



Facsimile Advertising Rules Under the Junk Fax Prevention Act of 2005

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Summary

On July 9, 2005, President Bush signed S. 714, the Junk Fax Prevention Act (“the act” or JFPA) (P.L. 109-21) and on April 5, 2006, the Federal Communications Commission (FCC) issued its final rules in the related proceeding. These rules

- provided an established business relationship (EBR) exemption to the prohibition on sending unsolicited facsimile advertisements;
- provided a definition of an EBR to be used in the context of unsolicited facsimile advertisements;
- required the sender of a facsimile advertisement to provide specified notice and contact information on the facsimile that allows recipients to “opt-out” of any future facsimile transmissions from the sender; and
- specified the circumstances under which a request to “opt-out” complied with the JFPA.

Also, the rules required that small businesses and nonprofits adhere to the rules and clarified the term “unsolicited advertisement.” The FCC did not address whether there should be a time limit on the duration of an EBR. The rules in their entirety became effective on August 1, 2006.

On April 5, 2006, in accordance with the JFPA, the GAO submitted a report to Congress on the FCC’s enforcement of the junk fax law.

On January 4, 2007, in accordance with the JFPA, the FCC released its first annual report on the enforcement of its junk fax rules.

The FCC’s Junk Fax Fact Sheet is available online at <http://www.fcc.gov/cgb/consumerfacts/unwantedfaxes.html>.

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The Junk Fax Prevention Act

President Bush signed S. 714, the Junk Fax Prevention Act (“the act” or JFPA), on July 9, 2005.¹ This law vacated previous rules promulgated by the Federal Communications Commission (FCC) in July 2003 relating to unsolicited facsimile (fax) advertising; those rules amended section 227 of the Communications Act of 1934 (47 U.S.C. 227). The JFPA contains the following specific provisions relating to fax advertising.

- Provides an “established business relationship” (EBR) exemption, allowing businesses, political organizations, and trade associations to send advertisements and solicitations to persons with whom they have an existing relationship.
- Requires organizations to place a “clear and conspicuous” notice on the first page of each fax informing the recipient how to opt out of future faxes—the notice must include U.S. telephone and fax numbers and a “cost-free” way for recipients to make their requests.
- Requires that businesses be able to accept opt-out requests 24-hours a day, seven days a week.

The JFPA also directed the FCC to conduct a rulemaking to implement certain portions of the act (see below, “FCC Activity”) and the Government Accountability Office (GAO) to issue a report on the effectiveness of the FCC’s junk fax enforcement policies by April 5, 2006 (see below, “GAO Activity”).

FCC Activity

The JFPA required the FCC to adopt rules concerning unsolicited fax advertising as well as issue an annual report on its enforcement activities.

FCC Junk Fax Rules

On December 9, 2005, the FCC released a Notice of Proposed Rulemaking (NPRM) and Order on various questions related to the regulation of commercial faxes.² On April 5, 2006, the FCC adopted its final rules in this proceeding. These rules

- codified an exemption to the fax rules to allow fax advertisements to be sent to parties with whom the sender has an EBR and provided a definition of an EBR to be used in the context of sending fax advertisements;³

¹ The Junk Fax Prevention Act of 2005, P.L. 109-21, 119 Stat. 359 (2005). This legislation, S. 714 (S.Rept. 109-76), was introduced by Senator Gordon Smith on April 6, 2005.

² Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, FCC 03-208, Order on Reconsideration (rel. August 18, 2003), available online at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-206A1.pdf.

³ The term “established business relationship” means 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 an 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 been previously terminated (continued...)

