

K&LNG Alert

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Communications

FCC ADOPTS NEW JUNK FAX RULE

The Federal Communications Commission (“FCC” or “Commission”) has adopted rules favored by businesses and other entities that advertise by fax. On April 6, 2006, the Commission revised its telemarketing and telephone solicitation regulations¹ to implement the Junk Fax Prevention Act of 2005² (the “Junk Fax Act”). The new regulation (the “Junk Fax Rule” or “Rule”), which was published in the Federal Register on May 3, 2006,³ does the following:

- Adds an exemption from the general prohibition on unsolicited faxes for recipients with whom the fax advertiser has an established business relationship (“EBR”). As a result, an entity may send an advertisement by fax if either (i) it has obtained a signed, written consent from the recipient, or (ii) it has an established business relationship with the recipient.
- Defines established business relationship for unsolicited fax advertisements (the definition is different from the definition of EBR for telephone solicitations).
- Requires fax advertisers to include an opt-out notice and contact information on the top or bottom of a faxed advertisement’s first page.
- Defines the requirements for an effective opt-out request.

- Requires fax advertisers to comply with opt-out requests within the shortest reasonable time, not to exceed 30 days from the date of the request.

Deadlines for the submission of petitions for reconsideration, oppositions to such petitions, and reply responses to the oppositions are determined by the date that the Junk Fax Rule is published in the Federal Register.⁴ If you are interested in filing in this rulemaking proceeding, please contact us.

BACKGROUND

The Telephone Consumer Protection Act⁵ (the “TCPA”) was enacted in 1991 to regulate telephone marketing calls and telemarketing practices. Among other matters, the original version of the TCPA prohibited any person from sending an “unsolicited advertisement” to a telephone facsimile machine. The Act 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.*”⁶

The FCC adopted rules implementing the TCPA - including its prohibition on unsolicited facsimile advertisements - in 1992.⁷ Although the Act did not contain an exception from its prohibition for facsimiles sent to persons with whom the sender had

¹ 47 C.F.R. § 64.1200.

² Pub. L. No. 109-21, 119 Stat. 359 (2005).

³ 85 Fed. Reg. 25,967 (May 3, 2006).

⁴ The Junk Fax Rule was published in the Federal Register on May 3, 2006. Any person seeking reconsideration will have 30 days from May 3 to file their petitions for reconsideration. Opposition to a petition must be filed within ten days of the filing of the petition, and any replies to these oppositions must be filed within seven days after the last day for filing oppositions.

⁵ Pub. L. No. 102-243, 105 Stat. 2394 (1991); codified as 47 U.S.C. § 227.

⁶ Id. § 227(a)(4) (*emphasis added*).

an EBR, the Commission determined that an EBR between a sender and recipient could constitute evidence that the recipient had given the necessary invitation or permission to receive facsimile advertisements.

In July 2003, as part of a larger series of revisions to its TCPA rules, the FCC eliminated the EBR exception for unsolicited facsimile advertisements and provided that a facsimile recipient must give prior express permission to receive an unsolicited facsimile advertisement. The permission would have to be in writing and include the recipient's signature and facsimile number, and could not be in the form of an opt-out provision.⁸ This change would have created an enormous burden for businesses that relied on advertising by fax, and several parties petitioned the Commission to reconsider the new requirement. Pending its decision on the reconsideration requests, the Commission repeatedly delayed the new requirement's effective date.

In July 2005, Congress resolved the issue by enacting the Junk Fax Act. The Act amended the TCPA to:

- Create a statutory EBR exemption from the unsolicited facsimile advertisement prohibition.
- Require facsimile advertisers to provide an opt-out notice and contact information on their faxes.
- Describe the requirements for an effective opt-out.
- Authorize the FCC to determine how long a sender will have to comply with an opt-out request and to create certain exemptions from the Act's requirements.

