



Fax Advertising: Complying with Federal Junk Fax Laws

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INTRODUCTION

The act of “spamming,” or sending unsolicited advertisements by electronic means, is not limited to e-mail and news groups, but also includes sending unsolicited advertisements through facsimile machines. In 1991, Congress addressed fax spamming and similar issues by passing the Telephone Consumer Protection Act (TCPA).¹ The TCPA prohibited sending any unsolicited advertisements to telephone facsimile machines.² In 2005, Congress amended the TCPA, by passing the Junk Fax Prevention Act (JFPA).³ The JFPA made an important change to the TCPA, by providing an exemption to the prohibition on faxing unsolicited advertisements if the recipient has an existing business relationship with the sender.⁴

DEFINING UNSOLICITED ADVERTISEMENTS

An unsolicited advertisement is any material that advertises the “commercial availability or quality of any property, goods, or services” that is transmitted

to the recipient, without the recipient’s prior express invitation, in writing or otherwise.⁵ Advertisements are not unsolicited if the sender receives the express invitation or permission of the recipient before sending a fax advertisement.⁶ A prior express invitation cannot take the form of a negative option under which a sender presumes the recipient consents unless the recipient chooses to opt out.⁷ Additionally, fax requests for permission to send fax advertisements are not allowed.⁸ Offers for free goods and services generally fall within the definition of unsolicited advertisements as such offers are usually part of a marketing campaign to sell commercial goods or services.⁹

Fax messages that do not promote a commercial product or service are not advertisements.¹⁰ This includes fax messages that involve political or religious discourse, such as requests for donations to a charitable cause or political campaign.¹¹ Incidental advertisements in an otherwise exempt fax message will not convert the message into an unsolicited advertisement if the primary purpose of the fax message is not to serve as an advertisement.¹² A fax message whose primary

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FOOTNOTES

1. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227).

2. *Id.*

3. Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005).

4. *Id.*

5. 47 U.S.C.A. § 227(a)(5) (West 2001 & Supp. 2008); 47 C.F.R. § 64.1200(f)(13) (2008).

6. Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25,967, 25,972 (May 3, 2006).

7. *Id.*; 47 C.F.R. § 64.1200(a)(3)(ii) (2008).

8. 71 Fed. Reg. at 25,972.

9. *Id.* at 25,973.

10. *Id.* at 25,972.

11. *Id.*

12. 71 Fed. Reg. at 25,973.

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purpose is to communicate information, such as industry news articles or legislative updates, is not an advertisement.¹³ A fax message whose primary purpose is to facilitate, complete, or confirm a commercial transaction, such as a receipt or invoice, is also not an advertisement.¹⁴ In order for a fax message's primary purpose to be for facilitating, completing, or confirming a commercial transaction, the message must relate specifically to existing accounts or ongoing transactions.¹⁵

ESTABLISHED BUSINESS RELATIONSHIP EXEMPTION

Under the TCPA, it is unlawful to send an unsolicited advertisement to a facsimile machine unless the sender has an established business relationship (EBR) with the recipient.¹⁶ The provisions of the TCPA apply to both intrastate and interstate faxes.¹⁷ A "sender" is not just the entity that sends a fax, but also the person or entity on whose behalf a fax is sent, or whose goods or services are promoted or advertised in the fax.¹⁸ Under this definition, an entity may be responsible for a violation of the junk fax rules even though it did not physically send the fax. In addition to the sender, any person or entity that, for a fee, transmits faxes on behalf of a sender will be liable for violating 47 C.F.R. § 64.1200 if there is a high degree of involvement or actual knowledge of the sender's unlawful activity, and it fails to take steps to prevent the faxes from being sent.¹⁹

A sender has an EBR with a recipient if the sender has established a relationship with the recipient by way of a prior or existing voluntary communication, and

the relationship has not been terminated.²⁰ The voluntary communication can take the form of an "inquiry, application, purchase or transaction" by the recipient regarding the services or products offered by the sender.²¹ But, an inquiry regarding the location of a store or the identity of the sender is not sufficient to establish an EBR.²²

If the sender has an EBR with the recipient and possessed the recipient's fax number before July 9, 2005, the sender may send unsolicited faxes to the recipient regardless of how the fax number was obtained.²³ In addition, a rebuttable presumption exists that if the sender had an EBR with the recipient prior to July 9, 2005, the sender possessed the fax number as well.²⁴ If the sender obtained the fax number after July 9, 2005, the sender can only send unsolicited faxes if the fax number was voluntarily communicated to the sender, within the context of the EBR, or if the sender received the fax number through a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make its fax number available for public distribution.²⁵ If the sender receives a potential recipient's fax information from a source compiled or provided by a third party and not the recipient, the sender should take reasonable steps to ensure that the recipient actually consents to receiving the fax advertisement prior to faxing any unsolicited advertisement.²⁶ The reasonable steps for verification taken need not include contacting the recipient directly if there is sufficient other evidence that the recipient consented to receiving unsolicited advertisements.²⁷ The sender should maintain records demonstrating

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 25,967; Notice of Pub. Info. Collection(s) Being Submitted for Review to the Office of Mgmt & Budget, 71 Fed. Reg. 20104, 20105 (April 12, 2006).

