established business relationship. The Commission, however, had to wait until at least October 9, 2005 before commencing a proceeding to decide whether to provide such a duration limitation.

Even if a sender has an established business relationship with the recipient and satisfies the other requirements of the Junk Fax Act, a sender is prohibited from sending the unsolicited advertisement if the recipient has previously informed the sender, as provided in the Act, not to send future unsolicited ads to the recipient's fax number.

An additional amendment to the TCPA is a requirement that a sender ensure that the unsolicited advertisement contain a clear and conspicuous notice located on the first page of the advertisement. The notice must state: (1) that a recipient can request that the sender of the advertisement no longer send any unsolicited advertisements to the recipient's fax machines, (2) the required contents of the opt-out request, and (3) that the sender's failure to comply with a proper opt-out request within any minimum time set by the Commission is unlawful. The notice must also provide a domestic telephone and fax number for the recipient to make an opt-out request and must provide a cost-free mechanism for a recipient to make an opt-out request. Each of the means to provide an opt-out request must permit the recipient to make an opt-out request at any time of any day of the week.

For the opt-out request to be proper, the recipient's request must satisfy certain statutory requirements. First, the opt-out request must specify the telephone number or numbers corresponding to the facsimile machines to which the request relates. Second, the request must be sent to the telephone number or facsimile number provided in the notice or by any other method determined by the Commission. Finally, the recipient making the request cannot subsequently provide express permission to the sender, in writing or otherwise, to send such advertisements to the recipient at the fax machine.

If an individual or entity violates the junk fax prohibition in the TCPA, the recipient of the unsolicited faxed advertisement can typically bring a private cause of action against the violator in an appropriate state court, not federal court. In contrast to many federal statutes, the TCPA does not grant jurisdiction to the federal courts for TCPA violations.

If a party is found liable for violating the TCPA's unsolicited fax prohibition, the recipient of the fax can recover actual monetary losses arising from the violation or \$500 for each violation, whichever is greater. These damages can be trebled if the TCPA violator willfully or knowingly violates the unsolicited fax prohibition.

### Recent FCC Rules Clarifying Issues Raised by the TCPA Amendments

The amendments to the TCPA contained certain ambiguities that the FCC was authorized to clarify. First, there was the issue of whether there should be a time limit for the existence of an established business relationship. In other words, could a sender of a

fax claim it had an established business relationship with a recipient of a fax because the sender and recipient did business together years prior to sending a fax to the recipient? Second, was the issue of what makes a required opt-out notice on the advertisement clear and conspicuous. Third, was the concern over what type of cost-free mechanism a sender must offer to allow a recipient to opt-out of receiving any subsequent faxed advertisement without cost. Finally, there was ambiguity concerning how long a sender had to ensure that a recipient who opted out of receiving any additional faxed advertisements did not receive any additional faxed advertisements. Effective August 1 of 2006, regulations promulgated by the FCC

became effective to address these ambiguities in the TCPA amendments.

### The Established Business Relationship

In addressing the issue of whether an established business relationship (EBR) between a sender and recipient ends after a certain period of time so a sender can no longer send unsolicited faxes to the recipient, the FCC was faced with several comments from interested parties arguing that the EBR should not have any time limit. In acknowledging the comments, the FCC chose not to limit the time period for an EBR. However, the FCC acknowledged that it would evaluate the EBR within one year of the effective date of its new regulations.

### Methods of Obtaining Fax Numbers

Even if a sender and recipient have an EBR, the EBR does not justify a sender sending an unsolicited ad to a recipient. Rather, the sender must also obtain the fax number by either receiving the fax number directly from the recipient or from a directory, an advertisement, or an Internet site. If the sender receives the fax number from the recipient, the fax number can be received in writing, verbally, or through the recipient's Internet site. However, if the sender receives the fax number from a directory, an advertisement, or an Internet site (other than the recipient's Internet site), the sender must ensure that the recipient voluntarily agreed to make its fax number public. Ensuring that a recipient voluntarily agreed to make its fax

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number public requires the sender to take reasonable steps to verify that the recipient agreed to have its fax number listed. This would include the sender either calling or emailing the recipient and asking if it intended to disclose its fax number to the public.

for a recipient to use a website address, email address, toll-free telephone number, or toll-free fax number to opt out of future faxed ads. A sender can also offer a local telephone number for opt-out requests provided that all recipients of the faxed ad are local and will not incur any long distance

tance of a business complying with the TCPA and its associated rules. In 2003, the California Attorney General commenced an action against a fax broadcaster, Fax.com, Inc., and certain affiliated individuals for, among other things, violating the TCPA. The state of Indiana subsequently joined the suit in 2004. After more than two years of litigation, Fax.com ceased operations, and the parties entered into a Consent Judgment in July of 2006. In the Consent Judgment, Fax.com and its affiliated companies were found liable in the sum of \$30 million, and the individual defendants were found liable in the sum of \$20 million.

## ■ It is imperative that a business deciding to advertise by fax be extremely cautious.

### Clear and Conspicuous Opt-Out Notices

The FCC also clarified what a sender needs to do to ensure that the required opt-out notice on the first page of the unsolicited advertisement is clear and conspicuous. First, the FCC stated that the notice is clear and conspicuous if the notice is apparent to a reasonable consumer. Second, the notice must be separate and distinguishable from the advertisement and any other disclosures. The notice can be distinguished through the use of boldface, italics, a different font, or other styling. Third, the notice must appear at the top or bottom of the fax.

### Cost-Free Opt-Out Mechanisms

The FCC also provided guidance on the type of cost-free opt-out mechanism that a sender has to offer a recipient. To provide a balance between the needs of consumers who may or may not have access to a computer and those of businesses who may not be able to afford a toll-free telephone number, the FCC's rules require that a sender of unsolicited faxed ads allow

or other charges for calls made to the number.

### Timing to Honor Opt-Out Requests

Finally, the FCC dealt with the issue of how long a sender has to comply with a recipient's request to opt out from receiving additional faxed ads. The FCC held that a sender must honor such an opt-out request within the shortest reasonable time from receiving such a request. However, the shortest reasonable time shall not exceed thirty days from the date that the recipient notifies the sender of the opt-out request.

### A Matter of Life or Death for Your Business

Although the faxed advertisement legal waters may still be murky, it is imperative that a business deciding to advertise by fax be extremely cautious in complying with the TCPA and the FCC's new rules. If nothing else, a review of *The People of the State of California v. Fax.com, Inc., et al.*, a California federal court case from 2003, exemplifies the impor-

Would you like your company to be faced with a multimillion dollar judgment for failing to comply with the TCPA or its rules? More importantly, would you like to have a multimillion dollar judgment filed against you individually? If the answer to either or both of these questions is "no," which it most likely is, pay particular attention to the amended TCPA and its associated regulations, and keep clean records justifying your business's compliance with the legal requirements for sending faxed advertisements. Otherwise, you may find yourself in the same position as Fax.com – out of business.



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