

FCC Clarifies Opt-Out Requirements for Fax Ads

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In response to inquiries seeking clarification, the FCC recently indicated that all fax advertisements, including those that consumers expressly consent to receive, must include an opt-out notice. This clarification came as a result of confusion surrounding the FCC's 2006 Junk Fax Order, which left many unsure as to whether solicited fax advertisements must in fact contain an opt-out notice.

In general, the TCPA requires senders of unsolicited fax advertisements to provide an opt-out notice. Specifically, the law prohibits "any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine" unless: there is an established business relationship between the sender and the recipient; the number was obtained in connection with that relationship; and there is an opt-out notice in the fax. In a footnote to its 2006 Order, which included instructions about the notice, the FCC stated that the "opt-out notice requirement only applies to communications that constitute unsolicited advertisements." This caused companies to believe that the opt-out notice only needed to be in unsolicited fax ads.

In this most recent clarification, the FCC has indicated that the opt-out notice is required in a fax ad even if someone agreed to receive the fax advertisement. The FCC reminded companies that this opt-out notice must, inter alia: (1) be clear and conspicuous, (2) be on the first page of the advertisement, (3) state that the recipient may opt-out and the sender's failure to do so within 30 days is unlawful, (4) include a domestic contact phone number and fax number to which the recipient may send an opt-out request, and (5) include a cost-free mechanism which recipients can use to send their opt-out requests.

The FCC acknowledged that the wording of its 2006 Order had caused confusion. As a result, the FCC granted a waiver to the petitioners of the Junk Fax Order as well as any person similarly situated—that is, any person that delivered fax advertisements without an opt-out notice to recipients who gave prior express permission. The FCC has received 11 petitions from companies who want to use this waiver and released a public notice requesting comments about those requests. The waiver will end April 30, 2015.

Tip: Companies that send fax advertisements should ensure that they have an opt-out notice, even if the recipient has agreed to receive the fax.

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