

New California fax law

In June 2005 Congress passed the federal Junk Fax Prevention Act (“JFPA”)¹ in response to new rules developed by the Federal Communications Commission that were scheduled to take effect July 1. The Junk Fax Prevention Act restored the “established business relationship” exception that allows associations and companies to send unsolicited faxes to their members and clients. The JFPA also requires that all unsolicited commercial faxes include an opt-out provision on the first page of the fax, providing a cost-free means for the recipient to request to be removed from the fax distribution list; requires that fax numbers be obtained either directly from the recipient or from a public source to which the recipient gave the number for publication; and “grandfathers” in fax numbers that were already in the possession of the sender at the time the JFPA was enacted.

In October 2005, however, California Governor Arnold Schwarzenegger signed into law a new fax bill that prohibits all “unsolicited advertisements” sent from or received by any person or company located in California without “prior express invitation or permission.”² This new law reverses the federal JFPA’s “established business relationship” exception. Although the U.S. Chamber of Commerce has sued California to block enforcement of the new California fax law, the new law will become effective on January 1, 2006.³ Until and unless the federal court blocks enforcement of the California law, companies sending faxes risk civil suits brought by government officials

and private citizens if they do not comply with the new California fax law. This alert summarizes the new California fax law to help you comply with it.

Parties subject to new California fax law

The new California fax law applies to any person or entity that sends, or causes another person or entity to send, an unsolicited advertisement to a telephone facsimile machine⁴, if either the person or entity, or the recipient of the fax, is located in California.

What is an “unsolicited advertisement”?

The law defines an “unsolicited advertisement” as, “any material advertising the commercial availability or quality of any property, goods, or services that is transmitted to any person or entity without that person’s or entity’s prior express invitation or permission.” Given the breadth of this definition, even sales offers printed on the bottom of invoices that are faxed to recipients may be prohibited unless the recipient has affirmatively elected, or “opted-in” to receive such faxes from the sender. The law does not state how express invitation or permission must be obtained, although it allows the recipient to make such election for either a specific or unlimited number of advertisements, or for a specific or unlimited time period. In other words, a person may request one fax advertisement without consenting to receive future fax advertisements from the sender.

Exceptions from opt-in requirement

Unlike the federal JFPA, the new California law does not include an “established business relationship” exemption for sending unsolicited faxes. In other words, opt-in permission is required from recipients even where the sender and the recipient have an established business relationship.

The new California law includes an exemption for faxes sent “by or on behalf of a professional or trade association” that is a tax-exempt nonprofit organization and in furtherance of the association’s tax-exempt purposes to members of the association, provided that the following three conditions are met:

1. The member voluntarily provided the number to which the fax was sent to the association.
2. The fax was not primarily for the purpose of advertising the commercial availability or quality of any property, goods or services of any third parties. This second condition does not limit faxes sent by an

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association that promote only the association's products or services if it is in furtherance of the association's purpose. For example, a fax to members about an association's annual conference would still fall within the exception.

3. The member recipient has not requested that the association stop sending such faxes.

Note that this exemption does not apply to other types of tax-exempt nonprofit organizations, such as charities or educational organizations.

What the new California fax law prohibits

The new California fax law prohibits a person or entity (a "sender") from using any telephone facsimile machine to send, or cause another person or entity to send, an unsolicited advertisement to a telephone facsimile machine if (1) the sender is located in California, or (2) the recipient is located in California.

The California law requires that all faxes sent to or from California contain the following identifying information either on the first page or in the top or bottom margin of each page sent:

- ▶ name of sender
- ▶ telephone number of sender or sending machine
- ▶ time of transmission

Consequences of noncompliance

Like the federal Junk Fax Prevention Act, the California law allows recipients of the illegal faxes to sue the sender. In addition to injunctive relief, the new law imposes damages of up to \$500 per violation. If a court finds that the sender willfully or knowingly violated the law, the court may increase the amount of the award to up to \$1,500 per violation.

Recommendations

Effective January 1, 2006, every unsolicited advertisement that is faxed by any entity

to recipients in California, and every unsolicited advertisement that is faxed by any entity located in California, is illegal unless the sender has obtained the "opt-in" consent of the recipient to receive such advertisements. As a result, we recommend that you take the following steps:

- ▶ If you are a tax-exempt entity, determine whether you within the exemption for tax-exempt professional or trade associations set forth in the new California law. Even if you fall within the exemption, be aware that faxes advertising third party products or that relate to purposes other than the association's tax-exempt purpose are subject to the requirements of the California fax law.
- ▶ Review any business materials that you currently fax to existing or prospective customers to determine if they could be deemed to be "unsolicited commercial advertisements" subject to the new California fax law.
- ▶ If you are located in California and you believe that any of the materials that you currently send by fax may be deemed to be "unsolicited commercial advertisements," stop faxing such materials until you have obtained opt-in permission to receive such faxes from your existing or prospective customers.
- ▶ If you are located outside of California and you believe that any of the materials you currently send by fax may be deemed to be "unsolicited commercial advertisements," remove all California fax numbers from your lists until you have obtained opt-in permission to receive such faxes from California recipients.
- ▶ Ensure that any faxes that you send comply with the federal JFPA, including the required identifying materials and the opt-out notice. Make sure that the opt-out notice required by the JFPA is drafted to cover only unsolicited commercial faxes. In the event that a recipient exercises its right to opt out, you do not want to be precluded from sending faxes, such as newsletters or legislative

updates, that do not fall within the purview of the JFPA.

Cooley Godward advises clients to review their current fax policies and practices to comply with JFPA and the new California fax law. Please contact an attorney in Cooley's Technology Transactions Group for updated information and further counsel on this matter. ■

Notes

1 Pub. L. No. 109-21, 119 Stat. 359 (2005)

2 Cal. Bus. & Prof. Code §17538.43

3 Mark Larson, U.S. Chamber sues state over law blocking unsolicited fax ads, December 4, 2005, <http://msnbc.msn.com/id/10331976>.

4 The California law defines a "telephone facsimile machine" as equipment that is capable of either or both of the following: (a) transcribing text and/or images from paper into an electronic signal and transmitting the signal over a regular telephone line; and (b) transcribing text and/or images from an electronic signal received over a regular phone line onto paper.