

Although facsimile technology may now seem passé as a telemarketing tool, its use has generated a continuing source of controversy under the Telephone Consumer Protection Act (TCPA). In an [Order](#) issued last week, the FCC confirmed that senders of fax advertisements must include certain specific information on the fax that will allow customers to opt out, even if the customer had previously agreed to receive ads from such senders. The Commission had originally adopted the “Opt-Out Notice” rule in 2006 while implementing the Junk Fax Protective Act of 2005, an amendment to the TCPA and its application to fax ads. With this Order, the Commission disposed of nearly two dozen pending petitions, several of which had challenged the legal authority of the agency under the TCPA to adopt the requirement in the first place.

The Commission found that there was “confusion among affected parties (or misplaced confidence that the opt-out notice rule did not apply to fax ads sent with the prior express consent of the recipients).” Conceding that “some parties may have reasonably been uncertain about whether our requirement for opt-out notices applied to them,” the agency retroactively waived the Opt-Out Notice rule for those petitioners, a number of which were defendants in class action litigation brought under the private right of action provisions of the TCPA. Those successful petitioners will have six months from October 30, 2014 to comply with the opt-out notice requirement. “Other, similarly situated parties” may also seek such retroactive waivers; the Commission expects that such parties will make “every effort to file” any such waiver requests within the same six-month period.

The Opt-Out Notice Requirement: FCC Statutory Authority

In 2006, the FCC, in implementing the Junk Fax Act, had required that a “solicited” fax advertisement “sent to a recipient that has provided prior express invitation or permission to the sender” must include an Opt-Out Notice containing the very same specific information required of senders sending an unsolicited fax advertisement. 47 C.F.R. §64.1200(a)(4)(iv). The rule was first challenged in 2010, on the grounds that the FCC lacked legal authority to apply the notice requirement to “solicited” faxes or, in any case, the TCPA subsection allowing for a private right of action was not the proper basis for the Opt-Out Notice rule for solicited fax advertisements. The FCC’s Consumer & Governmental Affairs Bureau rejected those arguments in 2012. In last week’s Order, the Commission’s Democratic majority also rejected, on both procedural and substantive grounds, those arguments and upheld the substance of the Bureau’s decision. Republican Commissioners Pai and O’Reilly, while concurring with the waiver relief granted in the Order, dissented on the legal authority issue in particular, both taking the position that the TCPA did not require the detailed Opt-Out Notice in the case of solicited faxes and the FCC was without legal authority to impose the requirement.

The Waivers: Rationale and Limitations

Despite upholding the applicability of the Opt-Out Notice rule to solicited fax advertisements, the Commission found “good cause” to grant a retroactive waiver to the petitioners. The Commission was persuaded, in part, by an internal inconsistency in the 2006 Junk Fax Order adopting the rule that the Commission acknowledged created confusion. Specifically, a footnote in the 2006 Junk Fax Order stated that the Opt-Out Notice requirement applies only to “unsolicited advertisements,” a fact that all petitioners argued was confusing. Also, the Commission conceded that notice of the proposed rule “did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient” although the FCC still rejected arguments that the notice was inadequate. Taken together, the Commission found that this combination of factors “may have contributed to confusion and misplaced confidence” regarding the applicability of the Opt-Out Notice requirement to solicited fax advertisements.

As a result, the Commission also concluded that granting the retroactive waiver would “serve the public interest” in major part because “confusion and misplaced confidence left some businesses potentially subject to significant damage awards under the TCPA’s private right of action or possible Commission enforcement.”

In granting the retroactive relief, the FCC emphasized that “simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver.” Moreover, the waivers do not extend to a similar requirement to include an opt-out notice on fax ads sent pursuant to an “established business relationship” and do not affect the prohibition against sending unsolicited fax ads. Nor did the Commission make a finding as to whether the “petitioners, in fact had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action.” Finally, the Commission rejected requests by some petitioners for a declaration that fax ads that “comply substantially” with the rule are not in violation, even if the opt-out notice does not conform to all the specified requirements for that notice.

Again, as previously noted, the waivers provide the successful petitioners with six months from October 30, 2014, to bring their fax practices into compliance with the opt-out notice rule, including the specific elements of the notice required under the rules. Similarly situated parties (e.g., others that might be the subject of lawsuits for non-compliance where solicited fax recipients were involved) may file for comparable retroactive waivers. The FCC expects those parties to “make every effort to file within” the same six-month period. The Commission was silent as to the effect of a failure to make a waiver request before that date.

FCC and TCPA: Road Forward?

So what might this action mean for the Commission's attention to TCPA issues as it moves toward 2015? A few observations in that regard:

First and foremost, the Commission's action puts a significant dent in the list of pending TCPA-related petitions on its docket and potentially frees up resources to focus on approximately 30 petitions that deal with other, non-fax-related issues, such as the definition of an "automatic telephone dialing system" and "called party" under the TCPA. This may mean FCC action on these issues will arrive sooner rather than later, a decidedly salutary result as the TCPA class action cases continue to mount.

Second, the FCC's action reflects the Commission's willingness going forward to use, in certain TCPA contexts, the waiver mechanism as a means to provide relief in particular factual circumstances with these pending petitions.

Third, despite the opportunity for retroactive waivers over the next six months, the division of view on legal authority to impose the rule at least leaves open the prospect of litigation on that issue in the DC Circuit.

Fourth, the FCC again referred to the obligation to "balance" the legitimate interests of businesses with the privacy rights of consumers, a "standard" that it stressed in decisions earlier this year involving notices to package recipients and consent in the context of social media groups. While not explicitly applied here, in those TCPA decisions the Commission factored into the analysis their view of whether there was information useful to consumers that consumers wanted to receive.

Fifth, the grant of the waivers in these special circumstances should not be interpreted as a relaxation of the FCC's enforcement attention with respect to the TCPA, and all aspects thereof. Recent statements by the FCC Enforcement Bureau chief, combined with a recent enforcement advisory related to robocalls, suggest that the Bureau will be active in investigating alleged violations of the TCPA.

Squire Patton Boggs has a deep and experienced team advising clients on all aspects of the TCPA, including the Junk Fax Prevention Act provisions, from a compliance, counseling, regulatory and litigation perspective. If you are contemplating taking advantage of the FCC's waiver window or there are any questions about this alert or the TCPA in general, please contact one of the members of our TCPA team listed in this publication.

Contacts

Monica S. Desai

Partner, Communications
Washington DC
T +1 202 457 7535
E monica.desai@squirepb.com

Amy L. Brown

Leader – Class Action & Multidistrict Litigation
Washington DC
T +1 202 626 6707
E amy.brown@squirepb.com

Philip M. Oliss

Partner, Litigation
Cleveland, OH
T +1 216 479 8448
E philip.oliss@squirepb.com

Paul C. Besozzi

Partner, Communications
Washington DC
T +1 202 457 5292
E paul.besozzi@squirepb.com

Brian A. Cabianca

Partner, Litigation
Phoenix, AZ
T +1 602 528 4160
E brian.cabianca@squirepb.com

Anne Choi Goodwin

Partner, Litigation
Los Angeles, CA
T +1 213 689 6535
E anne.goodwin@squirepb.com

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations nor should they be considered a substitute for taking legal advice.

© Squire Patton Boggs.