



4900 Woodway Drive, Suite 650

Houston, TX 77056

Phone: 713-871-0005

Fax: 713-871-1358

**Thomas E. Black, Jr., P. C.\***

**Calvin C. Mann, Jr., P. C.**

**Gregory S. Graham, P. C.**

**David F. Dulock**

**Diane M. Gleason**

**Benjamin R. Idziak \*\***

**Shawn P. Black \*\***

**Thomas L. Kapioltas**

**Margaret A. Noles**

**Robert J. Brewer**

**Mark E. Sanders \*\*\***

\* Also Licensed in New York, Washington  
and West Virginia

\*\* Also Licensed in New York

\*\*\* Licensed in New Mexico

December 22, 2006

To: Clients and Friends

From: David F. Dulock

Subject: FCC Rules on Unsolicited Facsimile Advertisements

Over the last several years we have periodically updated our clients on the status of the Federal Communications Commission's rules on unsolicited facsimile advertisements (see memos dated August 18, 2003 (updated October 18, 2004 and June 28, 2005) and July 5, 2005). On April 5, 2006, in its Report and Order and Third Order on Reconsideration ("Order"), the Commission adopted its final rules regarding unsolicited facsimile advertisements. These rules became effective August 1, 2006, and implement the Telephone Protection Act of 1991 (Public Law No. 102-243) and the Junk Fax Prevention Act of 2005 (Public Law No. 109-21), codified at 47 U.S.C. §227.

This memorandum is a summarized redaction of the summary of the Commission's Order published in the May 3, 2006 issue of the Federal Register (Volume 71, Number 85, pages 25967-25979). For the purposes of clarity, we have rearranged some of the material published in the Federal Register. This memorandum only concerns facsimile transmissions of unsolicited advertisements as addressed in the Order. Advertising by other means, such as by telephone call solicitation or email, are not addressed in this memorandum.

The Order amends the Commission's rules on unsolicited facsimile advertisements as required by the Junk Fax Prevention Act of 2005. In compliance with the requirements of that Act, the Commission amended its rules in 47 C.F.R. §64.1200 to expressly recognize an Established Business Relationship (EBR) exemption from the prohibition on sending unsolicited facsimile advertisements. **(Facsimile senders will now be permitted to send facsimile advertisements to recipients with whom they have an EBR without first securing the recipient's written permission.)** Should a question arise, however, as to the validity of an EBR, the burden will be on the sender to show that it has a valid EBR with the recipient.

For purposes of sending unsolicited facsimile advertisements under an EBR exemption, 47 C.F.R. §64.1200(f)(5) defines the term "Established Business Relationship" to mean *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, 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.*

47 C.F.R. §64.1200(f)(13) of the rules defines "unsolicited advertisement" as follows: *The term unsolicited advertisement means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without the person's prior express invitation or permission, in writing or otherwise.*

47 C.F.R. §64.1200(f)(8)) defines "sender" as *the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement.*

The rules adopted in the Commission's Order do not require the maintenance of specific records for the sending of facsimile advertisements, nor do the rules limit the duration of the EBR.

Any person sending a fax advertisement under the EBR exemption must have obtained the facsimile number directly from the recipient within the context of the EBR, or ensure that the recipient voluntarily agreed to make the number available in a directory, advertisement, or Internet site which is accessible to the public. An exception to this requirement applies if the EBR was formed prior to July 9, 2005. The amended rules provide that if the EBR was in existence prior to July 9, 2005, and the sender also possessed the facsimile number before July 9, 2005, the sender may send facsimile advertisements to that recipient without demonstrating how the number was obtained or verifying it was provided voluntarily by the recipient. The Commission adopts a presumption that if a valid EBR existed prior to July 9, 2005, the sender had the facsimile number prior to that date as well. (This presumption could be rebutted, for example, with evidence that the recipient did not use the facsimile number before July 9, 2005.)

