

## **RULES RESTRICTING TRANSMISSION OF UNSOLICITED FAX ADVERTISEMENTS**

An NIGP Chapter was recently the subject of a claim for \$1,500, on account of the fact that 18 months ago, one of its members sent an unsolicited fax transmission, advertising its reverse trade show, to a vendor. The matter has been settled, because the fax clearly violated the restrictions on sending “junk faxes” found in federal law.

### **General Rules**

The Telephone Consumer Protection Act (TCPA)<sup>1</sup> and the Federal Communications Commission (FCC) rules generally prohibit most unsolicited facsimile (fax) advertisements. In addition, most states have their own individual consumer protection laws that protect state residents from receiving unwanted intra-state fax solicitations. State laws can establish additional restrictions on top of the TCPA restrictions, but only apply to intra-state fax transmissions.

**It is important to understand, that unlike the DO NOT CALL rules, non-profit organizations are subject to the unsolicited FAX rules.**

The FCC’s regulations<sup>2</sup>: (1) codify an established business relationship (EBR) exemption to the prohibition on sending unsolicited fax advertisements; (2) define EBR for unsolicited fax advertisements; and (3) require the sender of fax advertisements to a recipient with whom it has an EBR to provide specified notice and contact information on the fax that allows the recipient to “opt-out” of any future faxes from the sender.

### **What is an Unsolicited Advertisement?**

As defined in FCC rules, an “unsolicited advertisement” is “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person *without that person’s prior express invitation or permission*, in writing or otherwise.” The rules provide that it is unlawful to send unsolicited advertisements to any fax machine, including those at both businesses and residences, without the recipient’s prior express invitation or permission. In addition, it is unlawful to send an unsolicited advertisement to any recipient who has expressly requested that unsolicited advertisements not be sent to its fax machine.

### **Do you meet the Established Business Relationship (EBR) Exemption?**

Unsolicited fax advertisements may be sent to recipients provided three conditions are satisfied:

1. The sender has an established business relationship with the recipient;
2. The fax number was provided voluntarily by the recipient; *and*

---

<sup>1</sup> 47 U.S.C. § 227

<sup>2</sup> 47 CFR § 64.1200

3. The sender includes the necessary “opt-out” language (discussed below).

### **What is an established business relationship?**

An “established business relationship” is “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 [payment], 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 by either party.”

### **How does a recipient voluntarily provide its fax number?**

A recipient voluntarily provides its fax number only if the sender—

(1) Obtained the fax number either (a) directly from the recipient, for example, on an application, contact information form, or membership renewal form; (b) from the recipient’s own directory, advertisement, or website, provided the recipient has not noted on such materials that it does not accept unsolicited advertisements at the fax number in question; or (c) from any other source, if the sender has taken reasonable steps to verify that the recipient consented to make the number available for public distribution; or

(2) Had an EBR with the recipient and possessed the recipient’s fax number before July 9, 2005 (the date the Junk Fax Prevention Act became law).

### **What are the Opt-out Notice Requirements?**

Senders of permissible fax advertisements (those sent to an EBR customer or with the recipient’s prior express permission) must provide notice and contact information on the fax that allows recipients to “**opt-out**” of future faxes. The notice must:

- be clear and conspicuous and on the first page of the advertisement;
- state that the recipient may make a request to the sender not to send any future faxes and that failure to comply with the request within 30 days is unlawful;
- include a telephone number, fax number, and cost-free mechanism (including a toll-free telephone number, local number for local recipients, toll-free fax number, Web site address, or e-mail address) to opt-out of faxes. These numbers and cost-free mechanism must permit consumers to make opt-out requests 24 hours a day, seven days a week;
- notify the recipient that any opt-out request must identify the telephone number or numbers of the telephone facsimile machine or machines to which the request relates; the

request must be sent to the sender at the number(s) or address(es) provided, and that the request will be void if the recipient subsequently expressly invites or otherwise permits the sender, in writing or otherwise, to send unsolicited advertisements to the telephone facsimile machine or machines in question.

Senders who receive a request not to send further faxes must honor that request within the shortest reasonable time from the date of the request, not to exceed 30 days. They are also prohibited from sending future fax advertisements to the recipient unless the recipient subsequently provides prior express permission to the sender.

### **What are the penalties for violating the rules?**

A person or entity may, if otherwise permitted by the laws or rules of court of a state, file an action in state court to recover statutory damages equal to the greater of the recipient's actual damages or \$500 per violation (each FAX sent), and for an injunction. If the court finds that the violation was willful or knowing, it may increase the damage award to up to \$1500 per violation. In addition, the state attorney general may bring an action against the sender, and the FCC can issue warning citations to suspected violators, and may impose civil penalties on actual violators.

