

The FCC Issues Rules to Implement Junk Fax Prevention Act of 2005

EXECUTIVE SUMMARY

On April 5, the Federal Communications Commission (“FCC”) announced that it had adopted rules to implement the provisions of the Junk Fax Prevention Act, which was passed by Congress in July 2005. The rules will become effective 90 days after publication in the Federal Register. As of today they have not yet been published, but we expect that they will be shortly, and they will take effect in July.

BACKGROUND ON THE JUNK FAX PREVENTION ACT

Last summer Congress passed the Junk Fax Prevention Act (the “Act”) in response to the FCC’s decision to eliminate the established business relationship (“EBR”) exemption to federal law’s general prohibition on sending unsolicited fax advertising. By making the EBR exemption law, the Act allows advertisers to send unsolicited fax advertisements to those:

- (1) with whom it has an EBR; and
- (2) who have given their express consent.

The Act also requires advertisers to include a way for fax advertisement recipients to opt out of receiving future faxes. The Act directed the FCC to promulgate rules to implement its provisions.

THE ESTABLISHED BUSINESS RELATIONSHIP EXEMPTION

The Act and the FCC’s implementing

rules allow a company to send an unsolicited fax advertisement to persons, both consumers and businesses, with whom it has an EBR. The FCC has defined an EBR as a relationship, not previously terminated, formed by a voluntary two-way communication between the fax sender and recipient, with or without an exchange of consideration, on the basis of an inquiry, application, purchase, or transaction. If the EBR is based on an application or inquiry, the application or inquiry must be regarding products or services offered by the sender. This means, for example, that an inquiry about the sender’s location would not create an EBR. Nor would a mere visit to the sender’s website, without more, such as the visitor’s request for product information. The exemption applies only to the entity with which the recipient has a “voluntary two-way communication.” It does not extend to the sender’s affiliates.

In contrast with the do-not-call rules enforced by the FCC and the Federal Trade Commission, the FCC decided not to impose a time limit on the duration of an EBR. However, it will revisit the issue within a year of the rules’ effective date to determine whether a time limitation would be appropriate in light of any EBR complaints the FCC may have received by that time.

In order to take advantage of the EBR exemption, the sender generally must have obtained the fax number directly from the recipient, or it must have ensured that the recipient voluntarily agreed to make

the number available for public distribution. There is an exception to this requirement. If a company had an EBR with a proposed recipient prior to July 9, 2005, and it also possessed the recipient's fax number before that date, then it may send an unsolicited fax advertisement to the recipient without having to worry about how it obtained the number.

EXPRESS CONSENT TO SEND A FAX

Formerly, in the absence of an EBR, a sender had to have its proposed recipient's express written permission before it could send an unsolicited fax ad. The FCC's rules relax this requirement a bit, allowing the sender to obtain the required express permission orally, in writing, or electronically. The permission must be given prior to the sending of any unsolicited fax ad, and it must include the fax number(s) to which ads may be sent. It cannot take the form of a "negative option," where the sender presumes consent unless advised otherwise. However, the FCC explained that a company that requests a fax number on an application, or other form, could include a clear notice explaining that, by providing such fax number, the person agrees to receive fax ads from the company.

OPT-OUT REQUIREMENTS

Regardless of the basis on which an unsolicited fax ad is transmitted – whether under an EBR or with the recipient's express consent – the sender must instruct the recipient how to request not to receive future unsolicited fax ads. The Act and the FCC's rules provide that the notice must:

- Appear on the first page of the fax advertisement.
- Be "clear and conspicuous." According to

the FCC, this means that the notice must be apparent to a reasonable consumer. Specifically, it must be:

- Separate from the advertising copy or other disclosures;
- Placed at either the top or bottom of the fax; and
- Distinguishable from the advertising material through, for example, the use of bolding, italics, different font, or the like.
- Include a domestic contact telephone number and a fax number for the recipient to transmit his or her opt-out request. These numbers must be available to accept opt-out requests 24 hours a day, 7 days a week.
 - The fax number must be a number separate and distinct from the phone number.
- Also include at least one, cost-free way for transmitting an opt-out request. This may be a website address, email address, toll-free telephone number or toll-free fax number. The mechanism must be available to accept opt-out requests 24 hours a day, 7 days a week.
 - A local telephone number may satisfy the cost-free requirement, provided that the ads are sent only to local consumers for whom a call to that number would not result in long distance or other separate charges.

The sender must honor opt-out requests as soon as reasonably possible but not more than 30 days after the request is made. An opt-out request terminates an EBR for purposes of

the fax advertising rules. It also negates the recipient's express permission for sending fax ads.

The FCC declined to impose an expiration date on opt-out requests. This means that, once a recipient makes such a request, an advertiser may not transmit a fax ad to him or her unless it has received his or her subsequent express permission.

RELATED GOVERNMENT ACCOUNTABILITY OFFICE REPORT

The federal Government Accountability Office ("GAO") issued a report to Congress on April 5th that criticized the FCC's enforcement of the fax advertising rules. The GAO reports that, while the FCC has received a vast increase in the number of fax complaints—from 2,200 in 2000 to 46,000 in 2005—the number of investigations and enforcements has remained the same. Accordingly, the resulting proportion of citations has decreased from 5.7% to 0.7%. Moreover, although six companies have been ordered to pay forfeitures totaling approximately \$6.9 million for their fax advertising violations, none of this money has been collected. According to the GAO, "the FCC has no clearly-articulated long term or annual goals for junk fax monitoring and enforcement, and it is not analyzing the junk fax data." We expect the FCC to start a new round of investigations to mollify the GAO.

WHAT DOES THIS MEAN FOR BUSINESSES?

In light of the FCC's new rules, as well as the anticipated response of the FCC to the GAO report, we encourage companies to ensure that their fax advertising programs comply with the law. To determine whether or not you are in compliance, ask:

(1) Do I want to send an unsolicited fax

advertisement? (If the purpose of the fax is not to advertise products or services, then the fax is not an "advertisement" and is therefore not subject to these rules.)

- (2) If so, do I have an EBR with the proposed recipient? If I do have an EBR, did I receive the fax number directly from the recipient or did he or she voluntarily agree to make the number available for public distribution? Has the recipient opted out of receiving fax ads from me?
- (3) If I don't have an EBR with the proposed recipient, do I have his or her express permission to send the fax? Has the recipient subsequently opted out of receiving fax ads from me?
- (4) Does the first page of the fax ad include a clear and conspicuous notice of the recipient's right to opt out of receiving future transmissions, as well as contact information for him or her to do so without cost?
- (5) Do I honor opt-out requests as quickly as reasonably possible and, at a minimum, within 30 days?

ABOUT OUR ADVERTISING AND MARKETING PRACTICE

Kelley Drye Collier Shannon's Advertising & Marketing practice comprises attorneys with proven success in advertising litigation and NAD proceedings; expertise in the area of advertising, promotion marketing, and privacy and data security law; and experience at the FTC, FDA, and the Offices of State Attorneys General. We help leading companies identify risks, respond effectively to inquiries, and prevail in contested proceedings.

FOR MORE INFORMATION

Kelley Drye Collier Shannon is on the forefront of developing advertising industry guidelines and regulations. For more information, please visit: <http://www.KelleyDrye.com>.

If you have any questions about this alert, please feel free to contact one of our team members at (202) 342-8400 or via email:

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