

## Still Sending Faxes? Consider Content Before Hitting “send”!

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Last week, the Federal Communications Commission (the Commission) released an [Order](#) denying a Petition for Declaratory Ruling by Kohll’s Pharmacy & Homecare, Inc. (Kohll’s) originally filed on March 29, 2016, requesting the Commission to declare that certain faxes describing the health benefits of flu vaccinations did not constitute unsolicited advertising under the Telephone Consumer Protection Act (TCPA) and, therefore, sending them did not violate the TCPA. The sending of unsolicited fax advertisements, which Kohll’s apparently did, is squarely within the conduct restricted by the TCPA.

The TCPA, 47 U.S.C. § 227, is a federal statute that was enacted in 1991 to address concerns relating to telemarketing/solicitation practices. Not surprisingly, the TCPA has become a hot-button issue for class-action lawyers across the country due to uncapped statutory damages ranging from \$500 to \$1,500 per violation (the top end being reserved for “willful” violations), as well as an increasingly expansive interpretation of the statute given by the Commission and some courts.

The TCPA generally prohibits, among other things, the sending of unsolicited fax advertisements. The TCPA defines unsolicited advertisement to mean “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.”

Kohll’s petition stemmed from a lawsuit alleging that it had sent unsolicited faxes to businesses advertising the availability of corporate flu shots by Kohll’s. In its petition, Kohll’s contended that the faxes did not promote the sale of any good or service but rather provided health information and were intended to promote wellness by encouraging people to avoid illness by getting vaccinated. Alternatively, Kohll’s sought a declaratory ruling that the faxes were exempt from the TCPA on the same reasoning underlying the exceptions for healthcare-related calls subject to HIPAA. Finally, Kohll’s argued that exempting healthcare related calls, but not faxes, would violate the First Amendment as an overly burdensome restriction on commercial speech without a rational basis. All of Kohlls’ arguments were unsuccessful.

The Commission ultimately concluded that Kohlls’ faxes clearly constituted unsolicited

advertisements for the primary purpose of selling flu shots. In its analysis, the Commission focused on three (3) primary aspects of the faxes:

1. The language used by Kohll's in the faxes;
2. The amount of space devoted to advertising versus the amount of space used for non-advertising information; and
3. The primary purpose of the faxes.

The Kohll's fax stated in bold, highlighted print, "Corporate Flu Shots" and "Only \$16-\$20 per vaccination," which were considered key elements indicating their "commercial availability" pursuant to the Commission's definition of "advertisement." Further, the use of the word "only" as a modifier of the \$16-\$20 price range evidenced that the purpose of the fax was not just to convey neutral facts, but rather to encourage sales. The inclusion of price in the fax was strongly probative in determining the language was an "advertisement" because the primary purpose of including price will almost always be to convince the fax recipient that the price for the product or service is reasonable and that a purchase should be considered.

When considering the amount of space devoted to advertising versus the amount of space used for non-advertising information, the Commission noted that in the only section of the fax arguably containing non-advertising information, the fax mentions, in much smaller print, the economic harms of flu infections and the commercial advantages of purchasing vaccinations for the employees of a business. However, even that language was interpreted by the Commission as encouraging a purchase of Kohll's vaccination service so as to avoid the negative effects of the flu.

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