



COMMUNICATIONS AND INFORMATION TECHNOLOGY ALERT

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FCC Stays Broad Expansion of Rules on Unsolicited Faxes

The Federal Communications Commission (FCC) has issued a lengthy stay of an important aspect of its new restrictions on unsolicited faxes. On June 26, 2003, responding to complaints of “besieged” consumers, the FCC took action that greatly enhanced the existing statutory prohibition against unsolicited facsimiles contained in the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (TCPA). In its Report and Order, the FCC reversed an important prior interpretation by eliminating a key exception for sending faxes to existing customers; instead, the FCC concluded that affirmative, opt-in consent to receive faxes would be required, even for existing customers. The new rule is merely one component of the rules regarding the TCPA, but it merits significant attention because of its impact on all businesses and associations that communicate with customers via facsimile. Indeed, the FCC’s action generated so many petitions that, late on August 18, 2003, the agency issued a 15-month stay of its new affirmative consent rule until January 1, 2005. Also during this period, “an established business relationship will continue to be sufficient to show that an individual or business has given express permission to receive facsimile advertisements.” All other provisions of the Order, which primarily deal with telemarketing and the national Do Not Call registry, will become effective according to the original Order.

New Definition of Prior Consent

The relevant sections of the FCC Order on unsolicited faxes specifically require that a person or entity must obtain a potential recipient’s “prior express invitation or permission” before transmitting an unsolicited fax advertisement. To be effective, the Order requires that the invitation or permission be “evidenced by a signed, written statement” and include the specific fax number to which faxes may be sent. The impact of this requirement is even more pronounced given that the TCPA defines an unsolicited advertisement broadly 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.

The FCC Order thus not only prohibits unsolicited faxes concerning traditional commercial and marketing activities, but would also cover organizational announcements concerning membership dues, renewal notices, notices about upcoming meetings and educational seminars where a fee is charged, as well as solicitations to sponsor association events. No doubt concerned about potential constitutional challenges, the FCC has made clear that mere notices regarding free meetings, true surveys, and communications such as legislative updates would not be covered.

No EBR Exemption

The most significant expansion and source of controversy is that the FCC Order eliminates the previous exemption for faxes to individuals and companies with whom the “marketer” has an established business relationship (EBR). This interpretation is remarkable given that both the Federal Trade Commission and FCC rules on telemarketing allow an EBR to evidence consent. Indeed, under the new FCC rules, businesses may contact existing customers by telephone even if that customer is registered on the national Do Not Call registry for periods of 18 months from any purchase or transaction and 3 months from any inquiry or application. Faxes, under this new rule, would thus be much more restricted than telemarketing. As noted above, the affirmative, opt-in fax requirement has been stayed by the FCC until January 2005.


Violations of the prohibitions against unsolicited faxes could subject senders to FCC enforcement, state enforcement and a private right of action, which can lead to penalties of \$500 per violation, which can be trebled if the violation is knowing and

willful. Even before the new interpretation, the FCC had issued nearly twenty such citations in 2003 to businesses that use faxes to market, and the FCC has imposed and/or collected several million dollars over the past few years. Such enforcement has largely been a concern of companies that engage in substantial direct marketing. The FCC’s new interpretation, however, makes enforcement, especially by potential consumer class actions, a possibility for a much broader group of companies.

Constitutional Questions

Given its interpretative choice, the FCC will now be forced to confront constitutional concerns regarding the burdens associated with requiring that commercial and not-for-profit organizations obtain affirmative opt-in consent. In other contexts, efforts to create such opt-in privacy regimes have been rejected by the Tenth Circuit in *U.S. West v. FCC*, 182 F.3d 1224 (1999) (rejecting a requirement for opt-in consent for customer information) and the Supreme Court in *United States v. Playboy*, 529 U.S. 803 (2000) (opt-out blocking of cable pornography an adequate alternative). When considered against the backdrop that restrictions on speech must not be more extensive than necessary to serve the governmental interest at issue, such concerns are especially prominent here in light of the different treatment that faxes and telemarketing receive. Undoubtedly, the FCC will further consider this issue and others raised by the Petitions for Clarification and Petitions of Reconsideration, which are due to the agency by August 25, 2003.

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