

# COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE NW  
WASHINGTON, DC 20004-2401  
TEL 202.662.6000  
FAX 202.662.6291  
WWW.COV.COM

WASHINGTON  
NEW YORK  
SAN FRANCISCO  
LONDON  
BRUSSELS

March 24, 2006

## VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: Notice of *Ex Parte* Communications  
CG Docket Nos. 02-278 & 05-338

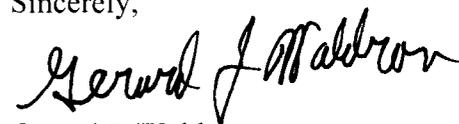
Dear Ms. Dortch:

Yesterday, Jade West, Senior Vice President of Government Relations of the National Association of Wholesaler-Distributors and Director of the Fax Ban Coalition; Steven M. Emmert, Director, Government & Industry Affairs at Reed Elsevier, Inc.; and Gerard J. Waldron and Robert M. Sherman of Covington & Burling met with Commission staff to discuss the Commission's rulemaking to implement the provisions of the Junk Fax Prevention Act of 2005 ("JFPA").

Ms. West and Messrs. Sherman and Waldron met with Dana Shaffer of Commissioner Tate's staff; Ms. West and Messrs. Emmert, Sherman, and Waldron met with Ian Dillner of Chairman Martin's staff; and Ms. West and Messrs. Emmert, Sherman, and Waldron met with Jay Keithley, Erica McMahon, and Richard Smith of the Consumer and Governmental Affairs Bureau. During these meetings, we emphasized that the Commission does not have authority at this juncture to impose time limitations on established business relationships. In addition, the Coalition explained that, in light of the wide variety of industries and business relationships regulated by the JFPA, the Commission must adopt flexible rules that do not impose unrealistic regulatory and litigation burdens on senders of legitimate business faxes.

The attached handouts were used during these meetings.

Sincerely,



Gerard J. Waldron

cc: Dana Shaffer  
Ian Dillner  
Jay Keithley  
Erica McMahon  
Richard Smith

**THE FAX BAN COALITION****Junk Fax Prevention Act of 2005  
CG Docket No. 05-338**

*The established business relationship preserves the ability to conduct legitimate business.*

- The Commission is not yet empowered to impose a time limit on EBRs. Before doing so, it must meet the four requirements in section 2(f) of the JFPA.
- The EBR definition proposed in the NPRM should be adopted.
- Congress intended not to require a writing to demonstrate invitation or permission to send a fax.

*Compliance requirements must be flexible and workable.*

- The organizations, industries, and relationships subject to the TCPA are diverse and varied. An attempt to impose specific permission or recordkeeping requirements will necessarily be both under- and over-inclusive.
- Senders should be permitted to use faxes listed in directory entries if they have a reasonable basis for believing the fax numbers were provided voluntarily. Specific due diligence requirements would eliminate efficiencies associated with directory use, and would therefore stop senders from using them.
- Because senders will keep records that are necessary and efficient to respond to lawsuits under the TCPA and JFPA, it is unnecessary for the FCC to impose specific recordkeeping requirements regarding the existence of EBRs, voluntary provision of fax numbers, and invitation or permission to fax.

*The rules implementing the JFPA's opt-out scheme must be realistic.*

- The Commission should adopt the definition of “clear and conspicuous” that it used in its MSCM rules: *The notice “must be clearly legible, use sufficiently large type . . . and be placed so as to be readily apparent” to a recipient.*
- The Order should provide a “safe harbor” list of opt-out notice elements, whereby senders will know that any opt-out notice including the listed elements will be sufficient. (Senders should have discretion to add or remove content from the notice based on relevant circumstances.)
- Senders should have discretion to identify the cost-free mechanisms that are most efficient for their recipients and their businesses.
- For faxes sent by a fax transmitter, opt-out requests should apply only to the sender on whose behalf the fax was sent, not to all senders that use the transmitter.
- Thirty-one days is an appropriate “shortest reasonable time” for the honoring of opt-out requests.

**THE FAX BAN COALITION****Junk Fax Prevention Act of 2005  
CG Docket No. 05-338****NO TIME LIMIT ON EBR**

The Commission has no authority at this juncture to impose a time limitation on EBRs.

- In section 2(f), the JFPA gives the FCC authority to impose time limitations on EBRs but requires that, “before establishing any such limits, the Commission shall,” in part, “determine whether the [new EBR] has resulted in a significant number of complaints....”
- Because the Commission has no experience with its new rules, it is impossible for the FCC to evaluate its experience as required by the statute. Accordingly, the Commission cannot impose a time limitation in this rulemaking.

Adopting a time limitation at this juncture would be contrary to Congressional intent.

- While the House of Representatives was considering the JFPA, Congressman Markey explained the purpose behind the time limitation provision:

The legislation will permit the Commission to put in place a [duration limit on] the established business relationship, *after the FCC implements the new opt-out policy and it gets a track record on what is happening in the marketplace.* In particular, the Commission will examine consumer complaints to the agency *during this period* with an analysis as to whether junk faxes [cause] a significant number of complaints.

150 Cong. Rec. H6089-02 (emphasis supplied).

The JFPA’s new framework introduces new dynamics with which the FCC has no experience.

- The JFPA paired an EBR with a mandatory opt-out requirement in order to increase recipients’ ability to choose, and to reduce burdens on senders and recipients alike. Specifically, the EBR facilitates faxes between businesses and customers, but the new opt-out requirement gives recipients the ability to prevent faxes from specific senders.
- Although the FTC has limits on EBR in the telemarketing context, those rules are quite different in that the JFPA’s EBR exception applies to both business-to-business and business-to-consumer communications.
- In contrast to other areas in which the FCC commonly regulates, the JFPA involves a wide range of industries and business relationships. Before regulating in this area, Congress intended the Commission to take the time to fully understand the complexities associated with regulating a diverse group of industries.