

The FCC's Clarification of its Blast Fax Rules to "Solicited" Fax Ads under Siege

Drinker Biddle®

Article By

[Laura H. Phillips](#)

[Drinker Biddle & Reath LLP](#)

[TCPA Blog](#)

- [Consumer Protection](#)
- [Communications, Media & Internet](#)
- [Litigation / Trial Practice](#)

- [All Federal](#)

Tuesday, November 18, 2014

In an attempt to clear out the backlog of numerous pending petitions **addressing how the FCC's "Blast Fax" rules apply** to consensual fax advertisement transmissions, the agency on October 30, 2014 **issued an [Order addressing the need for and form of opt-out notices](#)** required for fax ads. The FCC's [rules](#) since 2006 have contained a requirement that opt-out information be displayed on the faxed ad and that that notification requirement applies to both solicited fax ads, which are sent with the recipients' prior express permission or invitation, and to non-solicited fax ad transmissions. A large number of Blast Fax lawsuits have involved fax ads reportedly sent with prior express consent but that may have lacked the required FCC opt-out notification or that failed to use the exact language the FCC rule appeared to require. Many defendants in these lawsuits beat a path to the FCC seeking either relief from or clarification of opt-out requirements, claiming in some cases confusion about when opt-out notices were in fact required. In its Order that divided on political party lines, the FCC clarified that its opt-out notice requirements are required on *all* fax advertisements, but in a far-reaching move, the FCC granted retroactive waivers to the petitioning fax senders who previously sent non-conforming fax ads. Similarly situated fax senders were invited also to seek retroactive waivers of the opt-out notice requirement but were warned they should apply for waiver relief by April 30, 2015.

Significantly, the FCC acknowledged the existence of legitimate confusion regarding

the opt-out requirement for fax advertisements that are “sent to . . . recipient[s] who ha[ve] provided prior express invitation or permission to the sender[s],” as set forth in 47 CFR § 64.1200(a)(4)(iv), based in part on the FCC’s conflicting or inconsistent statements. The Order provides, in relevant part, that “there are two grounds that we find led to confusion among affected parties (or misplaced confidence that the opt-out notice rule did not apply to fax ads sent with the prior express permission of the recipient). . . . The record indicates that inconsistency between a footnote contained in the *Junk Fax Order* and the rule caused confusion or misplaced confidence regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission. Specifically, the footnote stated that ‘the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.’ The use of the word ‘unsolicited’ in this one instance may have caused some parties to misconstrue the Commission’s intent to apply the opt-out notice to fax ads sent with the prior express permission of the recipient.” Order ¶ 24. The FCC acknowledged a second source of confusion in terms of a “lack of explicit notice” of the FCC’s intent to impose an opt-out requirement on solicited fax advertisements. *Id.* ¶ 25. For these reasons and because of the substantial consequences stemming from non-compliance, including damages in private litigation and FCC enforcement, the FCC found that “good cause” exists and it would “serve the public interest” to “deviat[e] from the general rule,” and provide retroactive waivers to twenty-four petitioning fax senders who previously sent non-conforming fax ads. *Id.* ¶¶ 15, 22, 23. The FCC also denied petitioners’ requests to permit “substantial compliance” with the opt-out notice requirements and rejected one petitioner’s First Amendment challenge. *Id.* ¶ 33. The FCC also confirmed that it relied on Section 227(b) of the Communications Act in exercising its rule-making authority over solicited fax ads. *Id.* ¶¶ 19-20.

Three petitioners have already filed petitions for review appealing the FCC’s Order and specifically questioned the FCC’s authority to require opt-out notices on solicited fax ads; two appeals seek review of the portion of the Order that addresses the requests for retroactive waivers, and one appeal asks the court to set aside the portion of the Order denying request for declaratory relief and remand the matter to the agency for further action. Douglas Walburg filed an appeal in the Eighth Circuit, which, after the FCC filed a notice of multi-district litigation, was transferred to the DC Circuit. All three cases have been consolidated in the United States Court of Appeals for the District of Columbia Circuit. The cases are *Bais Yaakov of Spring Valley, et al. v. FCC, et al.* (Docket No. 14-1234), *Sandusky Wellness Center, LLC, et al. v. FCC, et al.* (Docket No. 14-1235), and *Douglas Walburg v. FCC, et al.* (Docket No. 14-03497).

We encourage businesses to review their fax marketing practices in light of this Order to ensure prospective compliance. Where appropriate, businesses also may wish to consider seeking retroactive waivers from the FCC with respect to otherwise problematic opt-out notices in their solicited fax advertisements. The FCC has called for all such requests to be submitted by April 30, 2015.

©2019 Drinker Biddle & Reath LLP. All Rights Reserved

Source URL: <https://www.natlawreview.com/article/fcc-s-clarification-its-blast-fax-rules-to-solicited-fax-ads-under-siege>