

THE NATIONAL LAW REVIEW

It Ends Today: FCC's Disastrous Solicited Fax TCPA Rules Now Officially Withdrawn

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The TCPA is so much fun. I mean, apart from all of its horrors and heartache.

Today we close another chapter of what-never-should-have-been in that great Book of TCPA lore I call life.

Back in 2006 the FCC decided to require opt-out notifications to prominently appear on the front of *solicited faxes*. If a solicited fax was sent without the notification the faxer faced liability for \$500.00 per fax, minimum. This was quite the change from the existing rule of... nothing being required on such faxes. As you might imagine, with the trap set people began suing for receipt of faxes—even faxes that were specifically requested—that lacked the newly-required opt-out notifications.

So very many lawsuits followed. Many of those lawsuits were class actions. Many were certified. Millions of dollars were spent litigating and settling these suits. Faxers who had been caught unaware by the ruling lined up to submit petitions for retroactive waivers for exemptions from the retroactive application of the FCC's new take on the content of invited faxes. What a mess.

Then we found out that the solicited fax rule was entirely illegal because the FCC never had the authority to regulate solicited faxes to begin with. See *Bais Yaakov of Spring Valley, et al. v. FCC*, 852 F.3d 1078, 1083 (D.C. Cir. 2017).

Lovely.

So all of the time, money, and consternation wasted battling the hundreds of TCPA cases the solicited fax rules spawned was entirely for naught. A byproduct of an FCC ruling it never had authority to make. (BTW- this headache continues to this very week. On Monday a court issued a ruling addressing the solicited fax rule in the aptly-named follow-on case of *Bais Yaakov of Spring Valley v. Educ. Testing Serv.*, No. 13-CV-4577 (KMK), 2019 U.S. Dist. LEXIS 43985 (S.D.N.Y. March 18, 2019). So the beat goes on.)

But somehow things get even more interesting.

The Supreme Court has very notably granted cert. to [determine whether or not the FCC's rulings under the TCPA have binding effect under the Hobbs Act](#). See *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, No. 17-1705, 2018 WL 3127423 (U.S. Nov. 13, 2018). The outcome of that determination will have a huge impact on TCPAworld—the Court may find that the FCC rulings are not, and never were, binding on district courts. It may also alter the court/agency power paradigm forever if the Court also takes up the related question of *Chevron* deference.

And here's the rub—do you know what the vehicle used for the Supreme Court's Hobbs Act review is? You guessed it—the very same 2006 Junk Fax rule that contained the solicited fax rule.

Interesting, no?

Well even more interestingly, in what may have been an act of expert trolling—or just a coincidence—the FCC issued a rule withdrawing that portion of the Junk Fax ruling containing the solicited fax rule *the day after the*

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Supreme Court granted cert to review different portions of the same order. That Order can be found here: [FCC Order on Junk Faxes](#)

All of which leads us to today- Solicited Fax Freedom Day in TCPAWorld. (Its sort of like Bastille day, but with fewer beheadings.) For today is the day that the FCC's post *Bias Yaakov* ruling finally takes effect and the solicited fax rule is officially withdrawn ending 13 years of (figurative) bloodshed in federal courthouses over the content of solicited faxes.

We made it to the promised land folks. Sort of.

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