

The Junk Fax Prevention Act of 2005 and the Established Business Relationship

On May 3, 2006, the Federal Communications Commission (“FCC”) published a *Report and Order and Third Order on Reconsideration*, CG Docket Nos. 02–278 and 05–338, FCC 06–42, adopted April 5, 2006, and released April 6, 2006, which contained the final rules adopted and promulgated under the Junk Fax Prevention Act of 2005 (S. 714) (“Act”), which will take effect on August 1, 2006. The Act, which was signed into law by President Bush on July 9, 2005, amends the Telephone Consumer Protection Act of 1991 (“TCPA”), which prohibits sending unsolicited advertisements by facsimile without an existing business relationship (“EBR”).

The Act and rule published by the FCC is a common sense solution that preserves the ability of businesses to send faxes to their established customers, just as they do now and have for years, while maintaining the strict prohibition set forth by the TCPA in 1991 on unwanted junk-faxes.

To further illustrate the significance of this Act’s passage and its impact on your business, some background information on the TCPA and the effect of recently proposed regulations by the Federal Communication Commission (FCC”) is necessary.

Background

The TCPA was passed in 1991 and established, among other things, a general prohibition on the sending of unsolicited advertisements by facsimile. The term “unsolicited advertisement” is defined in the TCPA 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.” 47 U.S.C. § 227(a)(4). The FCC was charged with the responsibility for implementing the TCPA and promulgated rules and regulations to carry out its purpose. Originally, the FCC took the position that one could send unsolicited advertisements by fax as long as the sender had a qualifying established business relationship (“EBR”) with the recipient, commonly referred to as the “EBR exception.”

The EBR exception is a provision that has been in effect for over a decade, allowing businesses to send commercial faxes without first obtaining prior consent. However, in July 2003, the FCC revised certain telemarketing and facsimile advertising rules pursuant to the TCPA and repealed the EBR exception. The revised FCC regulations now required businesses first to obtain express written authorization, signed by the recipient, before sending any unsolicited advertisement to such party by facsimile. Moreover, the facsimile could only be sent to the number provided in the written authorization.

The newly revised FCC rules eliminating the EBR exception was met with intense opposition. NAMB was part of a “Fax Ban Coalition” consisting of numerous businesses and trade associations that requested, and received, a six-month extension of the effective date of the FCC rules until January 2005. The Coalition then requested and received a second extension postponing the effective dates of the revised rules until June 30, 2005. Thus, beginning July 1, 2005, the repeal on the EBR exception would have gone into effect. However, almost

simultaneously to passage of the Act, the FCC granted another Petition for Stay, filed by NAMB and the Coalition, postponing the effective date of the regulations beyond July 1, 2005 to January 9, 2006.

On December 19, 2005, the FCC published a Notice of Proposed Rulemaking (“NPRM”) regarding the Act and the EBR. In the NPRM, the FCC requested public comment on several proposed regulations including: (1) the parameters of the EBR exception to the ban on unsolicited facsimile advertisements, (2) the possibility of a time limit on the duration of the EBR, (3) the requirement to include an opt-out notice and contact information on facsimile advertisements, and (4) the requirement to provide a cost-free mechanism for the opt-out. Comments to the NPRM were due January 18, 2006 and reply comments were due February 2, 2006.

In responding to the NPRM, NAMB filed a joint comment letter with the Mortgage Bankers Association (“MBA”) and the Consumer Mortgage Coalition (“CMC”) - together the Mortgage Finance Coalition, which with the exception of the government sponsored enterprises (“GSEs”), represented every segment of the mortgage finance industry. The Mortgage Finance Coalition’s comment letter supported the FCC’s desire and efforts to protect consumer privacy, but urged the FCC to do so by avoiding imposing unnecessary and unreasonable burdens on businesses (*i.e.* the mortgage industry) that rely heavily on legitimate fax communications.

The Fax Ban Coalition did not file a joint comment letter in response to this NPRM, but rather filed a joint reply comment on behalf of the Coalition, to which NAMB was a signatory.

The Effect of S. 714

The Act still retains the general prohibition set forth by TCPA on sending unsolicited advertisements by facsimile, but now creates the *statutory* exception of the EBR, thereby providing relief to businesses from the recently revised and onerous FCC regulations governing commercial fax communications. The Act continues to define an EBR as a prior or existing business relationship, but empowers the FCC to limit the duration of the EBR through regulation. However, before establishing any such time limit, the FCC must first determine: (1) whether the existence of the EBR exception has generated a significant number of complaints to the FCC regarding unwanted commercial faxes, (2) whether a significant percentage of these complaints were sent on the basis that the EBR was longer in duration than the FCC believes would be consistent with consumer expectations, (3) the costs to senders of demonstrating the existence of an EBR within a specified period of time *versus* the benefits obtained by recipients receiving such a time limitation, and (4) whether costs would be unduly burdensome to small businesses.

In addition, the Act authorizes the FCC to promulgate regulations that would provide an exception from the ban on faxed unsolicited advertisements for tax-exempt nonprofit professional or trade associations. The exception would enable these tax-exempt entities to send unsolicited advertisements by facsimile to their members without the requisite opt-out notice

The Final Rule

In the final rule released on April 6, 2006, and published in the Federal Register on May 3, 2006, the FCC amended the previous rules on unsolicited facsimile advertisements as required by the Act. Specifically, the FCC amended the rule to (1) codify an EBR exemption to the prohibition on sending unsolicited facsimile advertisements; (2) provide a definition of an EBR to be used in the context of unsolicited facsimile advertisements; (3) require 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; and (4) specify the circumstances under which a request to “opt-out” complies with the Act. According to the FCC, the final rule strikes a balance between the interests of entities that send facsimile advertisements with those of persons that do not wish to receive such messages.

So, what exactly does all of this mean to you in your day-to-day business operations? You can continue to send faxes to keep in touch with your customers without prior permission as long as: (1) you have an EBR with the recipient, (2) in the case of a new EBR, the fax number was provided to you by the recipient or made publicly available in a published directory, advertisement or website, (3) your fax provides a valid opt-out notice – on the first page if the fax is multiple pages, (4) the opt-out notice must include a domestic contact telephone number and a facsimile machine number for the recipient to transmit such a request to the sender, as well as a cost-free mechanism for transmitting an opt-out (*e.g.* a toll-free facsimile machine number, e-mail address, etc.), (5) the opt-out notice must be separate (on the top or bottom of the fax) and distinguishable from the advertising material (*e.g.* bolding, italics, etc.) and (6) opt-out requests must be honored within 30 days from the data such a request is made.

For a copy of the Act, go to http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s714enr.txt.pdf.

A copy of the NPRM can be obtained by visiting <http://www.fcc.gov/omd/pradocs/3060-xxxx/3060-xxxx-03.pdf>.

For a copy of the Federal Register Notice Vol. 71, No. 85, Wednesday, May 3, 2006/Rule and Regulations, go to <http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/pdf/06-4169.pdf>.

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