It is permissible for the sender to fax an advertisement to an EBR recipient that had provided a facsimile number to the sender, for example, on an application, information request, contact information form, or membership renewal form. Similarly, a business card provided by the EBR recipient to the sender containing a fax number would permit the sending of a facsimile advertisement. It also is permissible for the EBR recipient to provide to the sender its facsimile number orally over the telephone or through a Web site maintained by the fax sender. In circumstances such as these, the Commission concludes that the EBR recipient had provided the facsimile number in the context of an EBR with the fax sender. The burden rests with the sender to demonstrate that the number was communicated in the context of the EBR.

The Commission determines that a facsimile number obtained from the EBR recipient's own directory, advertisement, or Internet site is voluntarily made available for public distribution, unless the EBR recipient notes on such materials that it does not accept unsolicited advertisements at the facsimile number in question. Other examples are a number obtained from the EBR recipient's own letterhead or fax cover sheet. On the other hand, if the sender obtains the number from sources of information compiled by third parties, the sender must take reasonable steps to verify that the EBR recipient consented to have the number listed, such as calling or e-mailing the EBR recipient. Senders of facsimile advertisements must have an EBR with the recipient in order to send the advertisement to the recipient's facsimile number. The fact that the facsimile number was made available in a directory, advertisement or Web site does not alone entitle a person to send a facsimile advertisement to that number.

Once established, the EBR will permit the sender to send unsolicited facsimile advertisements to a business or residential subscriber until the subscriber "terminates" it by making a request not to receive future unsolicited fax advertisements. (The act of terminating the EBR exemption will only terminate the relationship for purposes of receiving communications constituting "unsolicited advertisements.")

An inquiry by a recipient could form the basis of the EBR if the inquiry or application is about products or services offered by the sender. Thus, an inquiry about store location or the identity of the sender would not alone form an EBR for purposes of sending unsolicited facsimile advertisements. Merely visiting a Web site, without taking additional steps to request information or provide contact information, also does not create an EBR.

The EBR exemption applies only to the entity with which the business or residential subscriber has had a "voluntary two-way communication." It does not extend to affiliates of that entity, including a fax broadcaster that is retained to send facsimile ads on behalf of that entity. The fax broadcaster is not permitted to use that same EBR to send a fax advertisement on behalf of another client.

The rules in 47 C.F.R. §64.1200(a)(3)(iii) and (iv) require that all unsolicited facsimile advertisements contain a “clear and conspicuous” notice on the first page of the advertisement stating that the recipient is entitled to request that the sender not send any future unsolicited advertisements. The notice must include a domestic contact telephone number and a facsimile machine number for the recipient to transmit such a request to the sender and at least one cost-free mechanism for transmitting an opt-out request. Including an opt-out notice on a facsimile advertisement alone is not sufficient to permit the transmission of the fax; an EBR with the recipient must also exist.

For purposes of the opt-out notice “clear and conspicuous” means a notice that is apparent to a reasonable consumer. Thus, the notice must be distinguishable from the advertising material through, for example, use of bolding, italics, different font, or the like. The opt-out notice must be separate from the advertising copy or other disclosures and placed at either the top or bottom of the fax. If there are several pages to the fax, the first page of the advertisement must contain the opt-out notice.

A Web site address, e-mail address, toll-free telephone number, or toll-free facsimile machine number constitutes “cost-free mechanisms” for purposes of the rules. A local telephone number may be considered a cost-free mechanism so long as the advertisements are sent to local recipients for whom a call to that number would not result in long distance or other separate charges. If a sender uses a Web site for receiving opt-out requests, it must describe the opt-out mechanism and procedures clearly and conspicuously on the first page of the Web site.

The opt-out notice must contain a domestic contact telephone number and facsimile machine number for the recipient to send an opt-out request to the sender. If the cost-free mechanism offered by the sender is either a domestic toll-free telephone number or toll-free facsimile machine number, the sender will be in compliance with both sets of requirements. The rules require the sender to accept opt-out requests 24 hours, 7 days a week at the number(s), Web site or e-mail address identified in the opt-out notice.

Senders must comply with an opt-out request within the shortest reasonable time of such request, not to exceed 30 days from the date such a request is made. Facsimile senders with the capability to honor do-not-fax requests in less than 30 days must do so. The time period during which an opt-out request remains in effect is not limited.

