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FCC Amends its “Junk Fax” Rules to Address Established Business Relationships

By Carl W. Northrop and J. Steven Rich

As part of the continuing efforts of Congress and the Federal Communications Commission (“FCC” or “Commission”) to balance the legitimate needs of businesses to communicate with their customers against the costs and privacy concerns related to receiving unwanted facsimile messages, the FCC released an order (the “Order”) on April 6 in which it amends certain provisions of its rules that relate to so-called “junk faxes.” In the Order, the FCC: (1) codifies an established business relationship (“EBR”) exemption to the general prohibition on sending unsolicited facsimile advertisements; (2) establishes a definition of an EBR to be used in the context of unsolicited facsimile advertisements; and (3) adopts rules relating to the process by which a recipient may “opt out” of any future facsimile transmissions from a particular sender.

Congress originally adopted a prohibition on unsolicited facsimile advertisements in the Telephone Consumer Protection Act of 1991 (“TCPA”), which contained no EBR exemption. In adopting its rules implementing the TCPA, the FCC declined to adopt an EBR exemption in light of the fact that the TCPA contained no such exemption, but concluded that an EBR could provide evidence of a facsimile recipient’s consent to receive facsimile solicitations from the sender. However, the Commission reversed this conclusion in 2003 as part of a comprehensive review of many of its rules pertaining to telemarketing and facsimile advertising. Under pressure from businesses that rely on facsimiles to communicate with their customers, Congress enacted the Junk Fax Prevention Act of 2005, which codifies an EBR exemption to the prohibition on unsolicited facsimile advertisements. This exemption is analogous to the EBR exemption that already existed for telemarketers.

The Order’s key rule changes include:

- The definition of an established business relationship includes any “prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase, or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.” The definition does not cover business relationships that a person may have with an affiliate of the sender. Nor does it specify any time limitation on the existence of an EBR after an inquiry, application, purchase or transaction, but the Order states that the FCC will evaluate complaint data to determine whether the EBR exception results in a significant number of complaints involving facsimile advertisements, and whether such complaints relate to purported EBRs “of a duration that is inconsistent with the reasonable expectations of consumers.”
- The Commission’s rules now expressly recognize an EBR exemption to the prohibition on unsolicited facsimile advertisements. The sender of such advertisement bears the burden of demonstrating the existence of an EBR.
- The sender of an unsolicited facsimile advertisement must demonstrate not only that an EBR exists, but also must show that the recipient has provided its facsimile number voluntarily to the sender, except with respect to recipients with whom the sender had an EBR prior to July 9, 2005. If the sender obtains a facsimile number from the recipient’s own directory, advertisement, or Internet site, this will serve as evidence that the number was provided voluntarily unless the materials state that the recipient does not accept unsolicited facsimile advertisements. However, if a sender obtains a facsimile number through sources compiled by third parties, the sender must take reasonable steps to verify that the recipient consented to making its number available, such as calling or e-mailing the recipient.
- If a valid EBR existed before July 9, 2005, the Commission presumes that a sender secured the facsimile number through appropriate means. However, the sender bears the burden of proving that the EBR existed prior to July

9, 2005 if the recipient alleges a violation of the junk fax rules.

- The sender of an unsolicited facsimile advertisement must include a notice on the first page of the advertisement that contains “clear and conspicuous” instructions on how to “opt out” of receiving future facsimile transmissions. The Commission declined to impose detailed requirements in this regard, such as a minimum font size, but stated that the notice must be separate from advertising copy or other disclosures, placed at the top or bottom of the fax, and “distinguishable from the advertising material through, for example, use of bolding, italics, different font, or the like.” **Note that the “opt-out” message is not sufficient to ensure compliance with the FCC’s rules; an EBR also must exist.**
- Each sender of an unsolicited facsimile advertisement also must provide a cost-free opt-out mechanism. This may be either a toll-free telephone number, a website, or an e-mail address.
- An opt-out request must be processed within 30 days, and remains in effect until the consumer who has sent the request gives express permission to receive future facsimile

advertisements. Absent such express permission, the EBR exemption is terminated by an opt-out request even if the consumer chooses to continue doing business with the sender.

- A sender of unsolicited facsimile advertisements—i.e., the business on whose behalf an advertisement is transmitted—remains responsible for compliance with opt-out requests, even if the sender has outsourced the actual transmission of its faxes to a fax broadcaster.

The FCC has the authority to impose fines of up to **\$11,000 per violation** on entities or individuals who violate the junk fax rules, and in 2004 assessed a record fine of \$5.4 million on fax broadcaster Fax.com. Recipients of unsolicited facsimiles also have a private, statutory right of action that entitles them to damages of up to \$1,500 per fax. In addition to the TCPA and other federal restrictions, the laws of certain states place additional restrictions on the circumstances under which facsimile advertisements may be sent.

The rules adopted in the Order will become effective 90 days after publication in the Federal Register.

If you have any questions about the FCC’s Order, or would like to discuss how the above rule changes may affect your business, please contact:

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