



Security Policy Considerations for the Junk FAX Prevention Act of 2005

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New FCC rules for the Junk Fax Prevention Act of 2005 have changed the way organizations must handle outbound customer communications via fax that may be considered "unsolicited". In this article we look at the F provisions of the recent ruling and suggest some audits of your information security policies that may help reduce the risk of violating the new fax requirements.

The history of "Junk Fax" regulations

The Telephone Consumer Protection Act of 1991 (TCPA) was designed to protect consumer privacy by placing restrictions on unsolicited marketing by telephone. The TCPA, which modified the Communications Act of 1934, was modified again in 1993 to establish the national "Do Not Call" registry and also had provisions that restricted unsolicited FAX communications. The basic provisions of the Act were that businesses were not allowed to send "unsolicited advertisements" to businesses or individuals without their prior explicit consent.

According to the TCPA:

Section 227(b)(1)(C) of the Act makes it "unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States . . . to use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."

According to the FCC 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."

On July 9, 2005, Congress enacted the Junk Fax Prevention Act of 2005, which proposed changes to the facsimile (fax) advertising rules of the original TCPA to better address the business and consumer protection needs of facsimile transmissions. In April 2006 the FCC approved these changes, which take effect in August 2006.

The new rules: (1) codify an established business relationship (EBR) exemption to the prohibition on sending unsolicited fax advertisements; (2) define EBR as used in the context of unsolicited fax advertisements; (3) require the sender of fax advertisements to provide specified notice and contact information on the fax that allows recipients to “opt-out” of any future transmissions from the sender; and (4) specify the circumstances under which a request to “opt-out” complies with the Act.

While most organizations are not in the business of direct marketing, many businesses routinely use FAX technology as part of normal business operations, especially in communication with customers and business partners. In view of this, information security policies should be examined to help reduce the risk of accidental violation of these new regulations.

Implications for Communication Policies

While each organization should analyze these requirements as part of their regular risk-assessment process, there are some basic audit questions that can help point to additions or modifications to existing information security and privacy policies.

Explicit Permission Required

1. Do our communication policies prohibit sending FAX communications to customers who have not explicitly given consent?

The basic provisions of the Junk Fax Prevention Act are that businesses are prevented from sending unsolicited fax advertisements unless they have an existing business relationship (EBR) as defined by the FCC.

It is generally good practice, regardless of any possible EBR exemption, to obtain permission to send FAX or any communications to customers. Perhaps your organization already has policies and procedures in place to limit unsolicited phone or email communication. These should be modified to include FAX communications as well.

2. Do our policies require that FAX numbers be acquired only by approved means?

According to the Junk Fax Prevention Act, FAX numbers must not be “harvested” or otherwise obtained from 3rd parties. FAX numbers obtained from 3rd parties must include consent from the individual that the fax number could be shared. The burden of proof is on the fax sender to establish that the FAX numbers were acquired with the proper permissions. By establishing documented procedures for acquiring FAX numbers, organizations can limit the potential liability of an individual or department unknowingly acquiring customer data using methods that would violate the Act.

3. Do our policies limit outbound FAX notifications to customers on an approved list?

Another way to mitigate the risk of accidental “junk” faxing is to maintain a list of customers who have elected to receive FAX communications, have an existing EBR as defined by company policy, and have not opted out of future communications. Existing Customer Relationship Management (CRM) systems could be modified to include a field to record customers who have opted out of FAX communications.

Opt-out notice required

4: Do our policies require an explicit opt-out notice on all outbound FAX transmissions?

To avoid problems with the Junk Fax Prevention Act, and to follow good privacy principles, organizations should include an opt-out notice on the standard cover or first page of all outbound FAX communications.

24. Section 2(c) of the Junk Fax Prevention Act adds language to the TCPA that requires senders to include a notice on the first page of the unsolicited advertisement that instructs the recipient how to request that they not receive future unsolicited facsimile advertisements from the sender. [2]

5: Do we have documented procedures for processing opt-out requests?

According to the Act, organizations must provide methods for consumers to opt-out of future FAX communications and must process these request in a reasonable time frame (30 days.) The opt-out 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.

“28. In an effort to balance the needs of consumers who wish to opt-out of faxes with the interests of business, we find that a website address, email address, toll-free telephone number, or toll-free facsimile machine number will constitute ‘cost-free mechanisms’ for purposes of our rules”

6: Do our opt-out procedures insure that requests are handled within 30 days?

According to the Act, opt-out requests must be handled within a “reasonable” period of time.

