

FCC Announces New Fax Advertising Rules

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The Federal Communications Commission ("FCC") has adopted new fax advertising rules, which go into effect on August 1, 2006.¹ The new rules codify an established business relationship ("EBR") exemption for fax senders and create an explicit opt-out mechanism for fax recipients.

EBR Exemption

The old rules created a general prohibition against the transmission of unsolicited fax advertisements unless the recipient had given its prior express written permission. The new FCC rules ease that general prohibition by officially recognizing an EBR exemption. The EBR exemption allows senders to send fax advertisements to recipients without prior express written permission, if (1) an EBR exists between the sender and the recipient and (2) the recipient has voluntarily provided its fax number to the sender.

What is an EBR?

The new rules define an EBR as

a 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

¹ The new FCC fax advertising rules implement the Junk Fax Prevention Act of 2005, which was enacted to amend the unsolicited fax advertisement provisions of the Telephone Consumer Protection Act of 1991.

person or entity, which relationship has not been previously terminated by either party.²

When has a recipient voluntarily provided its fax number?

A recipient voluntarily provides its fax number to a sender in the following situations:

- The recipient lists it on, for example, an application, contact information form, membership renewal form, business card, letterhead, or fax cover sheet; or
- The recipient publishes it in a publicly accessible medium, such as its own directory, advertisement, or webpage, unless the recipient notes in such materials that it does not accept unsolicited advertisements at that fax number.
- If the sender obtains a recipient's fax number from a source compiled by a third party, such as a membership directory or commercial database, the sender must take reasonable steps (e.g., calling or emailing the recipient) to verify that the recipient consented to the publication of its fax number therein.

Exception to the exemption and the burden of proving an EBR.

If a sender can show that a valid EBR existed with a recipient prior to July 9, 2005, it will be presumed that the sender properly had the recipient's fax number prior to that date as well.

In any case, the burden is squarely on the sender to show that it has a valid EBR with the recipient, because the sender is in the best position to possess ordinary business records showing an EBR.

Opt-Out Notices and Requests

The second major change to the new fax advertising rules relates to specific requirements for opt-out notices and requests. Both opt-out notices on senders' fax advertisements and opt-out requests by fax advertisement recipients must include certain information.

Requirements for senders' opt-out notices.

Senders of permissible fax advertisements must include an opt-out notice that:

² Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25,967, 25,968-69 (May 3, 2006) (to be codified at 47 C.F.R. pt. 64).

- Is clear and conspicuous, located on the first page of the fax advertisement; and
- States that the recipient may request that the sender not send any future fax advertisements and that the sender's failure to comply with the request within 30 days is unlawful; and
- Includes a telephone number, fax number, and cost-free mechanism (e.g., a toll-free telephone number, local number for local recipients, toll-free fax number, website address, or email address) to opt out of fax advertisements. These opt-out devices must be available to recipients to make opt-out requests 24 hours a day, seven days a week.

Senders must note that the inclusion of an opt-out notice on a fax advertisement, by itself, does not make a fax advertisement permissible—an EBR must still exist, or the sender must have the recipients' prior express permission to receive fax advertisements.

Requirements for recipients' opt-out requests.

A recipient's opt-out request must:

- Identify the fax number(s) to which the request relates; and
- Be sent to the telephone number, fax number, or cost-free mechanism included in the opt-out notice of the fax advertisement.

Senders who receive properly made opt-out requests must honor that request within 30 days of receipt. The recipient's opt-out remains in effect until the recipient subsequently grants express permission to the sender to receive fax advertisements.

Fax broadcasters.

Fax broadcasters who send fax advertisements on behalf of senders may be liable for violations of these fax advertising rules. Although a sender who authorizes the transmission of an unsolicited fax advertisement is ultimately responsible for any violation of these rules, a fax broadcaster may be found liable as well, especially if the fax broadcaster has a "high degree of involvement" in sending the sender's fax advertisements. A fax broadcaster may be "highly involved" if it, for example, supplies the fax numbers to which fax advertisements are sent or advises a sender on how to comply with the fax advertising rules. A "highly involved" fax broadcaster must include its name on any fax advertisement, even if the fax advertisement is permissible.

Penalties for Violation of the New Rules

Recipients of unsolicited fax advertisements may file a complaint with the FCC. The FCC may issue citations and fines to senders who violate any of the fax advertisement rules. Complaints may also be filed with local or state consumer protection offices or state Attorneys General offices.

A recipient of an unsolicited fax advertisement may also bring a private cause of action in court. In a private suit, a recipient may recover either the actual monetary loss resulting from a violation of the fax advertisement rules or receive up to \$500 in damages for each violation, whichever is greater. A court may also triple the damages for each violation for a sender's willing or knowing violation of the fax advertisement rules.

The full text of the amended fax advertising rules will be codified at 47 C.F.R. § 64.1200(a), (f).