Senders of facsimile messages must identify themselves on the message, along with the telephone number of the sending machine or the business, other entity, or individual sending the message. Facsimile messages must also include the date and time they are sent. The fax broadcaster must also identify itself if it demonstrates a high degree of involvement in the sender's unsolicited facsimile advertisements, such as supplying the numbers to which such an advertisement is sent. Senders that provide their telephone number and facsimile number as part of the opt-out notice will satisfy the identification rule so long as they also identify themselves by name on the unsolicited facsimile advertisement.

The rules require that an opt-out request identify the telephone number or numbers of the facsimile machines or machines to which the opt-out request relates. In addition, the opt-out request must be made using the telephone number, facsimile number, Web site address or e-mail address provided by the sender in its opt-out notice. An opt-out request should be honored whether or not the EBR recipient continues to do business with the sender.

A sender may resume sending unsolicited facsimile advertisements to a recipient that has opted-out of such communications if that recipient subsequently provides his express invitation or permission to the

sender. Such permission may be granted in writing or orally.

The sender is responsible for complying with the opt-out notice requirements and for honoring opt-out requests. Regardless of whether the sender includes its own contact information in the opt-out notice or the contact information of a third party retained to accept opt-out requests, the sender is liable for any violations of the facsimile advertising rules, including failure to honor opt-out requests. Third parties, including fax broadcasters, need only accept and forward do-not-fax requests to the extent the underlying business contracts out such responsibilities to them.

A fax broadcaster also will be liable for an unsolicited fax advertisement that violates the facsimile advertising rules if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile advertisements. A fax broadcaster that provides a source of fax numbers, makes representations about the legality of faxing to those numbers or advises a client about how to comply with the fax advertising rules demonstrates a high degree of involvement in the transmission of those facsimile advertisements. A highly involved fax broadcaster, for example, will be liable for an unsolicited fax advertisement that does not contain the required notice and contact information. In such circumstances, the sender and fax broadcaster may be held jointly and severally liable for violations of the opt-out notice requirements. Such a fax broadcaster must, at a minimum, ensure that the fax advertisements it transmits on behalf of each sender contain the necessary information to allow a recipient to opt out of a particular sender's fax advertisements in the future.

In the absence of an EBR, the sender must obtain the prior express invitation or permission from the recipient before sending the facsimile advertisement (but the request cannot be a facsimile request). Prior express invitation or permission may be given by oral or written means, including electronic methods. Whether given orally or in writing, prior express invitation or permission must be express, must be given prior to the sending of any facsimile advertisements, and must include the facsimile number to which such advertisements may be sent. It cannot be in the form of a “negative option” (i.e. - a facsimile advertisement containing a telephone number and an instruction to call if the recipient no longer wishes to receive such faxes). However, a company that requests a fax number on an application form could include a clear statement indicating that, by providing such fax number, the individual or business agrees to receive facsimile advertisements from that company or organization. Express permission need only be secured once from the recipient in order to send facsimile advertisements to that recipient until the recipient revokes such permission by sending an opt-out request to the sender.

Messages whose purpose is to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender are not advertisements for purposes of the facsimile advertising rules, but are “transactional communications.” For example, a receipt or invoice, the primary purpose of which is to confirm the purchase of certain items by the facsimile recipient, is not an advertisement of the commercial availability of such items. Similarly, messages containing account balance information or other type of account statement which, for instance, notify the recipient of a change in terms or features regarding an account, loan or comparable ongoing relationship, in which the recipient has already purchased or is currently using the facsimile sender's product or service, is not an advertisement. Communications sent to facilitate a loan transaction, such as property appraisals, summary of closing costs, disclosures (such as the Good Faith Estimate) and other similar documents are not advertisements when their purpose is to complete the financial transaction. A mortgage rate sheet sent to a broker or other intermediary for the purpose of communicating the terms on which a transaction has already occurred are not advertisements. (Commercial facsimile messages that advertise the commercial availability or quality of property, goods, or services, but purport to be “rate sheets” in order to evade

the rules, **are nevertheless unsolicited advertisements, if not sent for the purpose of facilitating, completing, or confirming an ongoing transaction.**)

