

April 7, 2006

FCC Adopts Commercial Fax Rules

On April 6, 2006, the Federal Communications Commission announced new rules concerning unsolicited commercial fax advertisements. The new rules implement the Junk Fax Prevention Act of 2005 ("JFPA"), a statute that permits companies and other organizations to send faxes to those recipients with whom they have established business relationships. The statute also requires senders to permit recipients to opt out of receiving future messages, and to include a notice to that effect on each fax.

In implementing the JFPA, the FCC adopted proposals made by Covington & Burling on behalf of the Fax Ban Coalition, a group of nearly eighty American businesses and trade associations from the financial, business, publishing, tourism and distribution sectors, and on behalf of other clients. These rules represent important protections for companies and organizations that regularly use fax communication to conduct business.

The FCC's new rules:

- **Permit businesses to send commercial faxes based on established business relationships.** Businesses that can show that they have an established business relationship with a recipient can send commercial faxes to the recipient, as long as the recipient provided the fax number directly to the sender or voluntarily publicized it.
- **Impose no specific recordkeeping requirements on businesses.** Although businesses will be required to prove, in the event of a complaint, that they complied with their obligations under the JFPA, the FCC imposed no specific recordkeeping requirements.
- **Impose no time limit on the length of an established business relationship.** Under the JFPA, businesses do not need to receive express permission to send faxes to recipients with whom they have an established business relationship. In its new rules, the FCC declined to impose any specific limitation on how long such relationships can last.
- **Require senders to include opt-out notices in faxes, but provide flexibility in designing opt-out notices.** Although businesses are generally required under the JFPA to provide recipients with the opportunity to opt out of receiving future faxes and must include an opt-out notice on the first page of each fax, the FCC gave businesses discretion to design opt-out notices that are appropriate for their industries. In its rules relating to opt-out notices, the FCC required only that the notice be "apparent to a reasonable consumer" and include: (a) a notice that the recipient is entitled to opt out; (b) a domestic telephone and fax number for the sender; and (c) include a "cost-free mechanism" for opting out.
- **Define broadly the "cost-free mechanism" for opting out.** Under the new rules, a cost free mechanism includes a web site, an email address, or a toll-free phone or fax number. For faxes sent locally, a local phone number is also sufficient.

- **Not require senders to honor non-compliant opt-outs.** The FCC's decision includes a long sought-after clarification that senders will not be required to honor opt-out requests unless those requests are submitted in compliance with the opt-out notice included with the fax, and include the fax number or numbers covered by the request.
- **Exclude many business communications from fax restrictions.** According to the FCC's decision, many "transactional" faxes and non-commercial faxes sent by nonprofits would not be included in the restrictions on commercial faxes. For example, under many circumstances, receipts and invoices, account statements, loan transaction communications, and travel itineraries would not be included.

These new rules provide recipients with greater ability to opt out of receiving commercial faxes than were available under previous law. However, they also protect legitimate businesses from unnecessary and burdensome government regulation.

The FCC's decision should reduce the litigation risks created by the JFPA, which subjects fax senders to FCC enforcement action and permits recipients to sue senders for as much as \$1,500 per non-compliant fax.

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This information is not intended as legal advice, which may often turn on specific facts. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our communications and media practice group:

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