

SCHWARTZ & BALLEN LLP

1990 M STREET, N.W. • SUITE 500
WASHINGTON, DC 20036-3465

(202) 776-0700

FACSIMILE
(202) 776-0720

www.schwartzandballen.com

M E M O R A N D U M

April 10, 2006

To Our Clients and Friends

Re: FCC Final Rule on Established Business Relationships

The Federal Communications Commission (the “Commission”) has adopted a final rule that permits companies to send unsolicited facsimile advertisements to persons with whom they have established business relationships (“EBRs”). The rule implements the Junk Fax Protection Act of 2005, which directed the Commission to implement an exemption to the Commission’s rules to permit the sending of unsolicited facsimile advertisements to recipients with whom the sender has an EBR. The rule will be effective in 90 days after publication in the Federal Register.

The Telephone Consumer Protection Act (“TCPA”) of 1991 prohibits the use of facsimile machines, computers and other devices to send an unsolicited advertisement to a person’s facsimile machine. An unsolicited advertisement is any material advertising the commercial availability of property, goods or services that is transmitted without the recipient’s prior express invitation or permission. Although the TCPA did not expressly exempt persons with whom the sender has an EBR, the Commission crafted an EBR exception when it adopted rules implementing the TCPA in 1992. At the time, the Commission concluded that an EBR evidenced the requisite invitation or permission under the TCPA. However, in 2003, upon further review the Commission reversed its position and determined that the recipient’s express permission must be in a signed writing.

Because of potential disruption to existing businesses, the Commission delayed the effective date for its requirement that companies receive express permission from recipients in order to send unsolicited facsimile advertisements. Congress subsequently enacted the Junk Fax Prevention Act, which codified an EBR exception to the junk facsimile provisions of the TCPA.

SCHWARTZ & BALLEN LLP

Under the Commission's rule, an EBR generally is defined as a prior or existing relationship formed by a voluntary two-way communication with or without an exchange of consideration based on an inquiry, application, purchase or transaction between the parties regarding products or services offered by the sender, which relationship has not been terminated by either party. The Commission did not establish a time limit for EBRs, but indicated that it will evaluate complaints and determine whether to consider imposing a time limit for EBRs.

The final rule adopted by the Commission provides that a person may send an unsolicited facsimile advertisement if the sender has an EBR with the recipient and the following conditions are satisfied:

- The sender obtained the recipient's facsimile telephone number voluntarily from the recipient or from a directory, advertisement or Internet site which received it voluntarily from the recipient
- The advertisement provides the recipient with an opportunity to opt out from receiving future advertisements
- The sender must honor an opt-out request within the shortest reasonable time, not to exceed 30 days from the date of the request

A copy of the FCC's release can be found on our web site at http://www.schwartzandballen.com/whats_new.html.

If you have any questions, please call Gilbert Schwartz, Robert Ballen Tom Fox or Heidi Wicker at (202) 776-0700.