



DMA Alert

A Matter of Fax: What Direct Marketers Need To Know About Sending Commercial Faxes

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This fact sheet sets forth requirements for sending commercial faxes off and online given the requirements of the TCPA and the Junk Fax Prevention Act of 2005.

Background

The Telephone Consumer Protection Act (TCPA) was passed in 1991 and is enforced by the Federal Communications Commission (FCC). The TCPA includes fax rules that prohibit sending unsolicited advertisements by fax to both businesses and residences with certain exceptions: (a) where the sender has an established business relationship (EBR) with the recipient or (b) where the fax recipient has given express, prior consent to receive a fax. These rules apply whether you transmit a fax using a computer, a fax machine or another device.

In 2003, the FCC announced it was making changes to a portion of the fax rules. These changes, if they had taken effect, would have eliminated the right of the marketer to send commercial faxes to their existing customers and would have required them to get signed, written permission from both prospects and customers before sending them any unsolicited fax advertisements. In late June 2005, however, the FCC announced it was delaying the effective date of this change until January 9, 2006. In December 2005, the FCC proposed amending its fax rules to bring them into alignment with the Junk Fax Prevention Act (see below) and announced it was again delaying the effective date of the change scheduled to go into effect in January 2006.

New Law Recognizes Established Business Relationship (EBR) Exception

On July 9, 2005, President Bush signed into law S. 714, the Junk Fax Prevention Act of 2005 (JFPA). The Junk Fax Prevention Act of 2005 allows marketers to send commercial faxes to those with whom they have an established business relationship (EBR), but imposes some new requirements. These requirements include providing an opt-out notice on the first page of faxes and establishing a system to accept opt-outs at any time of the day. Fax senders must begin complying with these new requirements, which are described in this fact sheet.

FCC Rules

In April 2006, the FCC released regulations to implement the JFPA. The rules clarify the meaning of an EBR for purposes of the fax rules, set standards for providing the required opt-out notice, and clarify the meaning of an "unsolicited advertisement" subject to JFPA limits on faxes. The rules are effective August 1, 2006. The FCC's regulations are also subject to reconsideration and could be appealed to the courts, so be sure to check back for further updates.

What You Need to Know Before Sending Commercial Faxes

(TCPA & Junk Fax Prevention Act Requirements)

I. Disclosure & Opt-Out Requirements

Q1: What types of faxes are covered by these rules?

A1: Faxes that contain unsolicited advertisements are subject to the notice and opt-out requirements. An unsolicited advertisement is “any material advertising the commercial availability or quality of any property, goods, or services.” This is a broad definition that includes many faxes that companies routinely send.

There are, however, a number of faxes that businesses, nonprofit entities, and others send that the FCC rules will NOT treat as advertisements. Some examples include faxes for debt collection, certain types of "transactional" faxes that serve to "facilitate, complete, or confirm" a prior transaction, and faxes involving political or religious discussion, including requests for donations to political campaigns, PACs, or religious or charitable organizations.

All faxes must include the date and time sent, the name of the sender, and the telephone number of the fax machine or sender.

Q2: What types of information do I need to disclose when faxing?

A2: All faxes, whether unsolicited or solicited and whether sent by fax machine or computer, must include:

- date and time sent,
- registered name of the company sending the fax, and
- phone number of the company sending the fax or the sending fax machine's phone number.

Faxes that contain an unsolicited advertisement must also include:

- an opt-out notice.

Q3: Where should this information appear?

A3: The opt-out notice **must** appear on the first page of the fax. Other information must appear on the first page or in the margin of each page sent.

Q4: What should the opt-out notice look like?

A4: The opt-out notice must:

- be clear and conspicuous;
- appear on the first page of the fax;
- be separate from the advertising copy, or other disclosures;
- be placed at either the top or bottom of the fax.

Note carefully: Do not hide the notice—Make it easy for the fax recipient to find, read, and understand.

Q5: What information should the opt-out notice contain?

A5: The opt-out notice should:

- clearly state that the recipient may opt-out of any future faxes *and* provide clear instructions for doing so;
 - provide both a domestic telephone and a separate, domestic fax number for the recipient to transmit an opt-out request; and
 - provide a cost-free mechanism to opt out (e.g., a toll-free number).
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- Cost-free mechanisms include toll-free numbers (telephone or fax), a website address, and an email address will be considered "cost-free." A local phone number is also considered cost-free if the fax ads are sent locally, and recipients who call will not incur long distance or other charges for calling.
 - You only need to provide one cost-free method. If at least one of the domestic contact numbers is toll-free, that satisfies the obligations to provide a domestic number and a cost-free method to opt-out. If the domestic numbers could result in long distance charges, then you also have to provide a separate, cost-free method, such as a website.
 - If you use a website to accept opt-outs, then the first page of the site must clearly and conspicuously describe the opt-out procedures.

