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To: All Clients

November 11, 2008

FCC CLARIFIES PROVISIONS OF JUNK FAX PREVENTION ACT

Recently, the FCC issued an *Order on Reconsideration* (the “Clarifying Order”) which clarifies certain provisions of its 2006 order implementing the Junk Fax Prevention Act (the “Junk Fax Act”). The Clarifying Order responds to two separately filed *Petitions for Reconsideration and Clarification*, one of which was filed by our office.

Background

The Telephone Consumer Protection Act (“TCPA”), enacted in 1991, prohibits the use of fax machines, computers or other devices to send unsolicited advertisements to another fax machine.

The Junk Fax Act, enacted in 2005, provides an exception to the prohibition on sending unsolicited fax advertisements, allowing a party to send unsolicited fax advertisements to another party with which it has an “established business relationship,” provided that (i) the sender obtained the recipient’s fax number voluntarily from the recipient, or from a directory, advertisement, or website which the recipient voluntarily made its fax number available for public distribution, and (ii) the sender provides the recipient with notice, on the first page

of the unsolicited fax advertisement, of a means to “opt-out” from receiving future fax advertisements. The notice must include a domestic telephone number and fax number for the recipient to transmit an opt-out request. If neither the telephone number nor fax number is a toll free number, a separate cost-free mechanism must be provided for the recipient to transmit the opt-out request. If the sender designates a website as its cost-free opt-out mechanism, a conspicuous description of the opt-out method must be included *on the first page of the website*.

In its 2006 order implementing the Junk Fax Act, the FCC required that if a sender obtains the recipient’s fax number from information compiled by third parties, the sender must take “reasonable steps” to verify that the recipient consented to have the number listed, *including by calling or emailing the recipient*.

FCC Clarification

In the Clarifying Order, the FCC stated that a fax sender satisfies the requirement to provide notice of a cost free mechanism for transmitting opt-out

requests when the first webpage to which recipients are directed in the opt-out notice includes a description of the fax sender's opt-out mechanism, even if such webpage is not the sender's "homepage." The FCC stated that it did not intend to require that the entire opt-out mechanism must appear on the homepage of every sender of unsolicited fax advertisements, but added that a clear and conspicuous link should be provided on the sender's homepage to direct recipients to the appropriate internal opt-out webpage.

The FCC also stated that since the Junk Fax Act requires that the opt-out notice be clear and conspicuous and *on the first page of the unsolicited advertisement*, placement of the opt-out notice on a cover sheet that accompanies the fax advertisement does not satisfy this requirement, and that the opt-out notice must appear on the first page of the advertisement itself.

Further, the FCC clarified that fax numbers compiled by a third party on behalf of the fax sender will be presumed to have been voluntarily made available for public distribution if they were obtained from the intended recipient's own directory, advertisement or Internet site, and that no additional verification that the recipient has voluntarily made available his or her fax number is required if the number is obtained from such sources. The FCC warned, however, that a sender using a third party to compile fax numbers will be liable for the errors of its third-party agent, and reiterated that senders of fax advertisements must have an established business relationship with the recipient in order to send the advertisement to the recipient's fax number.

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If you have any questions concerning the TCPA or Junk Fax Act, please contact an attorney in our office at (202) 429-8970.

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