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Guidelines To Fax Advertising

BACKGROUND

Many American Business Media members have been forced to settle threatened lawsuits as a result of their sending faxes to subscribers and others. The federal Telephone Consumer Protection Act subjects the sender of an “unsolicited advertisement” by fax to a payment to the recipient of \$500 for each offense (tripled if intentional). The law defines an “unsolicited advertisement” 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.” Most faxes sent by American Business Media members would meet this definition.

However, according to a Federal Communications Commission order, if the recipient has an “established business relationship” with the person or entity sending the message, an invitation or permission to receive unsolicited fax advertisements is presumed to exist, unless and until permission is withdrawn. According to the FCC, the recipient has an established business relationship with a person or entity if that recipient has made an inquiry, application, purchase or transaction regarding products or services offered by such person or entity. Past and present subscribers, advertisers, show exhibitors, etc., would meet this test.

Nevertheless, attorneys representing recipients of faxed advertisements have argued that the FCC’s statement is unlawful, because it allows a presumption to replace the law’s requirement for “express” permission. American Business Media members continue to receive threats of lawsuits, and even class actions, for faxes sent to those with whom they have an established business relationship. As far as we know, this issue has never been resolved in court.

The law also exposes the sender of a fax to a separate claim for damages if the fax does not contain, on the front page or on the margin of each page, (1) the date and time of the transmission, (2) the identity of the business, individual or other entity sending the fax, and (3) the telephone number of the sender or the sending fax machine (which cannot be a 900 or similar number). This requirement has not been a problem for American Business Media members, since modern fax machines include this information automatically unless they are programmed not to.

LIMITING YOUR EXPOSURE

In the absence of a judicial ruling affirming the validity of the “established business relationship” defense, there are only two ways to assure that you will not be exposed to a lawsuit by fax recipients:

- (1) Do not fax anything that meets the expansive definition of an “advertisement” OR
- (2) Fax advertisements only to those from whom you have received written permission for sending advertisements by fax. Written permission to send, without specifying by fax, will not provide full protection. The best protection is on an “opt-in” basis, although an “opt-out” notification on written material may suffice.

Whether or not to follow this practice is a business decision, requiring a balancing of the benefits of a broader fax program with the exposure to the payment of \$500-\$1,500 for each fax sent to a litigious recipient. A few American Business Media members have each settled several such claims, while others have had only one. The risk can be reduced in several ways. First, faxed advertisements can be limited only to those with whom you have an established business relationship. Those recipients are no doubt more receptive to such advertisements and less likely to threaten a lawsuit. You also have a reasonable defense to a claim of intentional violation. In addition, at least some of the plaintiff’s lawyers prominent in this field will respect the FCC’s regulation and will not threaten suit in this situation. Keep in mind that you have an established business relationship with recipients of a publication only if they have paid for or requested the publication (or the relationship exists for a reason apart from their names appearing on your “subscriber” list).

The most active of these attorneys, however, who are in St. Louis and Cleveland, ignore the FCC regulation and press their cases even where an established business relationship exists. As further protection, those intending to send faxed advertisements – whether or not limited to recipients with whom they have an established business relationship -- can omit potential recipients in the St. Louis and Cleveland areas from their lists. Keep in mind, however, that in an extreme but not unprecedented case, senders of faxed advertisements can face class actions and, literally, millions of dollars in damages.