

HPBA UPDATE: COMMERCIAL FAX ISSUE RESOLVED

Congress recently approved legislation to restore pre-2003 rules for sending unsolicited commercial faxes. The bill, S. 714 – Junk Fax Prevention Act – was signed into law by President Bush on July 9, 2005, and formally ends the long debate over whether businesses and trade associations can send unsolicited advertisement faxes to recipients with whom they have had an “established business relationship” (EBR).

Under the *Telephone and Consumer Protection Act of 1991 (TCPA)*, the law that regulates telemarketing calls and junk faxes, businesses could send faxes to people with whom they have an EBR. The term “established business relationship” means a relationship begun by a voluntary communication by the receiver of the fax regarding products or services provided by the sender of the fax. This relationship exists until either party ends it.

In 2003, a Federal Communications Commission (FCC) ruling eliminated the EBR exemption, thus requiring all businesses and associations to obtain prior written consent from anyone to whom they wanted to send a business-related fax. While the rule never went into effect, the new law permanently reverses that FCC rule. However, the new law does have some additional restrictions and guidelines for unsolicited faxing.

First, the sender can only use fax numbers that are obtained through the voluntary permission of the recipients or through public directories where the recipients have willingly provided their fax numbers with the expectation of receiving faxed information, e.g., websites, directory listings.

Secondly, all unsolicited fax ads must have an opt-out notice. The notice must:

- Be clear and visible on the first page of the fax;
- State that the recipient has the right to ask the sender to stop sending future faxes;
- Tell recipients how to submit opt-out requests, as follows:
 - i. Opt-out request must identify the fax number(s) that are to be removed;
 - ii. Opt-out request must be sent directly to the sender; and
 - iii. Person requesting opt-out must verify that he/she has not given previous permission to the sender to receive faxes;
- Provide a domestic contact telephone and fax number of the sender and a cost-free method for making the opt-out request; and
- Allow individuals or businesses to submit opt-out requests at any time on any day of the week.

Finally, the opt-out notices must comply with current requirements, which state that any unsolicited fax being sent contains, at the top or bottom of each page, the date and time that the fax was sent, the identification of the sender, and the telephone number of the sending fax machine.

Current fax lists are grandfathered from the rules regarding how the sender obtained the fax number. Fax numbers that were obtained prior to the new law and that were obtained through a prior EBR relationship are still eligible for use in unsolicited faxes. If limits are imposed, we will let you know.

With respect to providing the cost-free method for opt-out requests, Congress has granted authority to the FCC to exempt some classes of small businesses from that requirement if it determines that the cost of providing the cost-free method is unduly burdensome. Again, we will keep you informed of any developments. For more information, please contact Jack Goldman at goldman@hpba.org.