The Commission issued a Notice of Proposed Rulemaking⁹ to implement the Junk Fax Act on December 9, 2005, and issued its final Junk Fax Rule on April 6, 2006.¹⁰

HIGHLIGHTS OF THE JUNK FAX RULE

Established Business Relationship Exemption

Consistent with the Junk Fax Act, the Junk Fax Rule provides that no person or entity may send an unsolicited advertisement¹¹ to a facsimile machine, UNLESS:

- (i) the unsolicited advertisement is from a sender with an EBR (defined below) with the recipient; and
- (ii) subject to the grandfathering provision described below, the sender obtained the fax number through-
 - (A) the fax recipient's voluntary communication of the number directly to the sender, within the context of the EBR;¹² or
 - (B) a directory, advertisement, or internet site to which the recipient voluntarily agreed to make available its fax number for public distribution. If a sender obtains the fax number from the recipient's own directory, advertisement or internet site, it will be presumed that the number was voluntarily made available for public distribution¹³ (unless the materials explicitly note that unsolicited advertisements are not accepted at the specified fax number). If the sender obtains the fax number from other sources, the sender must take reasonable steps to verify that the recipient agreed to make the number available for public distribution; and

⁷ 47 C.F.R. § 64.1200.

⁸ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003).

⁹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Notice of Proposed Rulemaking and Order, FCC 05-206 (December 9, 2005).

¹⁰ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, FCC 06-42 (April 6, 2006) (hereinafter, the "FCC Report" or "Report").

¹¹ Consistent with the Junk Fax Act, under the Junk Fax Rule, an unsolicited advertisement is "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, in writing or otherwise." 47 C.F.R. § 64.1200(f)(12). This definition is the same as the definition in the original TCPA, except that it adds the phrase at the end clarifying that a person's "express invitation or permission" can be "in writing or otherwise."

¹² For example, the recipient could provide the fax number on an application, information request, contact information form, membership renewal form, orally over the telephone or through the fax sender's website. The burden rests with the fax sender, however, to prove that the fax number was communicated in the context of the EBR. Report ¶ 14.

- (iii) the advertisement contains an opt-out notice (complying with the requirements described below) informing the recipient of the ability and means to avoid future unsolicited advertisements.¹⁴

Established Business Relationship Defined

For purposes of the Junk Fax Rule, an EBR is:

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 transaction¹⁵ by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been terminated by either party.¹⁶

Note that the Junk Fax Rule's definition of "EBR" is different from the definition of EBR for purposes of the TCPA rules' telephone solicitation provisions. Under the latter definition, the EBR exemption expires 18 months after a purchase or transaction, and three months after an inquiry or application. Although the Junk Fax Act authorizes the FCC to limit the duration, the Junk Fax Rule's EBR exemption currently has no expiration.¹⁷

In contrast to the EBR exemption for purposes of telephone solicitations, the Junk Fax Rule's EBR exemption does not extend to a sender's affiliate.¹⁸

The FCC Report on the Rule notes that the sender of a fax advertisement "should be responsible for demonstrating the existence of the EBR." Although the Rule does not require specific records, the FCC

says that the burden will be on the sender to show that it has an EBR with the recipient.¹⁹

Grandfather Clause for Established Business Relationships Formed Before July 9, 2005

As described above, the Junk Fax Rule requires that the sender of a fax advertisement obtain a recipient's fax number directly from the recipient or from a public source. In accordance with the Junk Fax Act, the Rule contains an exception from this requirement for EBRs that existed before July 9, 2005, provided that the sender also had the recipient's fax number before that date.²⁰ The Rule provides that if the EBR was formed before July 9, 2005, there is a rebuttable presumption²¹ that the sender possessed the fax number before that date.

Note that this grandfather clause does not apply to the Rule's opt-out notice requirement. Fax senders must provide the opt-out notice even to those recipients with whom they had an EBR before July 9, 2005.

