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Telephone Consumer Protection Act Teleseminar

**FCC's Order Regarding Inclusion of Opt-Out Language in
Solicited Fax Ads and Steps to Seeking a
Retroactive Waiver**

November 19, 2014

Agenda

- Welcome
- Legal Framework
- Case Law Background
- FCC Petitions
- FCC's October 30, 2014 Order
- Requests for Retroactive Waivers
- Pending Appeals

Legal Framework

- Telephone Consumer Protection Act – enacted in 1991
- Junk Fax Prevention Act - 2005
- FCC's Junk Fax Order - 2006
- FCC's Order of October 30, 2014



Relevant Regulation – 47 CFR 64.1200(a)(4)(iv), created by
Junk Fax Order (the “Solicited Fax Rule”)

A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.

Opt-Out Notice Requirements – 47 CFR 64.1200 (a)(4) (iii)

- Clear and conspicuous on the first page of the fax advertisement.
- States that the recipient may make a request to the sender of the advertisement not to send any future fax advertisements and that failure to comply with such a request within 30 days is unlawful.
- Provides a domestic contact telephone number and fax number that operate 24 hours a day/7 days a week for the recipient to transmit such opt-out requests.
- If neither the phone number nor the fax number is toll-free, the opt-out notice must also include a cost-free mechanism, like a website, to transmit opt-out requests.

Junk Fax Order, ¶ 42, n. 154

“We note that the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.”

Explosion in TCPA-Junk Fax litigation

- Case after case after case filed both for no opt-out notice and for allegedly inadequate opt-out notices.
- Example: *Nack v. Walburg*
 - Eastern District of Missouri granted summary judgment in favor of defendant because plaintiff had expressly consented to receive the fax, and the opt-out notice provision did not apply to solicited faxes.
 - Eighth Circuit reversed and remanded, and encouraged Walburg to petition the FCC for relief.
 - Walburg filed a petition with the FCC and moved to stay Nack's case.
 - The Eastern District of Missouri granted Walburg's motion to stay the case pending resolution of his petition to the FCC.

FCC Petitions

- **Anda, Inc.'s Petition for Declaratory Ruling**

(In the Matter of Petition for Declaratory Ruling to Clarify That 47 U.S.C. 227(b) Was Not the Statutory Basis for Commission's Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient's Prior Express Consent, filed Nov. 30, 2010)

- Anda requested a ruling that:

- 1) The FCC lacked any authority to adopt a rule requiring an opt-out notice on fax ads sent with the recipient's express prior consent;
- 2) OR, Section 227(b) is not the statutory basis for the rule.

- **Consumer & Government Affairs Bureau May 2, 2012 Ruling**

- **Dismissed** Anda's Petition:

- No controversy to terminate or uncertainty regarding statutory basis
- Challenge was time-barred

- **Anda, Inc.'s Application for Review**

- Anda sought review by the full Commission on May 14, 2012.

FCC Petitions

- **Subsequent Petitions**

- More than 25 petitions filed since Anda's Application for Review
- They all argued:
 - There's a controversy and uncertainty over scope of and statutory basis for section 64.1200(a)(4)(iv).
 - FCC should issue a declaratory ruling that section 227 not the basis for rule requiring opt-out language in solicited faxes.
- Some of the petitions also sought:
 - A declaratory ruling regarding substantial compliance.
 - Retroactive waiver of the rule.
 - A finding that section 64.1200(a)(4)(iv) violates the First Amendment.
- Many comments filed regarding these petitions.

FCC's October 30, 2014 Order

- The FCC rejected all challenges to its authority to promulgate the Solicited Fax Rule.
 - Challenges to the Commission's authority to adopt the regulation made via request for declaratory ruling constitute improper collateral challenges to the rule that should have been presented in a timely petition for reconsideration and are now time-barred by the Act and the Commission's rules.
 - Petitions presented no "controversy to terminate" or "uncertainty to remove" because the Commission clearly relied upon its section 227 authority in promulgating the opt-out notification.
 - The FCC also did not find any basis to repeal the rule on First Amendment grounds because it furthered an important governmental interest in protecting consumers from the costs and annoyance of unwanted fax ads.

FCC's October 30, 2014 Order - cont.