Keep in mind that the recipient must be able to make an opt-out request at any time and any day of the week.

Some suggestions:

- Make sure the fax and telephone opt-out lines are properly staffed and/or set up so that all requests are captured. This means, for instance, making

sure your lines are not busy when recipients call to opt-out and that you have enough voicemail capacity to handle all calls.

- Senders may, but are not required, to honor opt-out requests that are not submitted using one of the methods specified in the notice; the FCC encourages senders to honor opt-outs if they have actual notice of them.

Q6: If I am faxing to a computer or another type of virtual fax equipment, do I need to provide such information?

A6: Yes. You need to provide this information whether sending to a fax machine, a computer or another device.

Q7: If I hire a service bureau to send faxes for me, should my information be provided?

A7: Usually, the "sender," which is the person or entity on whose behalf the fax is sent, must be identified on the fax. If a "fax broadcaster," or service bureau has "a high degree of involvement" in preparing and sending the faxes (such as providing the phone numbers, designing the content, making claims about whether faxes to those numbers are legal, or advising clients about compliance with the fax rules), then the broadcaster must also include its name as registered with a state corporation's commission.

Please note that in August 2005, the FCC issued a citation against a **fax broadcaster**, alleging violations of the TCPA's rules on fax solicitations. The FCC's action indicates that a fax broadcaster will be held liable for unlawful faxes if it "demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent" the sending of unlawful faxes.

Q8: How long do I have to process opt-outs?

A8: Requests have to be honored in the "shortest reasonable time," which may not be more than 30 days from the date of the request. Senders who are capable of complying with opt-outs sooner are required to do so.

NOTE: There is no limit on the duration of an opt-out for purposes of the JFPA rules. Unlike do-not-call requests under the TCPA and FTC Telemarketing Sales Rule, a fax opt-out lasts unless and until the recipient later provides express invitation or permission to send faxes.

II. Customers & Prospects

Q9: May I send an unsolicited ad by fax to prospects?

A9: NO. You may NOT send an unsolicited ad by fax to prospects—either consumers or businesses that you've never contacted before.

Q10: May I send an unsolicited ad by fax to *any* of my customers?

A10: Not necessarily. It depends on when they became your customers and how you obtained their fax numbers. Specifically:

- If an individual was a customer of yours prior to July 9, 2005 (the date the JFPA was signed), you may continue to send this customer faxes, regardless of how you obtained the fax number.
- However, if an individual became your customer after enactment of the Junk Fax Prevention Act on July 9, 2005, then you may only send that customer a fax if:
 - That customer voluntarily provided his/her fax number to you; or
 - That customer voluntarily agreed to make his/her fax number publicly available in a directory, advertisement, or on an Internet site.

NOTE: You can assume a number obtained from a fax *recipient's own* directory, advertisement, or Internet site has been voluntarily made available to the public, unless the source indicates that the number does not accept unsolicited advertisements. If you get you get the fax number from data gathered by *third parties*, then you have to take "reasonable steps" to verify that the intended fax recipient agreed to have the number publicly listed.

Also, check state laws: There are number of states that have more restrictive laws on sending faxes (typically these laws require obtaining consent before sending unsolicited faxes). Although a federal court has ruled that such a law in California applies only to **intrastate** faxes, this decision is limited to California. There is no clear answer to this issue yet. Therefore, you should check state law to be safe. Refer to Answers 15 (A15) and 16 (A16) for more details.

Q11: Can I send a fax to my affiliate's customers?

A11: No. Each entity must have its own established business relationship with a recipient to fax an unsolicited advertisement.

Q12: Do I need to get my customers' permission before sending them an unsolicited ad by fax?

A12: No, you do not currently need to obtain your customers' permission before faxing them an unsolicited ad. However, you should keep in mind the answer to Question 10 (Q10) and the following conditions:

- You must now include an **opt-out notice** in any fax you send to your customers, and you must honor all requests not to be faxed again.
- In addition, you may never send a *prospect* a fax asking permission to fax.
- N.B. Pay attention to state laws, which may be more restrictive. For instance, California has a fax law that prohibits businesses in California from faxing their customers without first obtaining consent. Refer to Answer 15 (A15) for more details.

Q13: If I get prior permission to fax advertisements, does it have to be in writing?

A13: NO. You can get permission orally or in writing, and written permission may be in a variety of forms – including hard copy, email, fax, or via the Internet. But, the consent has to include the fax number to be used and has to be express – "negative option" consent is not sufficient.