D. Opt-Out Notice Requirements

The opt-out notice required in each fax advertisement must comply with the following:

- (1) the notice must be clear and conspicuous,²² and appear at the top or bottom of the first page of the advertisement;
- (2) the notice must state that the recipient may request the sender not to send any future advertisements to a fax machine or machines, and the sender's failure to comply with a request that complies with the requirements described below within 30 days is unlawful;
- (3) the notice must describe the requirements for

¹³ Another example "might be a number obtained from the recipient's own letterhead or fax cover sheet." In contrast, if the fax number is obtained from information sources compiled by third parties – e.g., membership directories, commercial databases or internet listings – the sender "must take reasonable steps to verify that the recipient consented to have the number listed, such as calling or emailing the recipient." Membership directories made available only to subscribers are not considered available to the general public. Report ¶ 15.

¹⁴ 47 C.F.R. § 64.1200(a)(3).

¹⁵ The FCC Report cautions that an EBR would *not* be formed by an inquiry about a store location or the identity of the sender, or by a visit to a website without additional steps to request information or provide contact information. Report ¶ 19.

¹⁶ 47 C.F.R. § 64.1200(f)(5).

¹⁷ The Junk Fax Act authorized the FCC to establish a time limit on the junk fax EBR exemption only after studying the impact of the exception. In the year following the Junk Fax Rule's effective date, the Commission will evaluate its complaint data to determine whether fax advertising complaints involve EBRs of a duration that exceeds consumers' reasonable expectations.

¹⁸ FCC Report ¶ 20.

¹⁹ FCC Report ¶ 12.

²⁰ 47 C.F.R. § 64.1200(a)(3)(ii)(C).

²¹ The Report warns that if a recipient alleges a violation, the sender will need to provide proof that the EBR existed prior to July 9, 2005.

- an opt-out request;
- (4) the notice must include:
 - a. a domestic contact telephone number and fax number (the telephone and fax numbers should be distinct²³) to which the recipient can transmit an opt-out request; and
 - b. if neither the telephone nor fax number is toll free, **a separate cost free mechanism** (including a website²⁴ or email address) for recipients to send opt-out requests (a local phone number also shall constitute a cost-free mechanism so long as all recipients are local and will not incur any charges calling it); and
 - (5) the telephone and fax numbers, and cost-free mechanism must permit an individual or business to make an opt-out request 24 hours a day, seven days a week.²⁵

The Junk Fax Rule states that even if the recipient of a fax advertisement has provided the sender prior express invitation or permission, the advertisement must contain an opt-out notice complying with the requirements described above.²⁶

Opt-Out Requests

The Junk Fax Rule sets out the requirements that an opt-out request must satisfy before the sender of a fax advertisement is required to honor it:

- (1) the request must identify the telephone number(s) of the fax machine(s) to which the request relates;
- (2) the request must be made to the telephone number, facsimile number, website address or email address identified in the sender's fax advertisement; and

- (3) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine.²⁷

An opt-out request that complies with the requirements described above terminates the EBR exemption. A fax advertiser must honor an opt-out request within the shortest reasonable time, which must not exceed 30 days. Afterwards, the fax advertiser must not send an unsolicited fax advertisement to the recipient who opted out unless the recipient subsequently provides prior express invitation or permission to the advertiser.²⁸

The Junk Fax Rule states that if a fax advertiser's opt-out requests are recorded or maintained by another party, the advertiser will be liable for any failures to honor an opt-out request.²⁹ The Rule also provides that a facsimile broadcaster (*i.e.*, a person that transmits fax messages on behalf of another for a fee) will be liable for violations of the Junk Fax Rule, including the inclusion of opt-out notices on unsolicited advertisements, if the broadcaster demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent the prohibited facsimile transmissions.³⁰

Express Invitation or Permission

If a sender of fax advertisements never had an EBR with a recipient, or had an EBR with a recipient who subsequently opted out, the sender may not send an unsolicited fax advertisement to that recipient unless the sender first receives an express invitation or permission to do so.

²²The Rule states that "clear and conspicuous" means "a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures, and placed at the top or bottom of the facsimile." 47 C.F.R. § 64.1200(f)(2) (emphasis added). The Rule does not require any specific type size or font, but the Report suggests that the notice could be made distinguishable from the advertising material by the use of "bolding, italics, different font, or the like." Report ¶ 26.

