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Telemarketing

The Federal Communications Commission’s “Solicited Fax Rule,” which requires senders to include a lengthy opt-out notice on all fax advertisements, is now subject to appeals in the D.C. Circuit Court. If the court upholds the rule, large and small businesses could confront more lawsuits claiming technical violations of the rule. If the court strikes down the rule, the FCC’s ability to regulate under the Telephone Consumer Protection Act could be narrowed. In this case, the D.C. Circuit also could go so far as to clarify the legal standards applicable to compelled speech under the First Amendment. Wiley Rein LLP’s Megan L. Brown and Brett A. Shumate offer analysis on the issue in this installment of BNA Insights.

D.C. Circuit Challenge to FCC’s Authority Over Fax Advertisements Has Important First Amendment Implications

BY MEGAN L. BROWN AND BRETT A. SHUMATE

A battle is brewing in the D.C. Circuit over the Federal Communications Commission’s authority to regulate fax advertisements under the relevant statute and the First Amendment.

Megan L. Brown is a partner in Wiley Rein LLP’s Communications, Litigation, and Appellate practices. She represents corporations and industries in litigation and regulatory proceedings and develops compliance strategies under a variety of statutes and the Constitution, including the First Amendment. She can be reached at mbrown@wileyrein.com.

Brett A. Shumate is a lawyer in the Communications, Litigation, and Appellate practices at Wiley Rein LLP. He is an accomplished litigator with experience handling appellate matters and questions of first impression for the communications industry, including under the First Amendment. He can be reached at bshumate@wileyrein.com.

For many years, the FCC has regulated *unsolicited* fax advertisements as clearly permitted under the Telephone Consumer Protection Act (TCPA). 47 U.S.C. § 227(b)(1)(C). The TCPA defines an unsolicited fax advertisement as one sent to any person *without* that person’s prior express invitation or permission. In 2006, the FCC expanded its reach to *solicited* fax advertisements sent *with* the recipient’s prior express consent or permission. Now, the FCC’s authority to regulate solicited fax advertisements is being challenged in the D.C. Circuit.

The FCC’s “Solicited Fax Rule” requires the sender to include a lengthy opt-out notice on all fax advertisements, even those sent with a customer’s prior express consent or permission. 47 C.F.R. § 64.1200(a)(4)(iv). The rule has led to substantial, vexing litigation over technical violations by companies. Indeed, many companies large and small have been sued in class actions for sending solicited fax advertisements to their customers without FCC-approved opt-out notices on their fax advertisements to customers that have asked or consented to be contacted. The TCPA authorizes private lawsuits alleging a violation of the Solicited Fax Rule and awards successful plaintiffs with \$500 in dam-

ages for each violation. Plaintiffs have attempted to convert technical missteps under the Solicited Fax Rule into multi-million dollar class-action lawsuits under the TCPA.

Not surprisingly, interested parties have sought judicial review of the FCC's order, and multiple appeals have been consolidated in the D.C. Circuit. Many plaintiffs in TCPA cases have challenged the FCC's order because the retroactive waivers could lead to the dismissal of their class action lawsuits. At the same time, some recipients of retroactive waivers of the Solicited Fax Rule have filed appeals, mounting a fundamental challenge to the FCC's ability to enforce the rule prospectively.

Over 20 companies defending such lawsuits petitioned the FCC for relief, asking for a retroactive waiver or repeal of the Solicited Fax Rule. Several of these companies argued that the rule violates the First Amendment to the extent that it requires solicited faxes to contain an opt-out notice. On Oct. 30, 2014, the FCC retroactively waived the rule for these companies, finding that the FCC's 2006 order adopting the rule had created uncertainty about whether the opt-out notice requirement applied to solicited fax advertisements. (*Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, Docket No. 05-338, FCC 14-164.)

In addition, the FCC denied petitions seeking to repeal the Solicited Fax Rule entirely. In doing so, the FCC reaffirmed the controversial notion that the TCPA authorizes the FCC to regulate solicited fax advertisements. In particular, the FCC defended the Solicited Fax Rule under the First Amendment, concluding that the requirement to include an opt-out notice of fax advertisements "is not only necessary but essential to further the governmental interest in protecting consumers from unwanted fax ads." Because "Congress has expressed a strong governmental interest in protecting consumers from the costs and annoyance of unwanted fax ads," the FCC reasoned that an "opt-out notice provides consumers who have given prior express permission to be sent faxes the ability to revoke that permis-

sion and have them halted, should they decide they no longer wish to receive them."

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At least one appellate court has signaled doubt about the FCC's authority to regulate solicited fax advertisements. In *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013), the Eighth Circuit refused to hear a TCPA defendant's challenge to the rule, but the court explained that the TCPA "itself does not expressly impose similar limitations or requirements on the sending of solicited or consented-to fax advertisements," *id.* at 683. Indeed, the TCPA expressly authorizes the FCC to regulate "unsolicited fax advertisements," but there is no similar delegation of authority to regulate solicited fax advertisements.

Beyond these concerns under the TCPA, the Solicited Fax Rule raises serious constitutional concerns. The government bears the burden of justifying mandates on private parties to speak, but the applicable legal standards are in flux. The FCC's rule compels businesses to include a government-approved notice on fax advertisements and restricts the ability of businesses to communicate with their own customers. Courts have upheld the FCC's authority to regulate unsolicited fax advertisements because of a recognized "substantial interest in restricting unsolicited fax advertisements in order to prevent the cost shifting and interference such unwanted advertising places on the recipient." (*Missouri v. Am. Blast Fax*, 323 F.3d 649, 655 (8th Cir. 2003); *Destination Ventures v. FCC*, 46 F.3d 54, 56, 57 (9th Cir. 1995).) However, the Eighth Circuit has suggested that the analysis "would not necessarily be the same if applied to the agency's extension of authority over solicited advertisements." *Nack*, 715 F.3d at 683. The ability of the FCC to compel this sort of private communication has serious First Amendment implications.

These appeals present important questions about the FCC's authority to regulate commercial speech. If the court upholds the Solicited Fax Rule, large and small businesses could have to deal with even more lawsuits claiming technical violations of the rule. Should the court strike down the Solicited Fax Rule, it could significantly narrow the FCC's ability to regulate under the TCPA. This case could also present an opportunity for the D.C. Circuit to apply and clarify the legal standards applicable to compelled speech under the First Amendment.