



October 2008

TELECOMMUNICATIONS UPDATE

FCC Clarifies Rules Under Junk Fax Prevention Act of 2005

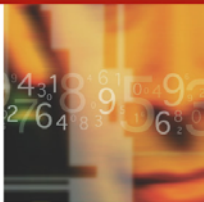
On October 14, 2008, the Federal Communications Commission (FCC) released an order clarifying certain of its rules under the Junk Fax Prevention Act of 2005 (JFPA).

BACKGROUND

Congress enacted the JFPA to amend the Telephone Consumer Protection Act of 1991's facsimile advertisement provisions. Among other changes, the JFPA codified an existing business relationship (EBR) exemption to the prohibition on sending unsolicited facsimile advertisements and required the sender of a facsimile advertisement to provide specified notice and contact information on the facsimile that allows recipients to "opt-out" of any future facsimile transmissions from the sender. The FCC implemented the JFPA in an April 2006 order.

The JFPA and the FCC's April 2006 rules allow a sender (*i.e.*, "the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement") who has an EBR with the recipient to send an unsolicited facsimile advertisement if the sender obtained the number of the facsimile machine through: (1) the voluntary communication of such number, within the context of the EBR, from the recipient; or (2) a directory, advertisement or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution. The FCC concluded that a facsimile number obtained from the recipient's own directory, advertisement or Internet site was voluntarily made available for public distribution, unless the recipient has noted on these materials that it does not accept unsolicited advertisements at that number. However, if a sender obtained the facsimile number from sources of information compiled by third parties – such as membership directories and commercial databases – the FCC's rules require that the sender take "reasonable steps to verify that the recipient consented to have the number listed, such as calling or emailing the recipient."

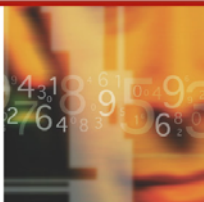
The JFPA also requires that all unsolicited facsimile advertisements include an opt-out notice that instructs recipients on how to notify senders that they do not wish to receive future facsimile advertisements. Among other requirements, the opt-out notice must identify a "cost-free" mechanism by which recipients can transmit their opt-out requests. The cost-free mechanism can include a toll-free telephone or facsimile number or a web site. If a web site is designated, a description of the opt-out mechanism and the procedures must be clearly and conspicuously included on the first page of the web site.



FCC'S RECONSIDERATION ORDER

The general prohibitions on sending unsolicited facsimile advertisements without an EBR or prior consent remain in effect. The FCC clarified or reaffirmed certain of its rules, including the following:

- The October 14, 2008 order reiterates that facsimile numbers are presumed to have been voluntarily made available for public distribution if they are obtained *from the intended recipient's own directory, advertisement or Internet site*.
- The FCC clarified that third parties acting on behalf of senders may compile information from these recipient-published sources. The use of a third party to compile the information for the sender does not require additional verification – assuming the number is obtained from the recipient's own directory, advertisement or Internet site. Further, *senders must have an EBR with the recipient in order to send the advertisement to the recipient's facsimile number (or prior express consent)*. “The fact that the facsimile number was made available in the recipient's own directory, advertisement or website does not alone entitle a sender to transmit a facsimile advertisement to that number.”
- For facsimile numbers requiring verification (*e.g.*, membership directories and commercial databases), “reasonable steps” can include methods other than calling or emailing the recipient directly. However, the sender will have the burden to demonstrate that the circumstances surrounding the acquisition of the facsimile number reasonably indicate that the recipient agreed to make the facsimile number available for public distribution should a complaint arise.
- The FCC also stated that the opt-out notice is satisfied where the opt-out notice designates a web page, and that page contains a description of the opt-out notice. A clear and conspicuous link should be provided on the web site's home page to direct recipients to the appropriate internal opt-out page.
- The FCC declined to alter its previous conclusion that the first page of the facsimile advertisement must contain the actual opt-out notice, rather than a cover page.
- The FCC also refused to limit the duration for which an opt-out request remains in effect, reasoning that it is burdensome for recipients to repeat their opt-out requests. Thus, an opt-out request to a sender remains in effect unless a recipient later expressly “opts-in” to receiving facsimile advertisements.



FOR MORE INFORMATION

For more information on this topic, please contact:

Michelle W. Cohen 202.263.4151 [**Michelle.Cohen@ThompsonHine.com**](mailto:Michelle.Cohen@ThompsonHine.com)

If you do not wish to receive future communications by email, please reply to this email with “unsubscribe” in the subject line.

This advisory may be reproduced, in whole or in part, with the prior permission of Thompson Hine LLP and acknowledgement of its source and copyright. This publication is intended to inform clients about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in it without professional counsel.

This document may be considered attorney advertising in some jurisdictions. Some of the design images and photographs in this document may be of actors depicting fictional scenes.

© 2008 THOMPSON HINE LLP. ALL RIGHTS RESERVED.

