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Special Advisory to Broadcasters
July 2006

Communications Broadcast Advisory

New "Junk Fax" Rules Take Effect August 1, 2006

The FCC's new "junk fax" rules, which were adopted on April 6, 2006 pursuant to the Junk Fax Prevention Act of 2005 ("Fax Act"), will take effect on August 1, 2006.

The Commission's junk fax rules generally prohibit for-profit, as well as non-profit, entities from sending facsimile "advertisements" — broadly construed — to recipients that have not given their "prior express invitation or permission." Notwithstanding this general prohibition, the new rules provide that where the sender of a facsimile advertisement maintains an "established business relationship" ("EBR") with the intended recipient, the advertisement will not be deemed "unsolicited." The new rules also confirm that other forms of "prior express invitation or permission" will render the general prohibition inapplicable. To the extent that a sender transmits facsimile advertisements on a regular or even occasional basis, it should be aware of the requirements of the new rules.

"Advertisements" Under the New Fax Act Rules

The Commission has defined "advertisement" broadly, with the effect that a wide array of transmissions are considered "advertisements" under the new rules. However, "informational messages," such as newsletters or other publications of a primarily informational nature, would not be viewed as "advertisements." Nor would "noncommercial messages," which include messages involving political, religious discourse or requests for donations to charitable organizations.

The "Established Business Relationship" Exemption

The EBR exemption permits a sender to fax advertisements to individuals and entities with whom the sender has an ongoing relationship. In order to qualify for this exemption, the sender must satisfy four separate conditions, even if it relies on third parties to handle the actual transmission of facsimile advertisements.

First, the sender must be able to demonstrate that an EBR does in fact exist between the sender and the recipient. Critically, the EBR does not extend to third-parties, such as affiliates, business partners, or third-party fax broadcasters.

Second, the sender must be able to demonstrate that it obtained the telephone number to the recipient's facsimile machine either (i) directly from the recipient; (ii) indirectly from a source to which the recipient voluntarily provided the number for public distribution; or (iii) through an EBR formed prior to July 9, 2005. It is simplest and safest for the sender to obtain facsimile numbers directly from recipients. The sample authorization at the bottom of this e-mail can be used for this purpose. Regardless of which method is used, the sender should maintain adequate records establishing how it obtained the pertinent facsimile numbers to which it sends faxes.

Third, notwithstanding the fact that there may be an EBR between the sender and a particular recipient, the sender must provide a notice on the first page of any facsimile advertisement informing the recipient of his/her/its right to "opt out" of future facsimile advertisements. This notice must describe what a recipient must do in order to "opt out" (discussed below), must note that the sender's failure to comply with a valid "opt out" request is unlawful, and must also provide: (i) a domestic contact telephone number through which the recipient may make an "opt out" request; (ii) a domestic facsimile number through which a recipient may fax an "opt out" request; and (iii) a website address; e-mail address; toll-free telephone number; toll-free facsimile number; or local telephone number (provided all intended recipients may call that number without incurring long-distance or other charges) through which recipients may make an "opt out" request. The notice must be "clear and conspicuous," such that its existence would be readily apparent to a reasonably attentive consumer. The notice must also be placed at either the top or bottom of the facsimile, and be separated and distinguishable from other disclosures and advertising material through, for example, use of bolding, italics, different font, or the like. The FCC is currently considering, on reconsideration of its new rules, whether it would be sufficient if the "opt out" notice is contained in a standardized fax cover sheet, rather than on the first page of the advertisement itself.

Fourth, the sender must not have received a prior "opt out" request from the recipient. Such a request will always trump an EBR. The sender must respect any valid request by a recipient to "opt out." In order to be valid, such an "opt out" request must (i) identify the telephone number(s) of the facsimile machine(s) to which the request applies, and (ii) be made through the telephone number, facsimile number, website address, or e-mail address provided by the sender in its "opt out" notice. "Opt out" requests must be honored within the "shortest reasonable time," not to exceed 30 days from the date on which such a request is made.

Other Forms of "Prior Express Invitation or Permission"

The Commission's new rules exempt from the definition of "unsolicited" all facsimile transmissions for which the sender has obtained "prior express invitation or permission." The best form of "prior express invitation or permission" is a written statement, signed by the recipient, expressly authorizing the sender to transmit facsimile advertisements to that recipient at one or more designated fax machines. In order to be effective, such authorization (i) must be provided by the recipient before the transmission of any facsimile advertisement is made, (ii) must be affirmative and express, and (iii) must include the facsimile number(s) to which advertisements may be sent. The sample authorization provided below can be used for this purpose. It is advisable to obtain express written authorizations from as many potential recipients as possible. Even if there is an existing business relationship between the sender and the recipient, such an authorization will provide an additional layer of protection.

Regardless of the manner in which "prior express invitation or permission" is provided, the sender must provide the same "opt out" notice required by the EBR exemption (discussed above) on the first page of each facsimile transmission sent to recipients and must respect a recipient's decision to "opt out" of future facsimile transmissions.

A Final Cautionary Note

The above discussion may lead senders to consider e-mailing information to recipients in lieu of facsimile transmission. However, senders should be aware that unsolicited commercial e-mail is subject to its own regulatory restrictions. Notably, the CAN-SPAM Act and the regulations promulgated by the Federal Trade Commission to implement the Act (i) ban the use of false or misleading header information in e-mails; (ii) prohibit the use of deceptive subject lines in e-mails; (iii) require that all commercial e-mails afford recipients an "opt out" option, through a return e-mail address or another Internet-based response mechanism; and (iv) require that all commercial e-mails include the valid, physical postal address of the sender as well as clear and conspicuous notice stating that the email is an advertisement and that the recipient can "opt out" of future e-mails.

Sample Fax "Opt Out" Notice

(to be included on the first page of all facsimile transmissions)

This facsimile has been sent by <name> as a service to those with an interest in the services provided by <name>. However, if you no longer wish to receive facsimiles from <name>, you may request that we not send facsimiles to your telephone facsimile machine(s). In order for your request to be valid, (i) the request must clearly identify the facsimile number(s) to which the request relates; (ii) the request must be communicated to us by calling <toll-free telephone number>, by sending a facsimile of the request to <fax number>, or by emailing the request to <email address>; and (iii) the requesting party must not have subsequently provided express permission, whether written or unwritten, to us to transmit faxes to the telephone facsimile number(s) identified in the request. Our failure to comply with a proper request is unlawful.

Sample Fax Authorization

(to be incorporated into underlying association forms)

From time to time, <name> faxes notices, requests and other information related to <name>'s products and services to those with whom <name> has an established relationship. By signing below, you grant <name> express invitation and permission to transmit Information by facsimile and/or email to you and the entity you represent. By signing below, you also acknowledge that you and the entity you represent maintain an established and ongoing business relationship with <name>. Please sign and date as indicated below and provide your preferred facsimile number(s) and email addresses.

Signature

Date

Facsimile Number(s)

Name of person signing

Entity represented by person signing

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