- The FCC clarified that even fax ads sent to recipients that previously agreed to receive such faxes must include on each fax opt out notices that comply with 47 CFR 64.1200 (a)(4)(iii).
- The FCC denied the request of some petitioners seeking a declaratory ruling permitting fax ads that “substantially comply” with the regulation, even if the opt-out notice included on the fax does not conform with all of the specified requirements of the rule.

FCC Order – Retroactive Waiver

- The FCC also found that good cause existed for a retroactive waiver because:
 - Of the inconsistency that existed between footnote 154 in the Junk Fax Order and the rule itself; and because
 - The Notice of Proposed Rulemaking in December 2005 had not made explicit that the Commission contemplated adopting an opt-out requirement on fax ads sent with the prior express permission of the recipient.
- These two factors, taken together, could have led to reasonable confusion about the applicability of the regulation, or misplaced confidence that the regulation did not apply to solicited faxes.

FCC Order – Retroactive Waiver

- **The Order provided Anda and the 23 other petitioners a retroactive waiver from the rule.**
- **The Order also provided that others similarly-situated could file their own waiver petitions.**
 - The deadline for filing petitions for retroactive waivers was set at April 30, 2015.
- **By that date (April 30, 2015), everyone must be in compliance with the clarified rule.**

TWO COMMISSIONERS DISSENTED

- Commissioner Pai: “To the extent that our rules require solicited fax advertisements to contain a detailed opt-out notice, our regulations are unlawful. And to the extent that they purport to expose businesses to billions of dollars in liability for failing to provide detailed opt-out notices on messages that their customers have specifically asked to receive, they depart from common sense.”
- Commissioner O’Rielly: “The order notes that an agency is entitled to fill gaps in a statute. But it is not entitled to invent gaps in order to fill them with the agency’s own policy goals, no matter how well intentioned.”

Requests for Waiver

- What should be in waiver requests?
 - a statement that petitioner is similarly situated to those that were expressly granted retroactive waivers in the October Order.
 - a reference to footnote 154 and an expression of previous confusion about the applicability of the notice requirement to solicited fax advertisements.
- Waivers will not address the factual issue of whether the sender of a solicited fax ad had the recipient's prior consent.
- There is a rebuttable presumption that petitions seeking retroactive waivers will be granted.

HOWEVER....

- **In recent days at least four Petitions for Review of the FCC's Order have been noticed.**
- **All have been consolidated in one docket in the DC Court of Appeals (General Docket 14-1234; opened 11/10/2014).**
- **Some question the FCC's authority to regulate solicited faxes.**
 - *Richie Enterprises, LLC v. FCC* (No. 1239)
 - *Douglas P. Walburg v. FCC* (No. 14-1239; originally filed in the 8th Circuit)
- **Others challenge the FCC's authority to grant retroactive waivers.**
 - *Bais Yaakov of Spring Valley v. FCC* (No. 14-1234)
 - *Sandusky Wellness Center, LLC v. FCC* (No. 14- 1235)

SO WHAT'S NEXT?

- **Briefing will likely take 3-6 months.**
- **Then oral arguments, likely late spring or summer.**
- **Anyone's guess when a ruling will be issued.**
- **Appeals raise numerous interesting issues about the scope and basis of FCC authority.**
- **Will there be a stay of the retroactive waiver process during pendency of appeal?**
- **Will trial courts stay, or dismiss without prejudice, pending TCPA cases involving solicited fax ads?**

Telephone Consumer Protection Act (“TCPA”) Team

- In an increasingly digital world, corporations are struggling to keep pace with developing technologies and navigating the use of faxes, robocalls and mobile devices to communicate with customers and consumers.
 - Our team has defended clients in class action lawsuits alleging such violations and have maximized potential insurance recovery of defense costs, settlements and judgments and is currently handling hundreds of individual and consumer class actions
 - Our team of over 30 lawyers nationwide includes:
 - Regulatory compliance lawyers focused on advertising and technology
 - Seasoned litigators with an unparalleled class action track record
 - Insurance coverage lawyers who proactively provide coverage reviews to identify potential issues or exposure
- We represent:
- Financial Institutions & Banks
 - Financial Services Companies
 - Debt Collection Companies
 - Insurance Companies
 - Trade Associations
 - Educational Institutions
 - Pharmaceutical Companies
 - Medical Equipment Manufacturers
 - Healthcare Providers
 - Hospitality
 - Leisure & Entertainment
 - Other Third Party Vendors & Marketers

Questions?



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