²³Report ¶ 29.

²⁴If a sender uses a website for receiving opt-out requests, it must describe the opt-out mechanism and procedures clearly and conspicuously on the first page of the website. Report ¶ 28.

²⁵47 C.F.R. § 64.1200(a)(3)(iii).

²⁶Id. § 64.1200(a)(3)(iv).

²⁷Id. § 64.1200(a)(3)(v).

²⁸Id. § 64.1200(a)(3)(vi).

²⁹Id.

Note that the express invitation or permission may be provided in writing, electronically or orally. It must, however, include the fax number to which advertisements may be sent. An express invitation or permission cannot be obtained via a negative option (i.e., where the sender of the fax advertisement presumes consent unless the recipient advises otherwise), but it can be requested on an application form that includes a clear statement that by providing the fax number, the individual or business agrees to receive fax advertisements from the entity.³¹ Fax senders that obtain permission orally will need to take “reasonable steps to ensure that such permission can be verified,” and should consider promptly documenting the receipt of the permission. For instance, the sender could record oral authorizations or require its personnel to use contact forms to document the receipt.³²

Effective Date

Most of the provisions of the Junk Fax Rule (*i.e.*, 47 C.F.R. § 64.1200(a)(3)(i),(ii), (iii), (iv) and (vi)) must be approved by the Office of Management and Budget. The FCC will announce the effective date for these provisions in the Federal Register. The remainder of the Junk Fax Rule will become effective on August 1, 2006.³³

PREEMPTION AND PRIVATE RIGHT OF ACTION

Preemption

Section 227(e)(1) of the Junk Fax Act provides that, except for certain specified provisions of the TCPA, nothing in the TCPA or in the Commission’s implementing regulations shall preempt any state law that imposes more restrictive intrastate requirements or regulations on, or that prohibits the use of, telephone facsimile machines or other electronic

devices to send unsolicited advertisements. A number of states have state junk fax laws that contain requirements that are stricter in one way or another than the Junk Fax Rule. However, in February 2006 a US District Court in California struck down the much stricter California law (no EBR exception and full opt-in) as unconstitutional insofar as it purported to regulate interstate junk fax transmissions.³⁴ Notwithstanding this decision, the stricter California law presumably still governs the substantial volume of intrastate transmissions and, even if the logic of the February 2006 decision were applied generally to the other state junk fax laws, a considerable body of intrastate transmissions would appear to be governed by those state laws insofar as they are stricter than the Junk Fax Rule. This may present both legal and operational compliance problems to businesses operating over larger geographic areas.

Private Right of Action.

The TCPA provides consumers with a private right of action in state court for any violation of the TCPA’s prohibitions on the use of automatic dialing systems, artificial or prerecorded voice messages, and unsolicited facsimile advertisements. As the Junk Fax Rule was being considered, commenters requested the Commission to clarify the parameters of the private right of action, specifically with respect to class action lawsuits. The Commission declined to do so.

The Commission has, however, at least informally indicated that it believes a private right of action is available for Junk Fax Rule violations. In an April 14, 2006 consumer advisory release, the Commission stated: “It is also possible to bring a private suit against the violator in an appropriate court of your state. Through a private suit, you can either recover

³⁰Id. § 64.1200(a)(3)(vii).

³¹Report ¶ 45.

³²Report ¶ 46.

³³85 Fed. Reg. 25,967 (May 3, 2006).

³⁴Chamber of Commerce of the United States of America v. Lockyer, US DC Eastern District of California, February 27, 2006, Case # 2:05-CV-2257-MCE-KJM.

the actual monetary loss that resulted from the TCPA violation, or receive up to \$500 in damages for each violation, whichever is greater. The court may triple the damages for each violation if it finds that the defendant willingly or knowingly committed the violation."³⁶

In light of the foregoing, fax advertisers should be especially careful as to the structure of their fax advertising programs.

³⁵ Report ¶ 56.

³⁶ <http://www.fcc.gov/cgb/consumerfacts/unwantedfaxes.html>

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