

December 2004

The Last Blast . . . or Not!

The day after I finished writing my “last blast” article there was a major development in the law that has caused me to add an “. . . or not” to the title and amend the article. Such is the current regulatory environment for most marketing mediums. So, first the article as written:

Perhaps no recent action by the Federal Communications Commission (FCC) has caused so many outcries from the business sector as the 2003 amendment to the Telephone Consumer Protection Act (TCPA) that imposed a complete ban on all unsolicited facsimile advertisements. The outcry was so great that the FCC issued an order placing a moratorium on the enforcement of the new rule until January 1, 2005.

The TCPA defines the term “unsolicited advertisement” 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.” Basically, any advertisement or any other type of solicitation falls under this ban. Each transmittal of an unsolicited fax page containing an advertisement is an independently actionable cause of act.

You may be thinking to yourself “unsolicited faxes” have always been illegal under the TCPA.” This is true, but under the previously existing regulations there was a loophole in the law: a business could send an unsolicited fax advertisement to any consumer or business with which they had an existing business relationship. This allowed restaurants to send lunch time specials to customers who had dropped their business cards in the establishments “WIN A FREE LUNCH” bowl. It also enabled office supply stores to send their customers faxes touting the “SEMI-ANNUAL PRINTER CARTRIDGE SALE” and hotels to fax prior guests the “WEEKEND ROMANTIC ESCAPE PACKAGE”.

Under the new law, businesses may send unsolicited fax advertisements only if they have express written consent to do so from the recipient. The FCC requires the written consent be in writing and include the consenting person’s fax number and signature. Additionally, the fax must contain the date and time sent, an identification of the business, entity or individual sending the fax, along with the telephone number of the fax machine or a telephone number of that business, entity or individual.

The moratorium, scheduled to extend until January 1, 2004, has opened a window of opportunity for companies that wish to continue to send fax advertisement after the New Year. Over the next six months businesses can use the fax to obtain the required consent from businesses and individuals with which they have an existing business relationship.

Now the Update:

The House Energy and Commerce Committee just passed H.R. 4600, the Junk Fax Prevention Act of 2004. This legislation aims to restore the established business relationship exemption. The act has bi-partisan support and many believe the act will be passed soon. Stay tuned!