Taking into consideration both large databases of facsimile numbers and the limitations on certain small businesses to remove numbers for individuals that opt-out, we conclude that a reasonable time to honor such requests must not exceed 30 days from the date such a request is made.

Exemptions for Existing Business Relationships

Much of the focus of the new ruling concerns the exemption based on established business relationship (EBR). According to the FCC:

An “established business relationship” (EBR) 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, which relationship has not been previously terminated by either party.

Businesses are allowed to send unsolicited FAX messages if they can demonstrate that an established business relationship exists between the sender and recipient and certain other conditions are met regarding how the facsimile number was obtained.

7. If our organization is going to use an EBR exemption, do we have a formal definition of this relationship and how it is established?

There are a number of good reasons to formally document what constitutes an existing business relationship for your customers and how this EBR is established. Organizations that wish to use the EBR exemption are subject to a number of additional requirements, including restrictions on how FAX numbers are obtained. If there is a dispute, the organization will be required to demonstrate the existence of the prior business relationship.

“12. To ensure that the EBR exemption is not exploited, we conclude that an entity that sends a facsimile advertisement on the basis of an EBR should be responsible for demonstrating the existence of the EBR.”

A formal definition will also help establish when and how the EBR was established. Business relationships established before the Act are not subject to the same requirements. According to the FCC:

"Pursuant to the statute, the amended rules shall 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."

According to the FCC, any request to "opt-out" of future FAX communications is considered a termination of the EBR as defined by the rule.

Therefore, our rules will reflect that a do-not-fax request will terminate the EBR exemption from the prohibition on sending facsimile advertisements.

8. Do we have documented procedures for collecting FAX numbers?

Organizations that wish to use the EBR exemption have a number of additional requirements that must be followed. Fax numbers can be acquired directly from recipients:

(1) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

Numbers may also be collected from 3rd parties; but these must be validated:

"15. The Junk Fax Prevention Act requires that, if the sender relies on an EBR and obtains the facsimile number from a directory, advertisement or site on the Internet, the sender must ensure that the recipient voluntarily agreed to make the number available for public distribution."

Documented procedures for properly collecting fax numbers can substantially reduce the risk of violating these provisions, and can formalize methods to record and track the validation process.

Fines and Penalties

Recent enforcements by the FCC indicate the organizations can expect fines of between \$4000.00 and \$10,000.00 for each FAX that violates provisions. While the recent Junk Fax law has just been passed, fines have been levied for violations of Section 227 of the Communications Act of 1934.

By March 2006, the FCC had issued 13 different citations and announced "forfeitures" against two different companies for violating junk fax provisions. Companies who continue to violate the provisions after an FCC citation are liable for up to \$11,000.00 per day.

On March 10, 2006 the FCC fined \$22,500 against Elf Painting and Wallpapering ("Elf") for willful or repeated violations of Section 227 of the Communications Act of 1934. The fines worked out to be roughly \$4500.00 for each FAX that violated the Act. According to the FCC announcement:

"Although the Commission's Forfeiture Policy Statement does not establish a base forfeiture amount for violating the prohibition on using a telephone facsimile machine to send unsolicited advertisements, the Commission has previously considered \$4,500 per unsolicited fax advertisement to be an appropriate base amount."

In February 2005 the FCC found First Choice Healthcare, Inc. liable for forfeiture in the amount of \$776,500.00 for repeatedly sending unsolicited faxes even after notification from the FTC. In the case, the Forfeiture Policy of the FCC allows them to escalate the fine to be roughly \$10,000.00 per FAX, due the egregious actions taken by the company.

Conclusions

The FCC is sending a clear message that they will enforce the provisions of junk fax laws. While most organizations are not in the direct marketing business, it would be wise to mitigate the organization risk of accidentally violating the guidelines of the FCC. One clear way to do this is to establish information security policies that document the organizational position on unsolicited fax messaging, and to establish formal procedures to make certain the important privacy decisions are not left up to individuals.

References

[1] FCC consumer site on "junk FAX" laws contains simplified descriptions of the Act's major requirements viewed from a consumer perspective.

<http://www.fcc.gov/cgb/consumerfacts/unwantedfaxes.html>

[2] FCC announcement about Junk Fax Prevention Act of 2005

http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-42A1.doc

[3] Telephone Consumer Protection Act of 1991 (TCPA).

<http://www.fcc.gov/cgb/policy/telemarketing.html>

[4] Link to Junk Fax Prevention Act of 2005 at the Library of Congress on Thomas <http://thomas.loc.gov/cgi-bin/query/z?c109:S.714>:

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