



Boston Concord Hanover Manchester

Author

Peter W. Leberman
Direct dial: 603.223.2020
Fax: 603.641.2330
pleberman@sheehan.com

Brian D. Thomas
Direct dial: 603.627.8136
Fax: 603.641.2399
bthomas@sheehan.com

Good Company

Unsolicited Facsimile Advertisements: Are Your Faxes Unlawful?

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How many unsolicited faxes does your office receive each day? Have you sent faxes to existing customers or clients informing them of new products or services? Isn't there a way to eliminate the plethora of unwanted "junk" faxes we receive, while permitting the legitimate informative faxes we send to our customers and clients?

Until recently, regulations promulgated by the Federal Communications Commission would have required written consent for you to send unsolicited faxes to customers and vendors, even those with whom you have done business for years. Indeed, many businesses preemptively solicited consents from their customers and vendors in anticipation of the July 1, 2005 effective date of the FCC regulations. Last minute Congressional intervention trumped these regulations, however, and pursuant to the newly amended Telephone Consumer Protection Act of 1991 (TCPA), businesses may now fax unsolicited advertisements to persons with whom they have an established business relationship and need not obtain prior written consent. This exception is not without limits, however, as the new amendment requires a clear and conspicuous notice on the first page of the unsolicited fax that provides information on how the recipient can opt out of future faxes from the sender. Moreover, this notice must include a toll-free telephone number that a recipient may call to opt-out and the sender must be equipped to accept such calls twenty-four hours a day, seven days a week.

Businesses should also be aware that the "opt-out requirement" mandated by the new amendment is by its own terms subject to FCC regulation, and as a result, may evolve to include more stringent requirements. Specifically, the FCC may enact regulations that apply to the amended portions of the TCPA, including enhancements to the required opt-out notice. Furthermore, it is not clear whether the opt-out requirement took effect when Congress enacted the new amendment or if it will apply only when the FCC issues related regulations at some future time. Either way, businesses are advised to comply immediately, and should include an opt-out notice on the first page of all unsolicited facsimile advertisements. Likewise, businesses should keep an eye out for new FCC regulations that more clearly define the opt-out requirement.

Complying with the new law is necessary not only to prevent unwanted attention from the FCC but also to avoid monetary penalties. Specifically, the TCPA provides that those who violate the statute, either by faxing unsolicited advertisements to persons with whom they do not have an established business relationship or by failing to include opt-out notices in such faxes, are subject to private legal action by those injured.

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SHEEHAN PHINNEY BASS + GREEN PA
www.sheehan.com

Manchester, NH | Concord, NH | Hanover, NH | Boston, MA
800-625-SPBG (7724)



Specifically, the TCPA allows victims of unlawful facsimile advertising to recover from violators actual monetary loss or \$500 in statutory damages for each breach, whichever is greater. Furthermore, courts may triple the damages for each infringement if a violator willfully or knowingly violates the TCPA or the related FCC regulations. Therefore, businesses wishing to avoid such penalties should make all efforts to comply with the federal law and regulations surrounding facsimile advertisements and should keep abreast of the inevitable changes.

In addition to compliance with the TCPA, businesses should be vigilant about changes in similar state privacy laws. Many state legislatures are addressing privacy issues, including in connection with unsolicited faxes, and the TCPA is clear that it does not pre-empt more restrictive state laws including in the areas of use of faxes and electronic devices to send unsolicited advertisements and requirements for intrastate only communications. The TCPA does require that states subscribe to use of the national "do not call" list in the related area of telephone solicitations.

If you are a business that actively undertakes telephonic or facsimile solicitation, it is imperative that you be fully familiar with the TCPA and any regulations promulgated thereunder. However, all businesses need to be aware of the TCPA's opt out requirements for the first page of faxes, even on transmissions to existing customers.

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