New 'No Solicitation Laws' Dissected at MATSO Meeting

BY RENEE DIIULIO, SENIOR EDITOR

Washington, DC – New federal restrictions on telephone, fax and e-mail marketing will affect the marketing efforts of all companies. To avoid stiff fines for violations, show organizers must be informed and prepared, said David Pawlik, Attorney with Skadden, Arps, Slate, Meagher & Flom LLP. Pawlik spoke at the *Marketing Exchange Program* launched September 23rd by MATSO, the Major American Trade Show Organizers Association.

"This is a timely topic and one that has important implications for almost everyone involved in the sales and marketing of trade shows, especially as it concerns prospecting for new business," said MATSO Managing Director, Meg Ellacott. MATSO members manage shows with at least 200,000 net sq. ft. of exhibit space. The meeting was hosted by NPES/ GASC-GRAPH EXPO and drew show executives from the National Association of Convenience Stores, Convention Management Group, VNU Expositions, National Trade Productions, National Association of Broadcasters, Vision Council of America and INFOCOMM.

The most consequential of the new laws may be those affecting faxes, says Pawlik. Fax transmissions are currently regulated by the Telephone Consumer Protection Act of 1991 (TCPA). TCPA and Federal Communications Commission (FCC) rules prohibit sending unsolicited advertisements to any telephone fax machine, whether business or residential. A fax is not considered unsolicited if is sent with "prior express invitation or permission," specifies Pawlik. Prior express permission arises from an established business relationship (EBR), which is created by a payment, transaction, application or inquiry.

In 2003, the FCC revisited this requirement again and decided to eliminate the EBR exception. The law was scheduled to change on January 1, 2005, so that prior express permission could only be granted in writing by the fax recipient. However, the FCC released an order on October 1, delaying the implementation of the new regulations until July 1, 2005.

A permanent reprieve may be granted if the Junk Fax Prevention Act of 2004 passes before then. The new bill preserves the EBR exception and extends the EBR to 5 to 7 years after the most recent transaction. The bill also requires that recipients be provided with opt-out information.

It is unclear, however, when this new bill will be up for vote. One issue is the extended EBR; opponents feel the new time frame is too long.

The delay will provide more time to those show organizers who have not begun to create a prior consent list-generating program. But according to Pawlik, many have already taken these steps. "Companies have added opt-in lines to their forms so that they are already building lists of clients who have opted to receive the fax transmissions," he says. Electronic signatures are valid, meaning online registration forms have also generated these names.

If the Junk Fax Prevention act does not pass, companies will need to eliminate from their fax lists the names of people who have not granted written permission or risk fines from the FCC. In 2004, Fax.com Inc. was fined nearly $5.4 million by the FCC for willful and repeated violations. Additionally, individual fax recipients may sue for statutory damages.

Fines also exist for breaking the laws regarding telephone and e-mail communications. Telemarketing restrictions will not change, but the Federal Trade Commission (FTC) will issue rules implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 or CAN-SPAM, which regulates e-mail marketing.

The rules will state what constitutes a message's "primary purpose"—commercial, transactional or non-commercial. Messages whose primary purpose is to advertise a meeting may be considered commercial; non-profits are not exempted. Therefore, recipients who opt out of receiving the messages will need to be removed from lists. Associations may be excluded if their messages are determined transactional.

The complete presentation, "Complying With the New Phone, Fax and E-mail Regulations," is available at www.matso.org.

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