

Dated: October 17, 2008.

Edward L. Connor,

Acting Federal Insurance Administrator,
National Flood Insurance Program,
Department of Homeland Security, Federal
Emergency Management Agency.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket Nos. 02-278 and 05-338; FCC
08-239]

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005

AGENCY: Federal Communications
Commission.

ACTION: Final rule; clarification.

SUMMARY: In this document, the Commission addresses certain issues raised in petitions for reconsideration and/or clarification of the Report and Order implementing the Junk Fax Prevention Act of 2005. The Commission believes the clarifications provided will assist senders of facsimile advertisements in complying with the Commission's rules in a manner that minimizes regulatory compliance costs while maintaining the protections afforded consumers under the Telephone Consumer Protection Act (TCPA).

DATES: Effective October 30, 2008.

FOR FURTHER INFORMATION CONTACT:

Erica McMahon, Consumer & Governmental Affairs Bureau at (202) 418-0346 (voice), or e-mail Erica.McMahon@fcc.gov.

SUPPLEMENTARY INFORMATION:

This is a summary of the Commission's *Order on Reconsideration*, FCC 08-239, adopted on October 8, 2008, and released on October 14, 2008. The Order on Reconsideration addresses certain issues raised in petitions for reconsideration and/or clarification filed in response to the Commission's *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278 and 05-338, Report and Order and Third Order on Reconsideration, document FCC 06-42 (*Junk Fax Order*), published at 71 FR 25967, May 3, 2006. Copies of document FCC 08-239 and any subsequently filed documents in this matter will be available for public inspection and

copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. Document FCC 08-239 and any subsequently filed documents in this matter may also be purchased from the Commission's duplicating contractor at Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554. Customers may contact the Commission's duplicating contractor at their Web site: <http://www.bcpweb.com> or call 1-800-378-3160. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice) or (202) 418-0432 (TTY). Document FCC 08-239 can also be downloaded in Word and Portable Document Format (PDF) at: <http://www.fcc.gov/cgb/policy>.

Paperwork Reduction Act of 1995 Analysis

Document FCC 08-239 does not contain any new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

Synopsis

1. In document FCC 08-239, the Commission clarifies that: (1) Facsimile numbers compiled by third parties on behalf of the facsimile sender will be presumed to have been made voluntarily available for public distribution so long as they are obtained from the intended recipient's own directory, advertisement, or Internet site; (2) reasonable steps to verify that a recipient has agreed to make available a facsimile number for public distribution may include methods other than direct contact with the recipient; and (3) a description of the facsimile sender's opt-out mechanism on the first Web page to which recipients are directed in the opt-out notice satisfies the requirement that such a description appear on the first page of the Web site. The Commission believes these clarifications will assist senders of facsimile advertisements in complying with the Commission's rules in a manner that minimizes regulatory compliance costs while maintaining the protections afforded consumers under

the Telephone Consumer Protection Act (TCPA).

Junk Fax Prevention Act of 2005

2. On April 6, 2006, as required by the Junk Fax Prevention Act, the Commission released the *Junk Fax Order* amending its rules on unsolicited facsimile advertisements. In so doing, the Commission adopted the requirements of that statute virtually verbatim. As relevant here, the Junk Fax Prevention Act allows a sender that has an established business relationship (EBR) with the recipient to send an unsolicited facsimile advertisement if the sender obtained the number of the facsimile machine through: (1) The voluntary communication of such number, within the context of the EBR, from the recipient of the facsimile advertisement, or (2) a directory, advertisement, or site on the Internet to which the recipient *voluntarily agreed* to make available its facsimile number for public distribution. For this second category of facsimile numbers, the Commission found that it would be unduly burdensome for senders of facsimile advertisements to verify that the recipient voluntarily agreed to make the facsimile number public in every instance. As a result, the Commission concluded that "a facsimile number obtained from the *recipient's own* directory, advertisement, or internet site was voluntarily made available for public distribution, unless the recipient has noted on such materials that it does not accept unsolicited advertisements" at that number. The Commission noted, however, that if a sender obtains the facsimile number from sources of information compiled by third parties—such as membership directories and commercial databases, the sender "must take reasonable steps to verify that the recipient consented to have the number listed, such as calling or emailing the recipient."

3. The Junk Fax Prevention Act also requires that all unsolicited facsimile advertisements include an opt-out notice that instructs recipients on how to notify senders that they do not wish to receive future facsimile advertisements. Among other requirements, the opt-out notice must identify a "cost-free" mechanism by which recipients can transmit their opt-out requests. The Commission concluded that, if a sender designates a Web site as its cost free opt-out mechanism, a description of the opt-out mechanism and procedures must be included "clearly and conspicuously *on the first page of the Web site.*" The Commission also clarified that, in accordance with the Junk Fax

Prevention Act, if there are several pages to the facsimile, the first page of the advertisement must contain the opt-out notice. In so doing, the Commission declined to find that the "first page" notice requirement was satisfied by including the notice on a cover page. Rather, the Commission required that the opt-out notice appear on the first page of the advertisement itself. Finally, the Commission declined to limit the time period during which a request to opt out from receiving unsolicited facsimile advertisements remains in effect. The Commission concluded that requiring consumers to repeat their opt-out requests to potentially hundreds of senders of unsolicited facsimile advertisements would be overly burdensome to recipients. Therefore, once an opt-out request has been received, the sender is prohibited from transmitting facsimile advertisements to that number until the sender obtains the prior express permission of the recipient to resume sending facsimile advertisements.

