

## E-ALERT | Communications and Media

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### WAIVERS OF FCC OPT OUT NOTICE RULE AVAILABLE TO SENDERS OF SOLICITED FAXES DURING LIMITED WINDOW

#### Parties Involved in TCPA Fax Litigation May Qualify for Potential Relief

The Federal Communications Commission (“FCC”) [recently granted](#) a group of parties facing lawsuits under the Telephone Consumer Protection Act a waiver of its rule requiring that fax advertisements sent with the recipient’s prior express invitation or permission (*i.e.*, solicited faxes) include an opt out notice. The waiver, which was granted in response to petitions filed by roughly two dozen entities, applies to any solicited fax advertisements that the parties previously sent or that they will send prior to April 30, 2015. Other similarly-situated senders of solicited fax advertisements may request their own waivers from the FCC, but the FCC’s order stated that such other parties should “make every effort” to file their requests by **April 30, 2015**.

#### Background

The Telephone Consumer Protection Act, as amended by the Junk Fax Prevention Act of 2005 (together, the “TCPA”), prohibits the transmission of most unsolicited advertisements via fax. The TCPA authorizes statutory damages to be paid in private civil actions based on a violation of the statute “or the regulations prescribed under” the relevant statutory section.

The TCPA contains a narrow exception that permits the transmission of unsolicited advertisements faxed pursuant to an “Established Business Relationship” (“EBR”) between the sender and the recipient. A sender that wants to take advantage of the EBR exception must, among other things, include an opt out notice on the first page of the fax that meets certain statutory standards and complies with other requirements.

In 2006, the FCC issued regulations implementing the Junk Fax Prevention Act. One of those rules appeared to apply the same opt out notice requirement for *unsolicited* faxes sent pursuant to an EBR to *solicited* faxes. However, a footnote in the FCC order adopting the new rules stated that opt out notices would be required only for *unsolicited* faxes.

In recent years, some plaintiffs began filing putative class action lawsuits under the TCPA asserting that the recipient of any fax advertisement, solicited or unsolicited, is entitled to recover statutory damages if the fax lacks an opt out notice or if the fax’s opt out notice contains any deviation from the content and format prescribed in the FCC’s rules. Some defendants argued that the FCC’s rule could not apply to solicited faxes because the TCPA authorizes the FCC to regulate only unsolicited faxes. However, a federal appellate court ruled that under the statute governing the process for challenging FCC rules, TCPA defendants could not raise defenses challenging the FCC’s authority to regulate solicited faxes. Instead, the appellate court said these defendants must first seek relief from the FCC.

Many defendants — including several represented by Covington & Burling — responded to that appellate decision by filing petitions asking the FCC for various forms of relief, including a declaratory ruling that the FCC’s rules regarding solicited faxes were not “prescribed under” the TCPA provisions allowing for private lawsuits or a waiver of the opt out notice rule as applied to solicited faxes.

### FCC Waiver of Opt Out Notice Rule for Solicited Faxes

In its order addressing the petitions — as well as a similar petition filed several years earlier — the FCC concluded that, although it had the authority to require opt out notices on solicited faxes, the public interest would be best served by granting waivers to the petitioners. According to the order, two factors combined to produce “confusion among affected parties” such as the petitioners regarding the requirements for solicited faxes. The FCC acknowledged that when it proposed rules to implement the Junk Fax Prevention Act, the Notice of Proposed Rulemaking “did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient.” In addition, the FCC noted that the contradictory language contained in its order implementing the Junk Fax Prevention Act “may have caused some parties to misconstrue the Commission’s intent to apply the opt-out notice to fax ads sent with the prior express permission of the recipient.”

The FCC concluded that the combination of these factors “presumptively establishes good cause for retroactive waiver of the rule” with respect to solicited faxes, and that such a waiver would be in the public interest “to ensure that any such confusion did not result in inadvertent violations” that could subject petitioners to substantial damage awards. However, the order states that the opt out notices on any faxes the petitioners send after April 30, 2015 — whether solicited or unsolicited — must contain fully compliant opt out notices. The order also emphasizes that the waiver does not apply to unsolicited faxes — including EBR-based faxes — sent at any time.

Other similarly-situated senders of solicited fax advertisements may request their own waivers from the FCC, but the FCC’s order stated that other parties seeking waivers should “make every effort” to file such requests by **April 30, 2015**.

A number of plaintiffs have filed lawsuits challenging the FCC’s grant of the waivers. At the same time, some of the petitioners also are challenging the portion of the FCC’s order in which the FCC reasserted its authority under the TCPA to regulate solicited fax advertisements. Both sets of challenges will be heard by the U.S. Court of Appeals for the District of Columbia Circuit.

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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:

<b>Yaron Dori</b>	202.662.5444	<a href="mailto:ydori@cov.com">ydori@cov.com</a>
<b>Michael Beder</b>	202.662.5138	<a href="mailto:mbeder@cov.com">mbeder@cov.com</a>

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