- required that, even in the case of an EBR, a person sending a fax advertisement must obtain the fax number directly from the recipient or ensure that the recipient voluntarily agreed to make the number available for public distribution;
- required the sender of fax advertisements to provide clear and conspicuous notice and contact information on the first page of a fax that allows recipients to “opt-out” of future fax transmissions from the sender;
- required senders to honor opt-out requests within the shortest reasonable period of time, not to exceed 30 days;
- determined not to exempt small businesses or nonprofit trade associations from the rules; and
- clarified the term “unsolicited advertisement.”⁴

In this proceeding, the FCC did not address whether there should be a time limit on the duration of an EBR, although the act allows the FCC to revisit that issue at another time. The FCC’s Junk Fax Fact Sheet is available online at <http://www.fcc.gov/cgb/consumerfacts/unwantedfaxes.html>.⁵

FCC Annual Report on JFPA Enforcement

As required by the JFPA, in January 2007, the FCC released its first annual report on junk fax enforcement.⁶ According to the report, the Commission issued 125 citations in response to 47,704 junk fax complaints representing 102,004 alleged violations during the period July 2005 through July 2006. The report further states that the Commission fully addressed approximately 85 percent of those alleged violations, but that figure includes not only complaints against which the FCC issued a citation, but also violations that were found to be non-actionable for various reasons.

GAO Activity

As required under the JFPA, on April 5, 2006, the GAO submitted its report to Congress on the FCC’s enforcement of the junk fax law.⁷ The report addressed the following.

(...continued)

by either party. *See* amended rule at 47 C.F.R. § 64.1200(f)(5).

⁴ The term “unsolicited advertisement” means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without the person’s prior express invitation or permission, in writing or otherwise. *See* amended rule at 47 C.F.R. § 64.1200(f)(13).

⁵ In the Report and Order, the FCC indicated that those rules containing information collection requirements under the Paperwork Reduction Act required approval by the Office of Management and Budget (OMB) before they could become effective. On July 19, 2006, the FCC received approval from OMB. Therefore, as announced in the Federal Register on July 26, 2006 (71 Fed. Reg. 42297), the amended facsimile rules became effective on August 1, 2006.

⁶ Federal Communications Commission, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (CG Docket 02-278) and Junk Fax Prevention Act of 2005 (CG Docket 05-338), Annual Report on Unsolicited Facsimile Advertisements (DA 07-16), January 4, 2007, available online at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-16A1.pdf.

⁷ General Accountability Office, Weaknesses in Procedures and Performance Management Hinder Junk Fax Enforcement, April 5, 2006, available online at <http://www.gao.gov/new.items/d06425.pdf>.

- The FCC's junk fax procedures and outcomes.
- The strengths and weaknesses of FCC's procedures.
- The FCC's junk fax management challenges.

The GAO found that the FCC had instituted procedures for receiving and acknowledging the increasing number of junk fax complaints, but that the numbers of investigations and enforcement actions had remained mostly the same. For example, the GAO stated that in 2000, the FCC recorded about 2,200 junk fax complaints; in 2005, the FCC recorded over 46,000 complaints. However, in total, the GAO found that the FCC's Enforcement Bureau issued only 261 warnings from 2000 through 2005. Further, the GAO discovered that although the bureau had ordered six companies to pay forfeitures totaling over \$6.9 million for continuing to violate the junk fax rules after receiving warnings, none of that total had been collected by the Department of Justice. The GAO also stated that FCC officials cited competing demands, resource constraints, and the rising sophistication of violators in hiding their identities as hindrances to enforcement.

With respect to strengths and weaknesses in the FCC's procedures, the GAO determined that an emphasis on customer service, an effort to document consumers' complaints, and an attempt to target enforcement resources efficiently were strengths in FCC's procedures; however, inefficient data management, resulting in time-consuming manual data entry, data errors, and—most importantly—the exclusion of the majority of complaints from decisions about investigations and enforcement, continue to be weaknesses. Further, the GAO stated that the FCC does not provide consumers with adequate guidance or information to support the FCC's enforcement efforts.

Finally, the GAO stated that FCC faces management challenges in carrying out its junk fax responsibilities. The FCC has no clearly articulated long-term or annual goals for junk fax monitoring and enforcement, and it is not analyzing the data it collects. Without analysis, the FCC cannot assess whether it needs to change its rules, procedures, or consumer guidance guidelines. Most importantly, the GAO found that without performance goals and measures and without analysis of complaint and enforcement data, it was not possible to explore the effectiveness of current enforcement measures.

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