### **What action should NIGP Chapters take?**

**Stop sending unsolicited faxes.** Because the rules are complex, and therefore easy to violate without realizing it; because multiple volunteers are often involved; and because there may be some doubt regarding whether the "sender" who is liable is (1) the Chapter itself, (2) the individual chapter member who actually decides which vendors will receive the fax and pushes the "send" button, and/or (3) the individual chapter member's employer—we recommend that Chapters stop sending announcements about meetings, trade shows, and other Chapter events by fax. The risk of violating the rules and incurring \$500-\$1,500 in liability is too great.

**Send unsolicited faxes Very Carefully.** If, notwithstanding these factors, a Chapter wishes to continue to send unsolicited faxes to recipients with whom it has an existing business relationship, from whom it has properly obtained the fax number, and includes the required opt-out notice, then we recommend the following procedures:

1. Transmission of faxes should be committed to a limited team of volunteers who are familiar with the federal junk fax rules described in this memo, **and any applicable state junk fax rules**, and who maintain an up-to-date list of fax numbers of all past recipients who have opted out of receiving unsolicited faxes.

2. The cover sheet for all faxes should show **the Chapter** as the sender, not any individual member or employer of a member.

3. The fax should be sent only to a recipient with whom *the Chapter*—not any chapter member or employer of a member—has an existing business relationship. These include members of the Chapter, and others who have attended Chapter events, or purchased goods or services from the Chapter. An employer has an existing business relationship with the Chapter if its employees have attended an event or purchased goods or services from the Chapter in connection with their employment.

4. The fax cover sheet *must* include the following notice—*verbatim*—in (not less than) 12-point, boldface type:

This is an unsolicited facsimile transmission, sent to you because the [Chapter Name] (“the Chapter”) believes you may be interested in information about the event described in the following page(s).

You may request that the Chapter not send you any future unsolicited faxes, and the Chapter’s failure to comply with your request within 30 days after receiving it is a violation of federal law.

To “opt-out” of receiving future unsolicited faxes, please make your request to [telephone number and/or fax number, **or to** toll-free telephone number, local number for local recipients, toll-free fax number, Web site address, or e-mail address]. You may make your request anytime, 24 hours a day, seven days a week.

When making your opt-out request, you must identify the telephone number or numbers of the telephone facsimile machine or machines to which the request relates; the request must be sent to the Chapter at one of the addresses or numbers listed above, and the request will be void if you subsequently expressly invite or otherwise permit the Chapter, in writing or otherwise, to send unsolicited faxes to the telephone facsimile machine or machines in question.

5. The volunteer fax team honors each request to opt-out as soon as reasonably possible, and in any event, within 30 days after the request is received.

**If our Chapter decides to stop sending unsolicited faxes, can we send event announcements by e-mail?**

Yes. Although the federal CAN-SPAM Act restricts the sending of commercial bulk e-mails, it does not prohibit them, and does not require an established business relationship between the sender and the recipient. However, the following conditions should be observed, and again, a

Chapter should establish procedures similar to those for sending unsolicited faxes, to protect against violations of the law. In addition, the Chapter should—

1. Not send the same e-mail to more than 100 addresses during any 24-hour period, more than 1,000 addresses during any 30-day period, or more than 10,000 addresses during any 1-year period; and
2. Establish a mechanism for recipients to opt-out of future emails and notify recipients of how they can opt out.
3. Promptly honor all opt-out requests.

Any commercial e-mail that is sent without advance written consent from the recipient must include a functioning return e-mail address or other conspicuous Web-based mechanism by which the recipient can request not to receive future commercial e-mail at the recipient's electronic mailbox. The mechanism must be functioning for at least 30 days (with allowances for temporary and unexpected technical problems) after the commercial e-mail message was sent. The reply mechanism may also permit the recipient to select from a menu of types of e-mails, electing to receive some and not receive others.

The message must include “clear and conspicuous” identification that the message is an advertisement and notice of the opt-out opportunity, and the sender's valid physical postal address.

The federal CAN-SPAM Act pre-empts any state law addressing the same issue.

## **Conclusion**

Sending unsolicited faxes is risky, and can expose a Chapter and/or its members to liability for substantial statutory damage. Chapters that wish to continue sending unsolicited faxes should implement careful procedures to ensure that federal and state laws are obeyed.

Chapters may send unsolicited e-mails, provided the number sent in certain periods are limited, and there is a web-based method by which the recipient can opt-out of receiving future unsolicited e-mails.