

ALERT

FCC Retroactively Waives Rule Requiring Opt-Out Notices on Fax Advertisements Sent with Prior Express Consent

October 31, 2014

The Federal Communications Commission (FCC) recently issued an order retroactively waiving its rule requiring that fax advertisements sent with prior express consent include opt-out notices. In 2006, the FCC adopted a rule requiring that 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.” 47 C.F.R. § 64.1200(a)(4)(iv). The rule has led to a substantial amount of confusion because the Telephone Consumer Protection Act regulates unsolicited fax advertisements. It has also led to numerous class-action lawsuits throughout the country claiming violations of the rule for sending fax advertisements without opt-out notices that fully comply with the rule.

On October 30, 2014, the FCC granted retroactive relief for certain parties that were reasonably uncertain about whether the opt-out notice requirement applied to faxes sent with the recipient’s prior consent. The FCC provided a six-month window for the waiver recipients to comply with the FCC’s rule and encouraged similarly situated parties to seek waivers prior to April 30, 2015. The FCC also warned that, going forward, all fax advertisements must contain opt-out notices, including those sent with prior express consent. In particular, the opt-out notice must:

- (1) be clear and conspicuous and on the first page of the ad;
- (2) state that the recipient may make a request to the sender not to send any future ads and that failure to comply, within 30 days, with such a request is unlawful; and,

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(3) contain a domestic contact telephone number and fax number for the recipient to transmit an opt-out request.

Fax advertisements sent pursuant to an established business relationship must also contain this opt-out information. Failure to comply with the rule could lead to an enforcement action at the FCC or private litigation.

The FCC's order could reduce the number of pending and future lawsuits claiming violations of the FCC's rule. Parties currently involved in litigation for alleged violations of the FCC's rule should consider the possibility of seeking a waiver from the FCC.

The order is available [here](#).