In order for such messages to fall outside the definition of “unsolicited advertisement,” they must relate specifically to existing accounts and ongoing transactions. Messages regarding new or additional business would advertise “the commercial availability or quality of any property, goods, or services ... ” and therefore would be covered by the prohibition. **A rate sheet on financial products transmitted to a potential borrower or potential brokers would not be considered merely “transactional” in nature and would require the sender to either have an established business relationship with the recipient or first obtain express permission from the recipient.** A reference to a commercial entity does not by itself make a message a commercial message. For example, a company logo or business slogan found on an account statement would not convert the communication into an advertisement, so long as the primary purpose of the communication is, for example, to relay account information to the fax recipient.

Facsimile communications that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited by the rules. An incidental advertisement contained in such a newsletter does not convert the entire communication into an advertisement. (In determining whether an advertisement is incidental to an informational communication, the Commission will consider, among other factors, whether the communication is issued on a regular schedule; whether the text of the communication changes from issue to issue; and whether the communication is directed to specific regular recipients. The Commission may also consider the amount of space devoted to advertising versus the amount of space used for information or “transactional” messages and whether the advertising is on behalf of the sender of the communication or whether the advertising space is sold to and transmitted on behalf of entities other than the sender).

***Summary of Commission’s Order and the Facsimile Rules:***

(1) Codifies an established business relationship (EBR) exemption to the prohibition on sending unsolicited facsimile advertisements.

(2) Permits the sending of unsolicited facsimile advertisements to recipients with whom the sender has an EBR, provided certain conditions are met regarding how the facsimile number was obtained.

(3) Provides a definition of an EBR to be used in the context of unsolicited facsimile advertisements that is not limited in duration.

(4) The definition of EBR for purposes of sending unsolicited facsimile advertisements extends the EBR exemption to faxes sent to both businesses and residential subscribers.

(5) Requires the sender of an unsolicited facsimile advertisement to provide specified notice and contact information on the facsimile that allows recipients to “opt-out” of any future unsolicited facsimile advertisements from the sender. The notice must be clear and conspicuous and located on the first page of the advertisement.

(6) Requires that an opt-out notice include a cost-free mechanism for the recipient to request not to receive future unsolicited facsimile advertisements. The cost-free mechanism must include a toll-free telephone number, toll-free facsimile number, Web site address, or e-mail address.

(7) If the recipient makes a request not to receive future fax advertisements, the sender must honor that request within the shortest reasonable time, not to exceed 30 days.

(8) Specifies the circumstances under which a request to “opt-out” complies with the Junk Fax Prevention Act of 2005.

(9) Declines to exempt small businesses from the cost-free mechanism requirement.

(10) Does not carve out an exemption for tax-exempt nonprofit professional or trade associations from the opt-out notice requirement.

(11) Provides guidance to fax senders on what messages do not constitute unsolicited advertisements for purposes of the fax rules and therefore could be sent without the prior permission of the recipient.

(12) Clarifies that messages that do not promote a commercial product or service, including all messages involving political or religious discourse, are not unsolicited advertisements.

(13) Messages whose purpose is to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender are not advertisements. These might include communications sent to facilitate a loan transaction already entered into by the recipient.

(14) Facsimile communications that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited by the rules. An incidental advertisement contained in such a facsimile does not convert the entire communication into an advertisement.

The Telephone Consumer Protection Act of 1991 provides consumers with a private right of action “if otherwise permitted by the laws or rules of court of a State” for any violation of the prohibitions on unsolicited facsimile advertisements. The Commission has stated that this language suggests that Congress contemplated that such legal action was a matter for consumers to pursue in appropriate state courts, subject to those state courts' rules, and that it is for Congress, not the Commission, either to clarify or limit this right of action. Thus, the rules do not clarify the parameters of this private right of action.

The facsimile advertising rules summarized herein became effective August 1, 2006.

A copy of the Commission’s Order may be obtained from us upon written request. The text of those portions of the Commission’s rules (47 C.F.R. §64.1200(a) and (f)) relating to an unsolicited facsimile advertisement is reprinted in the attachment to this memorandum.

