

Rules Governing Fax and E-mail Ads

Offer an Opt-out, or Prepare to Pay Out

By James H. Laskey, Fernando M. Pinguelo, and Andrew D. Linden

The importance of having a robust compliance policy to review the content of proposed advertisements is well-known and widely accepted. But what may not be as familiar is the need for a separate policy focused on the means of disseminating such advertising. In a technology driven world, it makes sense for businesses to capitalize on the use of electronic communications to increase the number of consumers they reach, and businesses more than ever rely on direct advertising through e-mail and fax promotions. However, an advertisement that would raise no issues if disseminated by mail or in the print media can create major headaches for in-house counsel if the means of distribution is fax or e-mail.

UNLAWFUL DIRECT ADVERTISING

Unlawful direct advertising through e-mail and fax promotions can be financially devastating, and cases that have made the headlines illustrate the potential devastation. For example, in a well-publicized case from Georgia, 1,321 recipients of improper unsolicited fax advertisements sued a Hooters restaurant under federal law and received a \$12 million jury verdict against the chain. Similarly, the Dallas Cowboys and the AMF bowling alley chain each settled cases involving unsolicited faxes for over \$1 million. To further accentuate the timeliness of this is-

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sue, on the day we sent this article to the publisher, a class action suit was filed in the federal District Court of New Jersey alleging defendants "sen[t] out thousands of unsolicited fax advertisements to the plaintiff and class without permission."

FEDERAL LAW

Federal laws governing e-mail and fax promotions regulate both the content of such advertisements and also to whom such advertisements may be sent. Violators may be subject to significant financial penalties. Here's what you should know.

Faxes

The Telephone Consumer Protection Act of 1991 (TCPA), which now includes the Junk Fax Protection Act of 2005, and corresponding federal regulations prohibit sending an unsolicited advertisement to a fax machine unless the recipient has granted the sender implied or express consent to receive the advertisement.

Implied consent comes from an established business relationship between the sender and the recipient. "Established business relationship" is defined as "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 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 previously terminated by either party."

Express consent may be communicated in writing or orally, but the sender bears the burden of proving that consent was provided. It is important to note, however, that otherwise lawful faxed advertisements become unlawful if they do not inform the recipient how to avoid receiving such faxes in the future. This information, called an "opt-out" notice, is required to be provided with every faxed advertisement, even one that was expressly authorized by the recipient.

In order to comply with the TCPA and federal regulations, an advertiser's opt-out notice must:

- appear on the first page of the advertisement in a clear and conspicuous fashion;
- state that the recipient may request that the solicitor not send any future faxed advertisements and that the failure to comply with such a request within 30 days is unlawful;
- set forth the requirements of a valid opt-out request as articulated by the TCPA and applicable regulations; and
- include a domestic telephone number and fax number for the recipient to send its opt-out request, as well as a separate cost-free mechanism to send an opt-out request, such as a Web site or e-mail address.

The telephone numbers, fax numbers, and cost-free mechanisms must be available for recipients to make an opt-out request 24 hours a day, seven days a week. In addition, any message sent via fax must contain in the top or bottom margin the time and date it was sent, an identification of the sender, and the telephone number of the sending machine, individual, or entity. Under the TCPA, a state may bring a civil action against an advertiser to recover \$500 in damages for each non-conforming advertisement or the actual amount of loss caused by the non-conforming advertisement. If the court were to find that the sender willfully failed to include a compliant opt-out notice, it can increase the award up to three times. Individuals and entities receiving faxed advertisements lacking proper opt-out notices may also sue to recover the greater amount of actual monetary loss or \$500 for each violation. As a result, penalties can add up quickly. This private cause of action has given rise to a new wave of class action litigation which has produced some of the large verdicts and settlements referred to above.

E-mails

Similarly, the CAN-SPAM Act, which governs the sending of commercial e-mails, requires that commercial e-mails contain a return address or comparable mechanism that allows the recipient to send a request not to receive future advertisements.

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Specifically, commercial e-mails must clearly and conspicuously:

- display a functioning return electronic mail address or other Internet-based mechanism for recipients to submit an opt-out request; and
- inform recipients that an opt-out request may be submitted in the manner specified in the e-mail message.

The return e-mail address or other Internet-based mechanism must be capable of receiving opt-out requests for at least 30 days after transmission of the commercial e-mail.

The CAN-SPAM Act permits the state to bring a civil action against persons violating the aforementioned provisions for damages in an amount that is the greater of the actual monetary loss suffered by the recipients of the messages or an amount equal to the number of vio-

lations multiplied by up to \$250, limited in some but not all cases to \$2 million aggregate. Like the TCPA, the CAN-SPAM Act authorizes a court to increase such damages up to three times if it were to determine that the sender willfully or knowingly committed the violations. Attorneys fees may also be awarded to the state. In contrast to the TCPA, the CAN-SPAM Act limits the private right of action to providers of Internet access services and reduces damages in such cases to \$25 for each violation, and no more than \$1 million in the aggregate in some but not all cases.

Even with these partial caps, penalties can be astronomical. In May 2008, MySpace received an award of approximately \$220 million under the CAN-SPAM Act against users who, among other violations, sent over 500,000 unsolicited commercial e-mails that did not contain satisfactory opt-out mechanisms. Most recently, in November 2008, the CAN-SPAM Act led to a judgment in excess of \$800 million in favor of Fa-

cebook and against one of its users who had sent commercial e-mails that violated the Act.

CONCLUSION

Faxed advertisements and commercial e-mails are marketing tools that should help enhance a business' performance. Disseminating fax ads and e-mails that do not contain proper opt-out notices defeat their own purpose by potentially subjecting your business to quickly surmounting penalties. Ensuring that the opt-out notices of your business' fax and e-mail ads comply with the TCPA and CAN-SPAM Act, respectively, will significantly reduce your business' liability and may even increase goodwill. When marketing through e-mail and fax, it is critical that your business do so in accordance with these and other similar state laws. If the recipients of your faxed and e-mail ed advertisements cannot opt-out, you may reluctantly join the club of those having to pay-out.

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