

Special Report

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NEW FCC RULES WILL REQUIRE BUSINESSES TO OBTAIN PRIOR WRITTEN CONSENT BEFORE SENDING FAXES WITH COMMERCIAL PURPOSE

Without much fanfare, on July 3, the Federal Communications Commission (“FCC”) issued a Report and Order making certain changes to the Rules and Regulations Implementing the Telephone Consumer Protection Act (“Amended TCPA Rules”). The Amended TCPA Rules, which take effect on August 25, 2003, will significantly affect the manner in which companies can send faxes to third-parties, such as customers, suppliers, and partners. Specifically, after the Amended TCPA Rules take effect, companies will need to obtain the prior written consent of every individual or company to whom it sends faxes with a commercial purpose (“Commercial Faxes”).

The biggest impact of the Amended TCPA Rules for companies is the elimination of the established business relationship exception. Previously, companies were permitted to send unsolicited Commercial Faxes to individuals or companies with whom the sender had an established business relationship, such as customers, vendors and suppliers. After August 25, 2003, it no longer will be permissible to send unsolicited Commercial Faxes to anyone without express written permission. The Amended TCPA Rules will not disturb a company’s ability to send faxes that are unrelated to a commercial purpose, such as purely informational communications, but note that the current guidance provided by the FCC regards any information that even remotely proposes a

future commercial transaction as a Commercial Fax requiring prior written consent.

Recognizing that the Amended TCPA Rules represent a significant deviation from current practices in most companies, we have assembled a list of questions and answers that should help explain these new regulations and how they might affect most businesses.

Which faxes are prohibited absent express written consent?

The Amended TCPA Rules apply to “unsolicited advertisements,” which are 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.” For simplicity, we refer to faxes within the scope of the Amended TCPA Rules as “Commercial Faxes.” Included within the scope of Commercial Faxes are promotional flyers, sales brochures, and other forms of written solicitations.

Does our company have to change our fax cover sheets?

The Amended TCPA Rules requires the following information on all Commercial Faxes: (1) the originator’s legal name; (2) the date of distribution; and (3) the time of

distribution. Companies may consider including a telephone number that may be used by recipients that need to contact the organization. If a business uses an acronym or name that has not been registered with the appropriate state agency, note that the regulations require the use of the full legal name.

How do we obtain permission?

The FCC has interpreted the statutory requirement of “prior express invitation or permission,” which is found in the TCPA definition of an “unsolicited advertisement,” as meaning prior *written* permission from the Commercial Fax recipient. The Amended TCPA Rules do not specify a particular method that must be used to obtain permission to send Commercial Faxes. Instead, the regulation identifies three elements that must be present: (1) an affirmative statement that the individual or business agrees to receive Commercial Faxes from the sending organization; (2) the recipient’s name and fax number(s) at which Commercial Faxes may be received; and (3) the signature of the recipient or, in the case of a business recipient, an individual who is authorized to act on behalf of the business. A company may prepare a separate Commercial Fax consent form or incorporate a consent statement into its web site or a document that currently exists, such as product order forms. Since there is no prohibition on receiving multiple consents, it may be a good idea to include a consent statement on all forms, applications, etc. that are signed by customers and suppliers.

Can we send a consent form via fax? Can we receive a consent form or other form of permission via fax?

Sending consent forms via fax is an issue that has conflicting interpretations. A consent form that is sent to an individual or business without referencing the commercial availability or quality of any property, goods, or services technically does not meet the definition of a Commercial Fax. However, early interpretations of the Amended TCPA Rules suggest that, in the eyes of the FCC, the consent form would constitute a Commercial Fax and, thus, could not be sent by fax. The most

conservative approach a company can take is to fax consent forms until August 25, 2003. After that date, if the FCC has not provided further guidance, companies may consider abandoning the process of sending consent forms by fax. Instead, individuals could be directed to a corporation’s website, where they may download a copy of the form. A signed consent form or other statement permitting Commercial Faxes always may be returned by fax, both before and after August 25, 2003. Written consent of intended recipients may also be obtained in person in retail stores or offices.

Can we send a consent form via the Internet? Can we receive a consent form or other form of permission via the Internet?

Electronic copies of consent forms in portable formats may be sent via e-mail to a recipient. Consent may be obtained via the Internet, either by the recipient sending a message that indicates consent to receive faxes or downloading a copy of a consent form from a company’s website. Consent forms that are received or accessed electronically may be returned to the corporation via the Internet, by fax, or by mail. Electronic signatures sent via the Internet must conform with federal Electronic Signatures in Global and National Commerce Act (also known as “E-SIGN”), which requires an affirmative statement that the individual acknowledges and understands that the act of clicking a certain box or typing his/her name has the same force and effect as a written signature.

