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## New Rules for Fax Advertising

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Last week the FCC announced amendments to its rules governing fax advertising. The rules prohibit the sending of fax advertisements unless the recipient has given a sending company express permission to send fax advertising **or** the sender and the recipient have an existing business relationship **and** the recipient has made available its fax number for that purpose. The rules also provide that recipients can opt-out of future fax advertising at any time.

In formulating its rules, the FCC acknowledged the need to balance the interests of companies to communicate effectively with their customers with the interests of those who wish to avoid such advertisements. The new rules, like the ones currently in effect, provide that a company may send fax advertisements to parties with whom the sender has an "existing business relationship," but only if the recipient also voluntarily provides its fax number to the sender. The rules recognize that the voluntary provision of a recipient's fax number, coupled with an existing business relationship, can be sufficient to indicate a recipient's consent to receive fax advertisements.

The rules also require that senders provide recipients with a cost-free means to opt-out of receiving future advertisements. The rules apply to advertising messages sent by businesses as well as nonprofit trade or professional organizations, and violations of the prohibitions on unsolicited fax advertising can give rise to a private right of action in state courts.

The FCC will consider a qualifying "existing business relationship" to exist in a variety of circumstances. For example, when a consumer makes a purchase, enters into a transaction, or makes a business inquiry about a company's products or services, these actions are sufficient to create a business relationship. In the event of a dispute, senders bear the burden of proving the necessary business relationship, because they are likely to have kept receipts or other records that would establish such a relationship in the ordinary course of business. The FCC declined to place any limit on the duration of these qualifying business relationships; therefore, senders may continue to send fax advertisements until a recipient requests that the advertisements be terminated.

It is not enough, however, for a sender to have an existing business relationship with a recipient: the recipient must also have voluntarily provided a fax number to the sender to permit fax advertising. Under the new rules, the FCC will consider a recipient's fax number to be voluntarily provided if: (1) it

is provided directly to the sender by the recipient; or (2) a recipient makes its fax number publicly available by publishing it in a directory, advertisement or on an Internet site that is accessible to the public. If the sender obtains the recipient's fax number from a source compiled by a third party—such as a membership directory, commercial database or Internet listing—the sender must verify that the recipient consented to have the fax number listed. Reasonable steps to verify consent include calling or emailing the recipient.

The new rules provide a safe harbor that applies where consumers and businesses formed a business relationship prior to July 9, 2005. For example, if a business sold a product to a consumer in 2004 and obtained that customer's fax number the same year, the business may continue to fax advertisements to that customer regardless of whether the fax number would qualify under the new standards as voluntarily provided.

The FCC's new rules also recognize the need for recipients to be able to terminate unwanted fax advertising. The new rules therefore require that recipients be given a convenient means to opt-out of receiving fax advertisements. The rules require that all fax advertisements contain a notice on the first page of the advertisement explaining that recipients can opt-out of any future advertisements. The opt-out notice must be clear and conspicuous enough to be apparent to a reasonable consumer. The opt-out notice must also provide at least one cost-free means to opt-out along with a domestic contact telephone number and a fax machine number that a recipient can use to opt-out. Acceptable cost-free opt-out methods include a toll-free telephone number, website address or a toll-free fax number. Senders must comply with recipients' requests to opt-out within the shortest reasonable time, not to exceed 30 days after the opt-out request is made. Accordingly, fax senders that are able to honor opt-out requests in less than 30 days must do so.

The new rules, which have not yet been published in the Federal Register, will become effective 90 days after their publication. A party may seek reconsideration by the FCC or review by an appropriate court.

If you have any questions or need any assistance in responding to these new advertising rules, please contact one of the attorneys listed above.