



---

Portfolio Media, Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | [www.law360.com](http://www.law360.com)  
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | [customerservice@law360.com](mailto:customerservice@law360.com)

---

## FCC Junk Fax Ruling Signals Agency's Flexibility On TCPA

By **Allison Grande**

Law360, New York (November 07, 2014, 7:45 PM ET) -- The Federal Communications Commission recently took the unprecedented step of granting advertisers retroactive immunity for sending solicited faxes that lacked opt-out notices, giving businesses hope the regulator will take a similarly lenient approach regarding other Telephone Consumer Protection Act provisions they find confusing, such as what constitutes an "autodialer" or "called party."

In an **Oct. 30 order**, the FCC dealt a blow to advertisers by confirming that they must include information on both solicited and unsolicited faxes that clearly and conspicuously tells recipients how to opt out of future communications, in order to avoid running afoul of the Junk Fax Prevention Act, which amended the TCPA.

The commission had declared in a 2006 order that opt-out notices were required even if the recipient had given the sender permission to send faxes, but companies had argued that that order was not clear about the notice requirement for solicited faxes. The FCC in its latest order refused to change course, but it acknowledged the potential for confusion in electing to grant a retroactive waiver of the rule to more than two dozen companies and extending an invitation for others to apply for the waiver within the next six months.

"The retroactive waiver that was granted is a good exercise of common sense, something that is not always present in TCPA jurisprudence," said Scott Shaffer, a partner at Olshan Frome Wolosky LLP. "Thanks to the waiver, businesses guilty of technical but largely harmless violations of law will not be subject to potentially crushing \$500-per-fax liability."

While the FCC's latest ruling largely confirmed what it had laid out in 2006, it showed its nascent willingness to balance junk-fax enforcement with concerns among businesses that widespread uncertainty over how to implement the regulations would expose them to crippling class action liability, attorneys say.

"It's a really excellent way of splitting the baby," Reed Smith LLP partner Judith Harris said. "This way, nobody gets everything."

And with dozens of petitions pending before the FCC on confusing and hotly contested issues such as the definition of "autodialer" and "called party," as well as the liability that attaches to calls and texts sent to **reassigned cellphone numbers**, the balanced approach reflected in the spam fax order could catch on, according to attorneys.

"This could be a way of saying in future [orders on petitions] that we're telling you what the law is going forward, but we understand that there has been some confusion and ambiguity to this point, so we're going to give businesses the opportunity to get waivers so

the plaintiffs' bar can't exploit the ambiguities," Harris said.

The FCC previously hinted at its willingness to more evenly balance consumer and business interests in **resolving a petition** brought by SoundBite Communications Inc. over confirmatory text messages.

Although the commission didn't grant retroactive waivers to any companies then, it did confirm that although companies are not allowed to bombard consumers with confirmation messages once they opt out of receiving communications, they can transmit a final, one-time text to confirm receipt of an opt-out request to consumers who had previously consented to texts without violating the TCPA.

"By giving businesses one free bite of the apple, the commission found a really interesting way to protect consumers while still encouraging class action attorneys to enforce the law in the case of serious violations where the sender should have known the law," Harris said.

But in giving both sides something to be happy about in its rulings, the commission is likely to spark fierce debates between the parties over what the orders did not give them, and how far the regulator is allowed to go to influence the growing wave of private litigation filed under the TCPA, attorneys say.

The commission's recent junk fax order clearly highlights the divide. On the plaintiffs' side, attorneys praised the ruling for confirming that even consumers who have consented to receive communications must have the opportunity to easily withdraw that permission.

"The ruling can be viewed as a benefit to consumers by confirming their right to control what ads they receive through the withdrawal of any prior consent they may have provided," said Ryan Andrews, a partner at plaintiffs firm Edelson PC.

But along with their approval of the holding, plaintiffs attorneys expressed reservations about the commission's decision to allow businesses that, as Joseph Siprut of Siprut PC put it, "feign confusion or ignorance about their obligations going forward" to dodge liability for the next six months.

While Siprut called the waiver an "equitable solution," fellow plaintiffs attorney Brian Wanca of Anderson & Wanca called the decision "disappointing on a number of fronts," including that there had been no challenges to the FCC's 2006 order, indicating that "there was never any confusion by any of the petitioners."

Wanca also criticized the regulator for issuing the waivers without any fact-finding into the pivotal issue of whether the recipients had consented to receive the faxes in the first place, and asserted that the waivers effectively stripped litigants of their ability to bring private rights of action under the TCPA.

"Under the separation of powers, the agency doesn't have the ability to interfere with the court's interpretation of what the law is," Wanca said.

While Wanca was uncertain about how courts would respond to the waivers, defense attorneys predicted the commission's action would, at least in the short term, greatly reduce the number of pending court disputes over opt-out notifications being left off of faxes.

"What the ruling means for companies that receive retroactive waivers and are in current litigation is that, if they can show that they had proper permission to send faxes, they don't have to worry about the opt-out requirement," Loeb & Loeb LLP partner Christine Reilly said. "That means that many companies may find that they can get their cases dismissed entirely, or at least curtail their potential liability."

However, defense attorneys quickly noted that the reprieve won't last for long. Because the FCC set a six-month deadline for businesses to strictly comply with the ruling, companies that fail to meet their broadened obligations will no longer have confusion and ambiguity as a defense to stave off suits after April 30.

"It seems likely that once the waiver period elapses, there will be an uptick in litigation involving the failure of senders to comply with the now-reiterated opt-out requirement," Vinson & Elkins LLP partner Jason Levine said.

With both sides finding reason to take issue with the commission's order, attorneys noted that an appeal of the decision is likely to resolve issues including whether the FCC has the ability to regulate solicited faxes or to issue liability waivers.

Businesses could derive some support from scathing partial dissents by commissioners Ajit Pai and Michael O'Reilly to the junk fax order, which both cast doubt on whether the commission has the statutory authority to require opt-out notices for solicited faxes.

"The partial dissents show that the issues are clearly not black and white and that even the FCC commissioners have divergent views on them," Reilly said.

Given that divide, attorneys anticipate that the regulator will continue to seek out middle ground to appease both those that want to aggressively enforce TCPA restrictions and those that are sensitive to the ambiguities that could expose businesses to significant liability.

"The dozens of petitions pending before the FCC on various issues under the TCPA make clear that there is widespread confusion about the decisions made in this space and a lack of clarity on what the law requires," Reilly said. "I really hope that the FCC considers taking a practical approach to those petitions to come up with some relief that allows companies to conduct business as well as comply with the law in a way that is reasonable."

--Editing by John Quinn and Brian Baresch.

---

All Content © 2003-2014, Portfolio Media, Inc.