How long is consent valid?

Written consent on behalf of an individual or company remains in effect until such person or company notifies your company of revocation. For this reason, consent forms should be stored indefinitely, in hard copy, electronically, or both. Databases should be re-configured to ensure that only customers, vendors and suppliers who have provided written consent to receive Commercial Faxes from your company receive any such faxes after August 25, 2003.

What if a fax recipient moves?

Consent forms are fax number-specific. Thus, if an individual or business that previously has consented to receive Commercial Faxes relocates and receives a new fax number, the consent no longer will be valid. Adding Commercial Fax consent language to change-of-address forms is advisable.

How does this affect our international customers and suppliers?

While the FCC cannot prohibit a company from sending unpermitted Commercial Faxes outside of the United States, it is still advisable to obtain written consent from international customers and suppliers, particularly because many European laws are more stringent than domestic regulations. To the extent a company incorporates Commercial Fax consent language into any applications or product order forms, individuals residing outside of the United States will give their consent regardless of whether or not it is required.

Our organization has several affiliated companies and subsidiaries. Can each of our subsidiaries rely on a single consent?

Companies that are affiliated with each other may utilize a single consent form, or rely upon the same consent statement if the consent is drafted in a manner that advises the fax recipient that the consent may be relied upon by multiple companies, each of which is identified by name. For example, a parent company could include its subsidiaries and affiliates in the same consent form.

At times our company sells our customer lists, including their fax numbers, to other companies. Can we be held liable for unsolicited faxes sent by companies that purchase our customer lists?

Yes. The FCC has indicated that a company that provides fax numbers to others may be liable for unsolicited Commercial Faxes where the company knew or should have known that such purchasing

company would send Commercial Faxes without prior written consent. We recommend either removing fax numbers from customer lists or adding language that reminds a purchasing company that Commercial Faxes may not be sent by facsimile to a company's customers without prior written consent.

What if a customer calls and asks us to fax information regarding our programs, product availability and price lists?

Notwithstanding the fact the individual may have given verbal permission to send a Commercial Fax, the Amended TCPA Rules require a company to receive a written, signed consent statement before sending the information. This applies to customers, suppliers, or any third-party. Written consent may be provided via fax, e-mail, Internet transmission, or regular mail, as described in answers to earlier questions.

Many of these questions pertain to Commercial Faxes sent to customers. Do we also need written permission to send Commercial Faxes to companies with whom we do business, such as our suppliers and vendors?

Yes. Written consent is required from business contacts as well as customers. In either event, consent on behalf of an organization may be given by any corporate agent with the authority to bind the company. Personal consent from each person who will receive a Commercial Fax is not necessary; one consent form may list multiple numbers in various departments and offices. Individuals who receive faxes at each fax number that has been identified will be deemed to have consented to such transmission.

What are the penalties for violating the rules?

The purpose of the TCPA and related regulations is to protect consumers and businesses from unsolicited fax advertisements. Any recipient of an unpermitted Commercial Fax may file a complaint with the FCC alleging that an organization has violated the Amended TCPA Rules. If, after conducting an investigation, the

FCC determines that the organization has violated the regulations, the FCC has authority to impose a fine of any amount up to and including \$11,000.00 per violation. The Amended TCPA Rules also give individuals and companies a private right of action against an organization that sent an unpermitted Commercial Fax; damages may be awarded to the recipient in an amount equal to \$500.00 per fax, with treble damages allowed up to \$1,500.00 total per fax.

Do the Amended TCPA Rules apply to e-mails sent by our company?

No. The Amended TCPA Rules apply only to unsolicited telephone calls and faxes with commercial purposes. Before switching to sending all commercial communications via e-mail, however, know that the

FCC presently is working on e-mail rules that will be similar to the Commercial Fax rules. Although they may not be as restrictive as the Commercial Fax rules (there has been talk that recipients will have to “opt-out” of receiving e-mails, as opposed to “opting-in” to receiving Commercial Faxes), companies would benefit from including e-mail communications in consent forms to eliminate the need to secure a second consent in the future.

Should you have any questions about the Amended TCPA Rules or how they will affect your organization’s current practices, please contact Michael E. Reed, Esq. (312/609-7640), Kathryn L. Stevens, Esq. (312/609-7803), or any Vedder Price attorney with whom you regularly work.

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