LAST WEEK TO FILE FOR RETROACTIVE WAIVER OF FCC RULE REQUIRING OPT-OUT NOTICE ON ALL FAX ADVERTISEMENTS

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Commercial Disputes Alert

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Any company that communicates by fax should strongly consider whether to request a retroactive waiver from the Federal Communications Commission ("FCC") rule[1] requiring that opt-out notice be included on all fax ads, including those sent to consumers who have provided prior express invitation or permission. On April 30, 2015, the period for requesting such waivers will come to a close.

In 2006, the FCC adopted a new rule, 47 C.F.R. 64.1200(a)(4)(iv), which requires opt-out notices in facsimile advertisements sent with the recipients' prior express permission. The FCC was then faced with an application for review of a Consumer and Governmental Affairs Bureau order and 24 petitions that collectively challenged the opt-in requirement adopted in 2006. The petitioners argued that the Telephone Consumer Protection Act of 1991 ("TCPA") applies only to unsolicited advertisements and, therefore, could not provide a statutory basis for the rule. The petitioners also argued that the FCC provided conflicting statements with regard to the applicability of the rule to solicited facsimile advertisements.

On October 30, 2014, the FCC released an Order confirming that opt-out notices complying with rules and regulations adopted by the FCC are required on all advertisements transmitted by facsimile, including advertisements transmitted with the prior express permission of the recipient.[2] The FCC, recognizing the uncertainty over whether the opt-out requirements applied to senders with express permission of the recipients, granted retroactive waivers to the parties that had made the requests with respect to faxes sent with consent but without opt-out notices, and allowed those parties until April 30, 2015, to come into compliance with opt-out requirements.[3] The FCC invited "similarly situated parties" to seek waivers prior to April 30, 2015, but noted that it expected parties making similar waiver requests to "make every effort to file within six months of the release of this Order."[4]

At least 64 petitions for waivers have been filed, and while the FCC has invited comment on many of these petitions, it has not issued any rulings.

Given the immense exposure that can result from TCPA violations, any company that communicated by fax after 2006 without an opt-out notice but with consent should strongly consider filing for a retroactive waiver.

Notes:

[1] 47 C.F.R. 64.1200(a)(4)(iv).

[2] *In The Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, FCC 14-164, 2014 WL 5493425 (Oct. 30, 2014)

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(hereinafter "2014 Order"); *see also* FCC Order Confirms that TCPA Regulations Require Opt-Out Notice on All Fax Advertisements, Even Those Sent with Prior Express Permission

[3] 2014 Order, 2014 WL 5493425, at *11.

[4] 2014 Order, 2014 WL 5493425, at *9.

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