

FCC "DO NOT FAX LIST"

The effective date of the Federal Communications Commission ("FCC") rule on fax advertising has been delayed six months, to **JUNE 1, 2005**. The rule would require faxers to obtain written permission before sending a fax advertisement. Compliance was scheduled to take effect January 1, 2005, but was moved after numerous advocacy groups filed complaints against the FCC.

This rule is far reaching and will have a substantial impact on business and day-to-day communications. Some of the advocacy groups estimated that it would cost offices thousands of dollars annually to manage and comply with this rule.

The FCC issued the "Do Not Fax" list in connection with the its regulations establishing a "Do Not Call" list for consumers who do not want to receive telemarketing calls.

Previous FCC rules banned unsolicited commercial advertisements distributed by fax, including messages promoting goods, products, and services that entailed any fee. An exception was granted for instances in which *express permission* was granted by the recipient of such messages.

Entities could meet that standard by demonstrating a prior *established business relationship*, usually by targeting messages to previous customers or event attendees or previous communication between recipients and an organization. The burden was placed on recipients to consciously "opt out" from receiving further communications.

The amended rules, however, no longer allow an established business relationship to satisfy express permission for unsolicited commercial fax advertisements. Under the new rule, if your office faxed a price quote in response to an inquiry over the phone, your company is liable for severe penalties if written consent was not obtained first. Past due notices or reminders, invitations to bid, invoices or any offer that states or strongly implies that a payment is required or requested would also be affected.

Overview of the "Do Not Fax" list rules:

Organizations and business must now actively seek "opt in" permission in the form of signed written consent from potential fax message recipients, stating the specific number that can receive faxes. Recipients can revoke consent at any time. Requests for consent may be sought and collected via direct mail, e-mail, or web technology; and potential recipients can send consent via fax at any time. Entities, ironically, can only request consent via fax until the rules go into effect.

Communications must clearly identify the date and time at which the fax was sent, the name of the actual author (not the sender) of the message, the official business name of the sending organization, and the telephone number of the sender/sending machine.

Third party entities and broadcast fax services are liable if they supply the recipient fax numbers, are involved in any way with the content, or demonstrate a "high degree of involvement" in sending the fax in question.

Telephone Consumer Protection Act

Currently, the Telephone Consumer Protection Act ("TCPA") prohibits junk faxes, but until now businesses and associations could send faxes to people with whom they already had a business relationship.

The TCPA generally prohibits *any* person or entity from sending any fax that contains an "unsolicited advertisement," which is defined 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." (The FCC has interpreted this term very broadly to include everything from educational conference promotions to association membership solicitations; it is unclear at this point whether it includes solicitations for donations to charities or solicitations for association PAC contributions, for instance.)

The FCC radically altered this framework with the revisions to the TCPA regulations. The new rules will require signed, written consent in order to send any fax that contains an "unsolicited advertisement" - even to association members. The consent must include the specific fax number(s) to which faxes may be sent. Thus, a consent from a company for one fax number will not suffice for another fax number within the same company; a separate consent will be required (or a consent that lists all applicable fax numbers). And if a company moves and obtains a new fax number(s), a new consent is required. Moreover, it appears that consent from a particular company employee (if not in the name of the company itself) for a particular fax number may not suffice if a replacement employee later assumes that same fax number; consent from the new employee would be required.

As under the prior rules, the fax ban applies not only to stand-alone fax machines, but also to computer fax boards or modems that can send a fax from a personal computer. It also applies to faxes received directly on the recipient's computer (with the exclusion of fax messages sent or received as e-mail).

Tips for Compliance

- Obtain express written consent not only for the *association* to fax to the recipient, but for all subsidiaries (including foundations, for-profit subsidiaries, insurance trusts, PACs, etc.) and affiliated entities (including chapters, regions and other subdivisions) of the association as well (*list each subsidiary and affiliate separately by name*);
- If applicable, obtain the consent in the name of the *company* or *organization*, not merely in the name of an individual (this will provide the association with broad authority to fax to anyone in the company/organization and will eliminate the need to obtain additional consents for other employees in the company/organization);
- Obtain consent for *all* fax numbers in the company or organization for which consent is desired (this can be done on a single form), and ensure that the form is signed by someone with the authority to provide such consent (along with a representation to that effect);
- Any time the association receives a notification of change of address or fax number, a new contact person at a member company, or a change of company/organization name, procedures should be in place to ensure that a new consent form is sent out, completed and returned;
- Seek consent from everyone in the association's database for whom the association has a fax number, not just members of the association; and
- For online consent (*e.g.*, on the association's Web site), be sure that those providing consent are required to manually key in their company/organization name (if applicable), their name (with a representation that they are authorized to act on behalf of the company/organization), all fax numbers for which consent is being provided, and to click a box or otherwise affirmatively indicate the company/organization's consent to receive faxes from the association.

Obviously, many issues and questions will arise for the FCC to clarify before the new rule takes effect and especially before delivering penalties for "gray area" violations. Some of those issues include:

- What parties can grant consent for an organization and if organizations can grant blanket consent or denial for all of its stakeholders.
- Whether consent is fixed only to an individual or an organization (in the event staff changes).
- Whether consent given to a national entity automatically extends to state or local chapters or affiliates.
- Whether written consent expires with an individual's term of membership.

- Standardization with respect to either a printed or electronic consent form.
- Type and degree of recordkeeping involved.
- Additional specific types of existing non-profit communications are exempt or permissible, including “save the date” notices, charitable solicitations, membership record updates, information-only messages directing recipients to online or third-party destinations that may entail a fee.

Please contact Goins, Underkofler, Crawford & Langdon, L.L.P. for additional information on this topic. We can provide you with the proper compliance forms to prevent any unnecessary penalties from the FCC once the rule takes effect.