



**FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

May 14, 2002

The Whittemore Corporation  
a.k.a. Datafax Solutions  
9330 LBJ Freeway, Suite 260  
Dallas, Texas 75243  
Attention: David Whittemore, President

RE: EB-02-TC-074

Dear Mr. Whittemore:

This is an official **CITATION**, issued pursuant to section 503(b)(5) of the Communications Act of 1934, as amended (Communications Act), for possible violations of the Telephone Consumer Protection Act of 1991<sup>1</sup> (TCPA) and the Federal Communications Commission's rules that implement that Act.<sup>2</sup>

It has come to our attention that your company recently transmitted to telephone facsimile machines unsolicited advertisements for products, goods, or services offered by Stock Communications Group, Inc. a.k.a. Operating Systems, Inc. (see attachments).<sup>3</sup> Pursuant to the TCPA and the Commission's Rules, it is unlawful to use a "telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."<sup>4</sup>

The TCPA and the Commission's rules also require any person or entity who sends a message via a telephone facsimile machine to clearly mark "in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual."<sup>5</sup>

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<sup>1</sup> Pub.L. No. 102-243, 105 Stat. 2394-2402 (1991) (codified at 47 U.S.C. § 227).

<sup>2</sup> 47 C.F.R. § 64.1200.

<sup>3</sup> In addition to the advertisement(s) referenced by and attached to this citation, the complaining party may also have included with the complaint one or more facsimile advertisements transmitted by other senders. This citation concerns only the facsimile advertisement(s) referenced by and attached to the citation, and your response only needs to address such advertisement(s).

<sup>4</sup> 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(3).

<sup>5</sup> 47 U.S.C. § 227(d)(1)(B); 47 C.F.R. § 68-318(d).

The term “unsolicited advertisement” is defined in the TCPA and the Commission’s rules as “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.”<sup>6</sup> The Commission has specified that an established business relationship between a fax sender and recipient constitutes prior express invitation or permission to send a facsimile advertisement.<sup>7</sup> Mere distribution or publication of a fax number, however, does not establish consent to receive advertisements by fax.<sup>8</sup>

Although entities that merely transmit facsimile messages on behalf of others are not liable for compliance with the prohibition on faxing unsolicited advertisements,<sup>9</sup> the exemption from liability does not exist when a fax transmitter has “a high degree of involvement or actual notice of an illegal use and [has] fail[ed] to take steps to prevent such transmissions.”<sup>10</sup> Accordingly, fax transmitters do not enjoy an absolute exemption from liability under the TCPA and the Commission’s Rules.

This citation serves as notice that the unsolicited facsimile advertisements sent by Stock Communications Group, Inc. a.k.a. Operating Systems, Inc. and transmitted by your company violate the TCPA and the Commission’s Rules. The Commission may assess to your company monetary forfeitures not to exceed \$11,000 for each subsequent violation if (1) your company has been highly involved on behalf of the sender of any unsolicited facsimile advertisements, or (2) your company continues to transmit facsimile advertisements for Stock Communications Group, Inc. a.k.a. Operating Systems, Inc. without taking steps to ensure that the sender has obtained permission from recipients to fax the advertisements.

**Pursuant to section 503(b)(5) of the Communications Act, you may request a personal interview at the Commission’s Field Office nearest to your place of business. The nearest office appears to be the Dallas Office at 9330 LBJ Freeway, Room 1170, Dallas, Texas 75243, which you can contact by telephone at (214) 575-6361. You must schedule this interview to take place within 21 days of the date of this citation. Alternatively, you may submit a written statement to the following address within 21 days of the date of this citation:**

Kurt A. Schroeder  
Deputy Chief  
Telecommunications Consumers Division  
Enforcement Bureau

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<sup>6</sup> 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(5).

<sup>7</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752, 8779 n. 87 (1992) (*TCPA Report and Order*); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12408 (1995) (*TCPA Memorandum Opinion and Order*).

<sup>8</sup> *TCPA Memorandum Opinion and Order*, 10 FCC Rcd 12391, 12408.

<sup>9</sup> *Id.* at 12407.

<sup>10</sup> *TCPA Report and Order*, 7 FCC Rcd 8752, 8780 (1992) (quoting *Use of Common Carriers*, 2 FCC Rcd 2819, 2820 (1987).)

Federal Communications Commission  
445 - 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Please reference EB-02-TC-074 when corresponding with the Commission.

If you choose to submit a written statement, you should discuss in detail your company's involvement in faxing advertisements on behalf of Stock Communications Group, Inc. a.k.a. Operating Systems, Inc., including any specific arrangements under which you transmit their advertisements. Please provide copies of any contracts or agreements that memorialize the terms and conditions under which you fax for Stock Communications Group, Inc. a.k.a. Operating Systems, Inc. You should also answer the following questions:

1. Has your company had any control over or involvement in determining the content of advertisements transmitted by facsimile on behalf of Stock Communications Group, Inc. a.k.a. Operating Systems, Inc. or any other entities on whose behalf you transmit advertisements by facsimile? Please describe such control or involvement in detail.
2. Who provided, compiled, or generated the distribution list(s) of telephone facsimile numbers that your company has used to transmit advertisements on behalf of Stock Communications Group, Inc. a.k.a. Operating Systems, Inc. or any other entities on whose behalf you transmit advertisements by facsimile?
3. If your company has been involved in any way in providing, compiling, generating, or editing the distribution list(s) of telephone facsimile numbers that your company has used to transmit advertisements on behalf of Stock Communications Group, Inc. a.k.a. Operating Systems, Inc. or any other entities on whose behalf you transmit advertisements by facsimile, describe in detail the process by which your company produces or participates in the generation of such list(s). Does your company employ or compensate any individuals or entities outside the company, including any tax-exempt nonprofit organizations, for any service, activity, assistance, or facilities used in connection with your company's providing, compiling, generating, or editing of such list(s)? Please describe such arrangements in detail.
4. If your company has been involved in any way in providing, compiling, generating, or editing the distribution list(s) of telephone facsimile numbers that your company has used to transmit advertisements on behalf of Stock Communications Group, Inc. a.k.a. Operating Systems, Inc. or any other entities on whose behalf you transmit advertisements by facsimile, what steps has your company taken to ensure that the telephone facsimile numbers belong to individuals or entities who have agreed, by explicit consent or by virtue of an established business relationship with the advertiser, to receive the advertisement? Please describe in detail the manner in which you record consumers' consent or the existence of an established business relationship and provide copies of any written record-keeping policies with respect to maintaining evidence of such consent or business relationship.
5. Does your company advertise its fax transmittal services, and, if so, by what means? Please provide copies of all print, audio, and video materials that have been used

within the past year to advertise your company's fax transmittal services. For each advertisement, list the media in which the advertisement appeared and the date(s) of such appearance(s).

Under the Privacy Act of 1974, 5 U.S.C. § 552(a)(e)(3), we are informing you that the Commission's staff will use all relevant material information before it to determine what, if any, enforcement action is required to ensure your compliance with the TCPA and the Commission's rules. This will include any information that you disclose in your interview or written statement. Please be advised that if you choose not to respond to this citation and a forfeiture is issued, your unresponsiveness will be considered in our assessment of a forfeiture amount.

You should also be aware that the knowing and willful making of any false statement, or the concealment of any material fact, in reply to this citation is punishable by fine or imprisonment under 18 U.S.C. § 1001.

Thank you in advance for your anticipated cooperation.

Sincerely,

Kurt A. Schroeder  
Deputy Chief  
Telecommunications Consumers Division  
Enforcement Bureau  
Federal Communications Commission

Enclosures