Petitions for Reconsideration

4. On June 2, 2006, two petitions for reconsideration and clarification were filed in response to the *Junk Fax Order*. Specifically, the Direct Marketing Association (DMA) seeks clarification that the *Junk Fax Order* does not prohibit the use of third-party agents to perform services that an organization would otherwise be permitted to conduct internally. In addition, DMA urges the Commission to make clear that when a sender does elect to use facsimile numbers collected independently from a third party source such as a membership directory, that "reasonable steps" to verify the number was provided voluntarily may include measures that do not involve direct contact with the intended recipient. Finally, DMA requests that the Commission reconsider the decision not to limit the time period for which an opt-out request remains in effect.

5. Leventhal Senter and Lerman PLLC (LS&L), on behalf of certain unnamed broadcast clients, seeks reconsideration or clarification of two issues relating to the opt-out notice. First, LS&L requests that the Commission clarify that the requirement that a clear and conspicuous description of the opt-out mechanism appear on the Web site's first page is met when "a dedicated opt-out page [is] specified by URL in the opt-out notice" that appears in the facsimile advertisement. In addition, LS&L suggests that a link could be included on the Web site's homepage to direct recipients to the appropriate internal Web page. Second, LS&L

requests that a properly formatted opt-out notice included on a facsimile cover page complies with the requirement that such opt-out notice appear on the "first page of the advertisement."

Established Business Relationship

Facsimile Numbers Obtained From the Recipient's Own Directory, Advertisement or Internet Site

6. Consistent with the Commission's conclusion in the *Junk Fax Order*, the Commission reiterates that facsimile numbers compiled on behalf of the facsimile sender will be presumed to have been voluntarily made available for public distribution so long as they are obtained from the intended recipient's own directory, advertisement or Internet site. In so doing, the Commission agrees with DMA that it did not limit this presumption to only those situations in which the sender compiles this information through "in-house" employees. Rather, it is the source from which the facsimile number is obtained, and not the identity of the compiler, that provides evidence of whether the recipient intended to make that number available for public distribution. Therefore, no additional verification that the recipient has voluntarily made available his or her facsimile number is required if the number is obtained from the recipient's own directory, advertisement or Internet site. However, the Commission cautions that a sender that uses a third party to compile facsimile numbers will be liable for the errors of its third-party agent or contractor. The Commission also reiterates that senders of facsimile advertisements must have an EBR with the recipient in order to send the advertisement to the recipient's facsimile number. The fact that the facsimile number was made available in the recipient's own directory, advertisement or Web site does not alone entitle a sender to transmit a facsimile advertisement to that number.

Reasonable Steps to Verify That the Recipient Has Voluntarily Made Available a Facsimile Number

7. The Commission clarifies that "reasonable steps" under its rules to verify that a recipient has agreed to make available a facsimile number for public distribution may include methods other than calling or e-mailing the recipient directly. The Commission cited these verification methods in the *Junk Fax Order* as examples that satisfy this requirement. The Commission did not, however, limit parties in this context only to means of direct contact with the recipient.

8. The Commission agrees with DMA that it is possible that the circumstances attending the collection of a facsimile number can provide sufficient evidence that the number has been provided voluntarily for public distribution without the necessity of contacting the recipient. For example, the recipient may expressly agree at the point of collection to allow for public disclosure of the facsimile number. The Commission cautions, however, that should a complaint arise on this issue, the facsimile sender has the burden to demonstrate that the circumstances surrounding the acquisition of the facsimile number reasonably indicate that the recipient agreed to make the facsimile number available for public distribution.

Notice of Opt-Out Opportunity

Location of the Opt-Out Mechanism on the Web site's First Page

9. The Commission clarifies that a facsimile sender satisfies the requirement to provide clear and conspicuous notice of a cost-free mechanism for transmitting opt-out requests when the opt-out notice directs the recipient to a dedicated Web page that allows the recipient to opt-out of future facsimile advertisements. The Commission's rules require that all facsimile advertisements include an opt-out notice by which recipients can inform senders that they do not wish to receive future unsolicited advertisements. The notice must include a domestic telephone number and facsimile number for the recipient to transmit an opt-out request. If neither the required telephone number nor facsimile number is a toll free number, a separate cost-free mechanism must be provided for the recipient to transmit the opt-out request. In the *Junk Fax Order*, the Commission noted that, if the sender designates a Web site as its cost-free opt-out mechanism, a description of the mechanism must be included clearly and conspicuously on the first page of the Web site.

