

OUTSIDE PERSPECTIVES

Know The Fax: Fines For Unsolicited Advertisements Can Grow To Six Figures Or More.



EDWARD S. HAMMERMAN

Your mission: Monitor your marketing staff more effectively.

As you and your colleagues brainstorm to bring your business' brand name before more buyers this season, someone suggests sending out mass e-mails.¹ You quickly quash that idea because of state laws against unsolicited e-mails. Although the question remains, how can a business get a brief summary of its services into the public's hands? The new guy suggests *faxing* out a one-page advertisement. What he does not know is that the Telephone Consumer Protection Act of 1991 (TCPA) and Federal Communications Commission rules prohibit the use of telephone facsimile machines to send unsolicited advertisements.

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." A telephone solicitation, by voice or fax, is the initiation of a telephone call or

message transmitted to any person for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services. That term does not include calls or messages to (1) any person who has issued a prior express invitation or given her permission, (2) any person with whom the caller has an established business relationship, or (3) communications by or on behalf of tax-exempt non-profit organizations.

The FCC's rules require that any message sent to a fax machine must clearly mark on the first page or on each page of the message, the date and time the transmission is sent, the identity of the sender, and the telephone number of the sender or of the sending fax machine.

Sending an unsolicited fax will not automatically activate enforcement by the FCC. However, if someone does file a complaint against the company, the FCC will pursue the following course of action. First, the FCC will issue a citation to your company pursuant to the TCPA, which authorizes the FCC to issue citations to non-common carriers (entities other than phone companies) for violations of the act. That

citation will be an order to stop sending your solicitations and serves as a warning that subsequent violations could result in imposed monetary forfeitures.

Read the Fine Print

If the company disregards the citation and continues faxing its friendly business reminders, it should prepare to pay up. Should the FCC find out that the company did not heed its warning, it will issue a Notice of Apparent Liability, or NAL. The NAL will include a forfeiture amount, or fine, that could easily soar into the six-figure range or higher. To date, the FCC has fined companies more than \$1.5 million. Texas-based Carolina Liquidators recently was fined \$230,000 by the FCC when the company sent at least 34 additional series of faxes, after it had been ordered by citation to stop. The FCC based the amount of the fine at \$4,500 for each of the first 20 violations, and \$10,000 for each of the additional 14 violations in which consumers had expressly requested that Carolina Liquidators discontinue the unsolicited fax advertisements.

T E L E C O M

The maximum fine enforceable for most companies is \$10,000 per violation. That amount applies to all businesses not classified as broadcasters, cable operators, or common carriers. That amount can increase up to a maximum of \$82,500 for each continuing violation. Broadcasters and cable operators, or FCC applicants filing to provide such services can be fined up to \$27,000 per violation, with a \$75,000 maximum for each continuing violation. Common carriers can be fined up to \$110,000 per violation with a \$1.1 million maximum for each continuing violation.

Upon receipt of the NAL, the served party must either respond to the NAL or pay the full amount of the proposed forfeiture within 30 days of the issuance. At that time, it would also be a good idea to consult with an experienced telecommunications attorney. Prepare to pay counsel by the billable hour. Depending on the forfeiture amount, legal bills could run as high as the fine, if not higher. If you fail to respond to the citation or pay the fine within that 30-day window, the forfeiture amount will be affirmed by the FCC. Failure to pay it then could result in further civil and criminal penalties including referral to the Department of Justice for collection.

The Flip Side

What can your company do if it is the victim of unsolicited faxes?

Companies can take the following actions:

- Ask the solicitor to stop calling your telephone num-

ber or sending unsolicited fax advertisements. You can use the telephone number or address provided by the solicitor on the fax to request this action.

- Find out if your state permits you to file suit to stop solicitation calls or faxes and/or file suit for actual monetary loss. The penalty is \$500 in damages or actual monetary losses (whichever is greater).

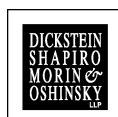
Contact state officials, the FCC's Consumer Information Bureau, or its Enforcement Bureau at 445 12th St. SW, Washington, DC 20554, (Voice) 1.888.225.5322 or (TTY) 1.888.835.5322, <http://www.fcc.gov/>

Before you market your message, choose your medium with care. Consult with outside counsel to ensure your solicitations are on the right side of the law. Share your attorney's advice with your marketing department. Otherwise, sending that fax could be the most expensive call your company has ever made.

There are currently no national laws regulating unsolicited e-mail. The following states have laws that regulate unsolicited e-mail: California, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Louisiana, Missouri, North Carolina, Nevada, Ohio, Oklahoma, Rhode Island, Tennessee, Virginia, Washington, and West Virginia.

Edward S. Hammerman is an attorney at Dickstein Shapiro Morin & Oshinsky LLP, who focuses on regulatory and transactional matters affecting communications companies. For further information Ted can be contacted at Tel: 202-861-9139 E-mail: HammermanT@dsmo.com. Web site: <http://www.legalinnovators.com>

Dickstein Shapiro Morin & Oshinsky LLP is a multiservice law firm that prides itself on learning and understanding client objectives and partnering with clients to generate genuine business value. The firm's clients range from Fortune 500 companies to start-up ventures and entrepreneurs, from multinational corporations and leading financial institutions to charitable organizations and government officials in high-profile investigations. Dickstein Shapiro's five core practice groups - Complex Dispute Resolution, Corporate & Finance, Legislative & Regulatory Affairs, Litigation, and Technology - involve the firm in virtually every major form of counseling, litigation, and advocacy.



Legal Innovators