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New Rules to Restrict “Junk” Faxes

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To: Broadcast Clients
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The Federal Communications Commission has amended its rules in order to comply with the Junk Fax Prevention Act of 2005, which amends the facsimile advertising portion of the Telephone Consumer Protection Act of 1991.

The amended rules, as outlined below, allow **unsolicited facsimile advertisements** to be sent only when there is an **established business relationship** (“EBR”) with a recipient whose **fax number has been voluntarily given** and where the fax contains a valid **opt-out provision**. All other unsolicited facsimiles continue to be prohibited. Each of these key elements is described below.

Definition of “Unsolicited Advertisement”

The amended rules define an “unsolicited advertisement” as:

... any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without the person’s prior express invitation or permission, in writing or otherwise.

The definition *excludes*:

- political or religious messages, such as a request for a donation to a political cause or party or a charitable organization;
- messages sent to complete or confirm a commercial transaction that the recipient previously agreed to enter into with the sender; and
- facsimiles that contain information only, such as news articles or opinion.

However, the definition covers additional business or promotions, even when the goods or services offered are free, and “mixed” messages that contain both advertising and exempt content.

Definition of “Established Business Relationship”

The Commission adopted a new definition of an EBR for purposes of sending unsolicited facsimile advertisements:

... a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

Please note:

- Currently, an EBR does not expire automatically. The Commission intends to review the number and type of complaints that are filed during the coming year to evaluate whether it needs to set a time limit on the duration for which an EBR is deemed to exist.
- The relationship is formed between a specific sender and recipient. The relationship does not extend to affiliates or companies that send faxes on behalf of others.

Voluntary Provision of Fax Numbers

When there is an EBR, there are three methods by which the sender may “voluntarily” obtain the recipient’s fax number:

- the recipient provides its facsimile number directly to the sender (orally or in writing), such as on a membership form or contact information sheet;
- the sender had the recipient’s fax number prior to July 9, 2005; or
- the recipient agrees to have its fax number “available to the public”. The Commission determined that a facsimile number is considered “available to the public” when it is available from the recipient’s own directory, advertisement, internet site, letterhead or fax cover sheet unless the recipient has noted on such materials that it does not accept unsolicited advertisements at the facsimile number in question. If a number is obtained from information compiled by a third party, such as a membership directory, commercial database or internet listing, then the sender must confirm with the recipient that it consented to the listing of its fax number.

While the Commission did not establish rules that would require specific documentation or records to prove the existence of an EBR or the voluntary disclosure of a recipient’s fax numbers, it cautioned that the sender of the facsimile bears the burden should a complaint be filed alleging non-compliance.

Opt-out Provision

Every unsolicited fax must contain an “opt-out provision” with instructions on how to inform the sender to cease further unsolicited faxes. The opt-out provision must:

- be placed on the first page of the facsimile;
- be “clear and conspicuous” to a reasonable consumer;
- be separate from the advertisement and other disclosures and placed at either the top or bottom of a page;
- include a domestic contact telephone and facsimile number;

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- contain at least one cost-free method for the opt-out request to be sent to the sender, such as a toll-free phone number or e-mail address; and
- provide availability 24 hours a day, 7 days a week for the contact methods.

A valid consumer opt-out request must contain a list of the telephone number(s) to which the facsimiles cannot be sent and must be sent using a method specified by the sender. For example, if an opt-out notice indicates that all opt-out requests should be sent to a certain e-mail address, then a request must be sent to that address in order to be honored.

Opt-out requests must be honored in the shortest reasonable time after receipt, but within no more than 30 days. Once a recipient has opted out, its request remains in effect even if it conducts further business with the sender. The sender may resume sending unsolicited advertisements only if the consumer subsequently gives express permission, whether orally or in writing.

The sender is always responsible for compliance with the opt-out notice requirements, even if a sender contracts with a third-party provider to send out facsimiles on its behalf.

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The amended rules are to become effective 90 days from their date of publication in the Federal Register. In the meantime, the rules promise to present both opportunities and challenges. Businesses will welcome freeing their incoming fax lines from unwanted solicitations, but must ensure that their own outgoing faxes strictly comply with the requirements of the new rules.

If you have any questions concerning compliance with the new rules, please let us know.

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