**This Memorandum is provided for the general information of the clients and friends of our firm only and is not intended as specific legal advice. You should not place reliance on this general information alone but should consult counsel regarding the application of the laws and official Commission rules discussed in this Memorandum to your specific case or circumstances.**

**Code of Federal Regulations**  
**PART 64--MISCELLANEOUS RULES RELATING TO COMMON CARRIERS**  
**Subpart L--Restrictions on Telemarketing, Telephone Solicitation, and Facsimile Advertising**

§64.1200 Delivery restrictions.

(a) No person or entity may:

(3) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless-

(i) The unsolicited advertisement is from a sender with an established business relationship, as defined in paragraph (f)(5) of this section, with the recipient; and

(ii) The sender obtained the number of the telephone facsimile machine through-

(A) The voluntary communication of such number by the recipient directly to the sender, within the context of such established business relationship; or

(B) A directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution. If a sender obtains the facsimile number from the recipient's own directory, advertisement, or Internet site, it will be presumed that the number was voluntarily made available for public distribution, unless such materials explicitly note that unsolicited advertisements are not accepted at the specified facsimile number. If a sender obtains the facsimile number from other sources, the sender must take reasonable steps to verify that the recipient agreed to make the number available for public distribution.

**(C) This clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005 if the sender also possessed the facsimile machine number of the recipient before July 9, 2005. There shall be a rebuttable presumption that if a valid established business relationship was formed prior to July 9, 2005, the sender possessed the facsimile number prior to such date as well; and**

(iii) The advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements. A notice contained in an advertisement complies with the requirements under this paragraph only if--

(A) The notice is clear and conspicuous and on the first page of the advertisement;

(B) The notice states that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under paragraph (a)(3)(v) of this section is unlawful;

(C) The notice sets forth the requirements for an opt-out request under paragraph (a)(3)(v) of this section;

(D) The notice includes-

(1) A domestic contact telephone number and facsimile machine number for the recipient to transmit such a request to the sender; and

(2) If neither the required telephone number nor facsimile machine number is a toll-free number, a separate cost-free mechanism including a Web site address or e-mail address, for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. A local telephone number also shall constitute a cost-free mechanism so long as recipients are local and will not incur any long distance or other separate charges for calls made to such number; and

(E) The telephone and facsimile numbers and cost-free mechanism identified in the notice must permit an individual or business to make an opt-out request 24 hours a day, 7 days a week.

(iv) A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(3)(iii) of this section.

(v) A request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if--

(A) The request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(B) The request is made to the telephone number, facsimile number, Web site address or e-mail address identified in the sender's facsimile advertisement; and

(C) The person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine.

(vi) A sender that receives a request not to send future unsolicited advertisements that complies with paragraph (a)(3)(v) of this section must honor that request within the shortest reasonable time from the date of such request, not to exceed 30 days, and is prohibited from sending unsolicited advertisements to the recipient unless the recipient subsequently provides prior express invitation or permission to the sender. The recipient's opt-out request terminates the established business relationship exemption for purposes of sending future unsolicited advertisements. If such requests are recorded or maintained by a party other than the sender on whose behalf the unsolicited advertisement is sent, the sender will be liable for any failures to honor the opt-out request.

(vii) A facsimile broadcaster will be liable for violations of paragraph (a)(3) of this section, including the inclusion of opt-out notices on unsolicited advertisements, if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.

\* \* \* \* \*

(f) As used in this section:

(2) The term clear and conspicuous for purposes of paragraph (a)(3)(iii)(A) of this section means a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures, and placed at either the top or bottom of the facsimile.

(ii) The subscriber's established business relationship with a particular business entity does not extend to affiliated entities unless the subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.

(5) The term established business relationship for purposes of paragraph (a)(3) of this section on the sending of facsimile advertisements 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, 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.

(6) The term facsimile broadcaster means a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.

(8) The term sender for purposes of paragraph (a)(3) of this section means the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement.

(11) The term telephone facsimile machine means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(13) The term unsolicited advertisement means 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.