



The Association of Business Media Companies

January 5, 2004

A Summary of Federal Laws Governing Marketing via E-Mail, Fax or Phone

In the past seven months, the business of conducting business has become more difficult. In June the FCC issued tougher regulations covering advertising faxes (and the number of lawsuits against legitimate businesses is soaring), in October the National Do-Not-Call Registry became effective, and on January 1, the first federal anti-spam bill took effect. Anyone using e-mail, faxes or the telephone to promote goods or services must be aware of and understand the limitations governing these practices.

The Federal Anti-Spam Law

The new federal law preempts all state e-mail laws (except to the extent that they cover misrepresentation and fraud) and provides a single, reasonable set of standards for legitimate e-mail marketers. The law does not ban all commercial e-mail messages. Businesses may lawfully use e-mail to advertise and solicit new customers, whether or not there is prior consent to receive e-mails or an established business relationship. It is essentially an "opt out" law that also prohibits fraudulent or deceptive conduct associated with e-mails whose "primary purpose" is to advertise or solicit new customers, referred to as "commercial e-mail."

The law imposes new obligations on businesses and e-mail marketers that use commercial e-mail. "Transactional and relationship e-mails" to confirm purchase or delivery; provide recall, safety, upgrade, or account information about a product or service purchased by the recipient; or notify recipients of changes to their subscriptions or accounts are not considered to be commercial e-mail and are therefore exempt from most provisions of the law.

Key provisions of the federal anti-spam law include:

- Commercial e-mails, as well as transactional and relationship e-mails, must accurately identify the sender and include the sender's e-mail address.
- Commercial e-mail messages may not contain false or misleading information or deceptive subject lines or headers.
- Commercial e-mail messages may not be sent to recipients who have declined to receive e-mails from the sender.
- Commercial e-mails must contain a functioning return e-mail address and the sender's physical address, as well as provisions within the e-mail allowing the recipient to unsubscribe or opt-out.
- Commercial e-mails must include a "clear and conspicuous" label identifying the message as an advertisement or solicitation.
- Senders must not use computer programs or software to generate or "harvest" e-mail addresses.

Equally important is what the new law does not include:

- There is no private right to sue, as there is with respect to faxes in the Telephone Consumer Protection Act.
- There is no requirement that there be "ADV" (short for advertisement) in the subject line or anywhere else, although the FTC is to report back to Congress on that issue.
- There is no "do-not-e-mail registry" established, although the FTC is to report on this as well and is authorized to establish one in the future.

Faxing and the “Established Business Relationship” Rule

Currently, federal and some state laws prohibit the faxing of “unsolicited advertisements.” Under the federal Telephone Consumer Protection Act (TCPA), an “unsolicited advertisement” is “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.” American Business Media has asked the Federal Communications Commission to clarify that communications relating to requester publications, for which there is no charge, and renewal notices for any publications do not fall within this definition.

Between now and January 1, 2005, the FCC by regulation allows companies to fax unsolicited advertisements to people with whom they have an “established business relationship” (EBR). This exception is causing some confusion and creating potential risk for American Business Media members.

According to the FCC’s current definition, an EBR:

- Exists if a recipient has ever made an inquiry, application, purchase or transaction regarding products or services that the sender offers.
- Does not end unless and until the recipient indicates he or she no longer wishes to receive faxes.
- Does not exist if the sender of the faxes has unilaterally communicated with the recipient without any such inquiry or the like from the recipient.

However, even though the FCC has determined that the existence of an EBR legitimizes advertising faxes, plaintiffs’ lawyers have been successful in arguing that the EBR regulation is not authorized by the law and is therefore invalid. As a result, many companies have faced and settled threats of lawsuits, even where there was a well-established relationship. Legitimate businesses, sending a modest numbers of faxes, have even had multi-million dollar class action judgments against them. As the plaintiffs’ bar has caught on, the number of threatened and filed lawsuits has escalated, and in some parts of the country they are now soliciting and purchasing faxes received by others in order to sue the sender. The geographic areas now of most concern are St. Louis, Cleveland, Denver and Phoenix.

Therefore, any business using faxes for promotional purposes must do so with great care and with knowledge of the risk. Between now and January 1, 2005, when even the FCC will no longer recognize the established business relationship defense, companies need to carefully weigh the risk versus reward of sending unsolicited faxes even to people and companies with whom they have an established relationship, and they should consider beginning the process of obtaining written consent. American Business Media will be working this year to obtain changes in the law.

Other important fax provisions of the TCPA include:

- **“Do not fax” requests:** If a recipient requests that someone stop sending unsolicited advertisements, the sender must comply promptly.
- **Damages:** Violators are liable in state court for \$500 for each unsolicited fax, or up to \$1,500 for “intentional” transmissions, and any recipient can file a suit against the sender.
- **Liability for third-party faxing services:** A company that hires a third party to send faxes on its behalf remains liable if the third party sends unsolicited advertisements. The fax broadcaster will be liable for an unsolicited fax if there is a “high degree of involvement or actual notice on the part of the broadcaster.”
- **Required information:** Each fax must reference the identity (by “official,” registered name) and phone number of the sender, along with the date and time.

The Do-Not-Call Registry

In October, the FTC activated the Do-Not-Call Registry and implementing regulations. The new restrictions apply only to business-to-consumer calls, prohibiting “sellers” and “telemarketers” from calling individuals who have listed their residential numbers on the Do-Not-Call Registry. Home business phones are not considered to be residential phones. More than 55 million residential phone numbers are already on the list. Although the prohibitions have been challenged and are under judicial review, they are currently in effect and are likely to survive as written.

Even when a residential phone is on the registry, a telemarketer may, by law, call if there is an established business relationship with consumers being called. The definition of an EBR for telemarketing purposes is different than for faxes. For telemarketing, an EBR means that the consumer has either:

- Purchased, rented or leased the seller’s goods or services or engaged in a financial transaction with the seller within 18 months before the call, or
- Inquired regarding a product or service offered by the seller within three months before the call.

In addition to enforcement by states and the federal government, there is a private right to sue for violations of the Do-Not-Call rules, but only if there is a second prohibited call from the same company within a twelve-month period. Keep in mind that the law appears to provide that a seller will be held liable for calls made on its behalf by a telemarketer.

This summary of the law and regulations governing e-mail, fax and telemarketing is intended to alert American Business Media members to the most important restrictions that may be applicable to their marketing and other activities. It is not intended to be a comprehensive analysis or to provide legal advice. You should seek legal advice with respect to specific applications of this information to your activities. For further information concerning these matters, you may contact American Business Media’s Washington attorney, David Straus, at 202-585-6921 or dstraus@thompsoncoburn.com.