

Complying with the Telephone Consumer Protection Act

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Q: We received a letter from an attorney claiming that a fax sent by the association violated the Telephone Consumer Protection Act and demanding that we pay \$1,500! What is the TCPA and how do we comply?

A: In July 2005, Congress enacted the Junk Fax Prevention Act amending the unsolicited fax advertisement provisions of the Telephone Consumer Protection Act (TCPA), and the Federal Communications Commission subsequently issued regulations implementing the statute. Failure to adhere to the fax laws subjects associations to potential FCC enforcement, state enforcement and private lawsuits with statutory damages of up to \$1,500 per violation or fax sent (\$500 per violation, which can be trebled if the violation is knowing and willful). This private right of action has mobilized a slew of plaintiffs' lawyers to solicit clients willing to file suit upon receipt of unsolicited faxes — hence the dubious \$1,500 demand letter.

The regulations provide that it is unlawful to send "unsolicited advertisements" to any fax machine, including those at either businesses or residences, without the recipient's prior express invitation or permission. However, fax advertisements may be sent to recipients with whom the sender has an "established business relationship," as long as the fax number was provided voluntarily by the recipient.

An "unsolicited advertisement" is defined as "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." An "established business relationship" means 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, in which relationship has not been previously terminated by either party.

Specifically, a fax advertisement may be sent to a member, customer or individual with whom the sender has an established business relationship if the sender also: (i) obtains the fax number directly from the recipient (through, for example, a membership application, contract, contact information form or membership renewal form); or (ii) obtains the fax number from the recipient's own directory, advertisement or site on the Internet (unless the recipient has noted on such materials that it does not accept unsolicited advertisements at the fax number in question). If the fax number is obtained from a directory or other source of information compiled by third parties, the sender must take reasonable steps to verify that the recipient consented to have the number listed. If the established business relationship existed before July 9, 2005, and the sender also possessed the fax number before July 9, 2005, the sender may send the fax advertisements without demonstrating how the number

was obtained.

Further, *all* advertisements sent via fax must include specific notice and contact information that allows recipients to "opt out" of receiving future faxes from the sender. The notice must (i) be clear and conspicuous and located on the first page of the advertisement; (ii) 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; and (iii) include both a telephone and fax number, and cost-free mechanism (e.g., a toll-free telephone number, local number for local recipients, toll-free fax number, website address or e-mail address) for opting out of receiving future fax advertisements from the sender. The mechanism for opting out must be available 24 hours a day, seven days a week.

It is particularly important to note that such opt-out requests remain in effect until revoked. Accordingly, it is important to have an effective record-keeping system in place in order to keep track of all such requests. **■**

The answers provided here should not be construed as legal advice or a legal opinion. Consult a lawyer concerning your specific situation or legal questions.