10. The Commission clarifies that a description of the facsimile sender's opt-out mechanism on the first Web page to which recipients are directed in the opt-out notice satisfies the requirement that such a description appear on the "first page" of the Web site. In addition, a clear and conspicuous link should be provided on the Web site's homepage to direct recipients to the appropriate internal opt-out Web page. The Commission agrees with LS&L, however, that it did not intend to mandate that the entire opt-out mechanism must appear on the

homepage of every sender of unsolicited facsimile advertisements. Rather, the intent of this requirement is to provide a reasonable means for recipients to locate the facsimile sender's opt-out mechanism and make requests to avoid future unwanted facsimiles. The Commission believes this interpretation of the "first" Web page requirement adequately ensures that recipients can locate the opt-out mechanism while providing flexibility to facsimile senders in designing their Web sites in the most cost-effective manner to comply with this requirement.

Facsimile Cover Page

11. The Commission declines to reconsider its decision that the first page of the facsimile advertisement must contain the opt-out notice. In so doing, the Commission notes that the Junk Fax Prevention Act requires that "the notice is clear and conspicuous and *on the first page of the unsolicited advertisement.*" Specifically, the Commission declines to find that placement of the opt-out notice on a cover sheet that accompanies the facsimile advertisement satisfies this requirement. The Commission specifically addressed this issue in the *Junk Fax Order*, and petitioners provide no new information or evidence that leads the Commission to now reconsider this conclusion.

Duration of Opt-Out Requests

12. The Commission declines to reconsider its decision not to limit the duration for which a request to opt-out from receiving unsolicited facsimile advertisements remains in effect. Here too the Commission directly addressed this issue in the *Junk Fax Order*, and petitioners provide no new evidence or arguments on reconsideration that lead us to reconsider this finding. The Commission has considered arguments that facsimile numbers may change hands over time and that those who make the opt-out request could, at some point, no longer be the same parties associated with those telephone numbers. The Commission has concluded, however, that these concerns are outweighed by the potential burdens imposed on those recipients that would otherwise be forced to repeat their opt-out requests to potentially hundreds of facsimile senders. The Commission disagrees with DMA's contention that opt-out requests from facsimile recipients should be limited in duration in the same manner as do-not-call requests. The Commission notes that, unlike the rules on telephone solicitations, once an EBR has been established for purposes of allowing the transmission of facsimile

advertisements, it remains in effect indefinitely until the recipient affirmatively opts-out from receiving future advertisements.

13. In contrast, the Commission's rules limit the duration of an EBR exemption in the case of telephone solicitations to no longer than 18 months after a purchase or transaction or three months following an application or inquiry. Thus, the EBR will expire automatically in the case of telephone solicitations without any further action by the consumer. In addition, recipients of facsimile advertisements assume the cost of the paper used, the cost associated with the use of the facsimile machine, and the costs associated with the time spent receiving a facsimile advertisement during which the machine cannot be used by its owner to send or receive other facsimile transmissions. The Commission believes that protecting recipients from the direct costs imposed by unwanted facsimile transmissions is best achieved by declining to limit the duration of an opt-out request.

Regulatory Flexibility Analysis

The Commission notes that no Final Regulatory Flexibility Analysis is necessary for the document FCC 08-239, as it is not making any changes to the Commission's rules.

Congressional Review Act

The Commission will send a copy of document FCC 08-239 in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

Ordering Clauses

Pursuant to sections 1-4, 227, and 303(r) of the Communications Act of 1934, as amended; 47 U.S.C. 151-154, 227, and 303(r); § 1.429 of the Commission's rules, 47 CFR 1.429; and § 64.1200 of the Commission's rules, 47 CFR 64.1200, the *Order on Reconsideration* in CG Docket Nos. 02-278 and 05-338 is adopted.

Petitions for reconsideration and/or clarification filed by the Direct Marketing Association and Leventhal Senter and Lerman PLLC in CG Docket Nos. 02-278 and 05-338 are denied in part and granted in part. The Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, shall send a copy of this Order on Reconsideration, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 93-177; FCC 08-228]

An Inquiry Into the Commission's Policies and Rules Regarding AM Radio Service Directional Antenna Performance Verification

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this proceeding the Commission permits the use of computer modeling techniques to verify that directional AM antennas perform as authorized. The new rules reduce the time and expense associated with the license application for a directional AM station. The changes, consistent with the Commission's streamlining initiatives, reduce the regulatory burden upon directional AM stations to the extent possible while maintaining the integrity of the service.

DATES: Effective December 1, 2008, except for the amendments to §§ 73.61, 73.68, 73.151, and 73.155 which contain information collection requirements that have not been approved by Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of these rules.

ADDRESSES: Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554, <http://www.fcc.gov>.

FOR FURTHER INFORMATION CONTACT: Peter H. Doyle, Audio Division, Media Bureau (202) 418-2700.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Second Report and Order* in MM Docket No. 93-177, adopted September 24, 2008, and released September 26, 2008. The new rules adopted here were proposed in an earlier *Further Notice of Proposed Rule Making* in this proceeding [See 66 FR 20779, April 25, 2001]. The final rules incorporate comments received in response to the *Further Notice of Proposed Rule Making*. The complete text of this *Second Report and Order* is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY-A257), 445 12th Street, SW., Washington, DC