

# Avoid Class Action Litigation: Compliance with the Telephone Consumer Protection Act When Faxing Advertising Material

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Privately Owned Businesses at Much

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In this age of high technology, sending an advertisement over a fax machine may seem outdated. For many companies, however, communicating via fax is still the simplest and most effective means of reaching customers and potential customers. Yet a seemingly innocent fax could result in class action litigation alleging violations of the "junk fax" prohibitions of the Telephone Consumer Protection Act (TCPA). Although TCPA class actions are not as common as some other types, companies large and small continue to be sued in what is essentially a cottage industry for certain plaintiff's lawyers.

Under the TCPA, it is illegal to use a fax machine, computer or any other device to send unsolicited advertisements to a telephone fax machine. The recipient of an unsolicited fax advertisement may sue to recover "actual damages" or \$500 per violation, whichever is greater. If the defendant's conduct is found to be "willful," the court may treble damages to a potential \$1,500 per violation. In a class action suit involving hundreds—or even thousands—of fax recipients, the damages can skyrocket.

The TCPA defines an advertisement broadly as any fax that describes the quality of a company's goods or services. Given this low threshold, you should assume that any fax informing the recipient about your goods and services will be considered an "advertisement" or "solicitation" under the TCPA. It makes no difference if the communication is glossy and professional or crude and handmade.

## Navigating the Exceptions

The TCPA does allow fax solicitations under certain circumstances, but only if the recipient *expressly* invites or permits the communication. However, this is not always easy to achieve and may ultimately defeat the purpose of using a fax, rather than standard mail, electronic mail or other means. Moreover, even if you can secure an invitation or permission from the recipient, you may still be sued. In most TCPA class actions, whether recipients expressly invited or permitted the faxes they received is one of the key issues, involving extensive discovery and motion practice. The burden may be on the plaintiff to establish its case, but the tables often feel turned on defendants, who must produce countless records to show that they obtained permission or an invitation before sending faxes to their customers and potential customers.

The TCPA allows *unsolicited* fax advertisements only when there is an established business relationship (EBR) between the sender and the recipient. The sender must have obtained the fax information directly from the recipient within the context of the EBR, or the recipient must have voluntarily supplied its fax information to the public via a directory, advertisement or Internet site.

For this EBR exception to apply, the advertisement must also contain a notice advising recipients that they may request the sender not to send any future unsolicited advertisements and that failure to comply with the request is unlawful. The notice must also contain telephone and fax numbers for the recipient to transmit the request to the sender, and there must be a cost-free mechanism in place for transmission.

Because the TCPA's rules are so complex, it is best to consult your attorney before sending any advertising material via fax.

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