17. *Hooters of Augusta Inc. v. Nicholson*, 537 S.E.2d 468, 471-472 (Ga. Ct. App. 2000); *Texas v. Am. Blast Fax Inc.*, 121 F. Supp. 2d 1085, 1088-1089 (W.D. Tex. 2000).

18. 47 C.F.R. § 64.1200(f)(8) (2008).

19. *Id.* § 64.1200(a)(3)(vii), (f)(6).

20. *Id.* § 64.1200(f)(5).

21. *Id.*

22. 71 Fed. Reg. at 25,969.

23. 47 U.S.C.A. § 227(b)(1)(C) (West Supp. 2008); 71 Fed. Reg. at 25,968.

24. 71 Fed. Reg. at 25,968.

25. *Id.*

26. *Id.*

the existence of the EBR and the voluntary communication of the recipient's fax number, as the sender will bear the burden of proving the EBR existed and the fax number was voluntarily given if a violation of 47 U.S.C. § 227(b) is ever alleged.²⁸

NOTICE REQUIREMENTS

Even if the sender has formed an EBR with a recipient, and the recipient has voluntarily given the sender the recipient's fax number, the sender must still make sure to include a notice on the advertisement that notifies the recipient of its right to opt out of future unsolicited fax advertisements.²⁹ The notice must be on the first page of the actual advertisement and not just on a cover page.³⁰ A cover page that accompanies a fax advertisement is not the first page of the advertisement.³¹ The notice must be clear and conspicuous.³² In order for the notice to be clear and conspicuous, it should be located at either the top or bottom of the first page and must be distinguishable from the advertising material.³³ The notice must state that the recipient can request the sender to not send any future advertisements and that failure by the sender to comply with such a request within 30 days is unlawful.³⁴ The notice must include a domestic telephone number for the sender and a fax machine number to which the recipient can send an opt-out request 24 hours a day, seven days a week.³⁵ If neither the fax number nor the telephone number allow the recipient to opt out for free, then the sender must also provide a cost-free method by which the recipient may opt out, such as by e-mail or an Internet site.³⁶ Finally, the notice must inform the recipient of the requirements for a valid opt-out request.³⁷ An opt-out request will be valid only if it identifies the number of the fax machine that received the unsolicited advertisement, the request is sent to one of the opt-out contacts provided by the sender in the notice on the advertisement, and the person making the request does not expressly invite or permit the sender to send fax advertisements to the recipient subsequent to making the opt-out request.³⁸ A valid opt-out request will terminate the EBR exemption for

making unsolicited faxes even if the recipient continues to do business with the sender.³⁹

PENALTIES/DAMAGES

Fax senders should be aware of the provisions of the TCPA and the JFPA, as failure to comply can result in substantial forfeitures being assessed against the senders by the Federal Communications Commission (FCC). The FCC may assess forfeitures not only against the holders of a license, permit, certificate, or other authorization issued by the FCC, but also against any other person if the FCC first issues the person a citation of the violation charged, gives the person a reasonable opportunity for a personal interview with the FCC, and the person subsequently engages in conduct of the kind described in the citation.⁴⁰ The fax recipient may also be able to maintain a private action in state court against the sender for damages equal to the greater of the actual damages or \$500, which damages may be trebled if the court finds that the sender willfully or knowingly violated the statute.⁴¹ Some private actions under the TCPA have resulted in substantial damage awards, costing companies millions of dollars.⁴² ■

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27. Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005, 73 Fed. Reg. 64,556, 64,557 (Oct. 30, 2008).

28. 71 Fed. Reg. at 25,975.

29. 47 U.S.C.A. § 227(b)(2)(D) (West Supp. 2008); 47 C.F.R. § 64.1200(a)(3)(iii) (2008).

30. 71 Fed. Reg. at 25,969.

31. 73 Fed. Reg. at 64,558.

32. 47 C.F.R. § 64.1200(a)(3)(iii).

33. 71 Fed. Reg. at 25,969.

34. 47 C.F.R. § 64.1200(a)(3)(iii) (2008).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* § 64.1200(a)(3)(v).

39. 71 Fed. Reg. at 25,971.

40. 47 U.S.C.A. § 503(b)(5) (West 2001 & Supp. 2008); *See Mex. Mktg. LLC*, 22 F.C.C.R. 22218 (2007).

41. 47 U.S.C.A. § 227(b)(3) (West 2001).

42. *Nicholson v. Hooters of Augusta Inc.*, No. 95-RCCV-616 (Richmond Co., Ga. Super. Ct. April 25, 2001) available at <http://www.keytlaw.com/faxes/hooterscase.htm>.