Q14: If “John” from Company A asks me to stop faxing, may I still fax “Jane” at Company A?

A14: When you receive an opt-out request for a specific fax number, you need to stop sending faxes to that fax number, regardless of whether the person who made the request is different than the person to whom you are addressing the fax.

Q15: I have an Established Business Relationship (EBR) with my customers. What is the time limit for my EBR?

A15: There is currently no time limit for the EBR. The FCC has the authority to impose a time limit, but has announced that it will review complaint activity over the next year, and then re-evaluate whether it should limit the duration of an EBR. It may be a good idea to prepare for changes in the future by starting even now to keep track of the dates on which individuals became your customers.

It is important to keep in mind that a customer can revoke consent or terminate an EBR at any time: If your customer requests that you stop faxing him/her, you must comply, even if they still do business with you.

Also, it is important to check state laws because some states have different requirements and do not recognize the EBR exemption. For instance, a California fax law that was passed in October 2005 has NO EBR exemption. In February 2006, a US District Court ruled that California's fax law applies to intrastate, but not interstate faxes. For more information on the California law, please review DMA Alert: California Fax Law.

Q16: Does the TCPA ban on sending unsolicited faxes apply to faxing between states & within states? Can I send unsolicited faxes within my state?

A16: The TCPA applies to both interstate and intrastate faxes. Many states also have duplicative prohibitions on intrastate unsolicited faxes. However, some states have enacted more stringent restrictions on faxes and have been attempting to apply them to both intrastate and interstate faxes. Although it is DMA's position that these laws do not apply to faxing within states, until the FCC clarifies the scope of the TCPA, it is advisable to review state laws to make certain there are none that impose a higher burden on obtaining consent. For instance, California has a fax law that prohibits businesses in California from faxing their customers. Refer to Answer 15 (A15) for more details.

Q17: Do the fax rules apply to business-to-business faxing?

A17: Yes. The fax rules apply equally to business-to-business faxes.

Q18: Do the same fax rules apply to nonprofit organizations?

A18: Yes. There is no exemption for nonprofits from the fax rules. Keep in mind, however, that some faxes that nonprofits send may not contain "unsolicited advertisements" and will not be subject to the notice and opt-out requirements. The FCC has said that "all messages involving political or religious discourse," are beyond the scope of the rules, including requests for donations to political campaigns, PACs, or religious or charitable organizations.

Q19: If my company receives signed, written consent, does the permission extend to my affiliate?

A19: Generally no. You need to look at it from the recipient's point of view. The recipient's permission would not extend to your affiliate unless the recipient would reasonably expect to receive the fax given the nature and type of goods or services offered by your affiliate and the identity of your affiliate.

Q20: Do I have to keep records of anything?

A20: The FCC's rules do not require you to keep any particular records, but if there is a dispute, the fax senders have the burden of showing there was an EBR (or consent), and how the number was obtained.

III. New Technology

Q21: Do the TCPA rules apply to faxes sent from computers (e.g. with a fax modem card) to fax machines?

A21: Yes. The TCPA does cover faxing from computers to fax machines.

Q22: Do the TCPA rules apply to faxes sent to computers or e-fax services?

A22: Yes. The FCC amended its rules to apply explicitly to faxes sent to computers or fax servers.

IV. Enforcement

Q23: Where do consumers go to file complaints against companies for violating the TCPA fax rules?

A23: Consumers or businesses may file complaints with the:

- FCC
Consumer & Governmental Affairs Bureau
Consumer Inquiries and Complaints Division
445 12th Street, SW
Washington, DC 20554
www.fcc.gov/complaints.html
1-888-CALL-FCC (1-888-225-5322)
- Their State or Local Consumer Protection Office
- Their State Attorney General's Office
- In court on their own behalf (often this is small claims court)

Q24: What types of fines do companies face if found in violation of the TCPA?

A24: Consumers can bring a private suit, in state court, against a company for violating the TCPA fax ban. Companies can be sued for the actual monetary loss that resulted from the TCPA violation or up to \$500, whichever is greater. In addition, if the court finds that the company willingly or knowingly committed the violation then fines can be tripled for each such violation.

The FCC can impose civil monetary penalties of up to \$11,000 for violations and state attorneys general may bring suits in federal court for

actual damages or \$500 per violation, with treble damages for knowing and willful violations. You can visit the FCC online to see the most recent TCPA enforcement actions: <http://www.fcc.gov/eb/tcd/ufax.html>.

If a lawsuit is successful, the filing party (FCC, state attorney general or consumer) will collect the amount of judgment.

Q25: Is there any liability for fax broadcasters if their clients violate the TCPA?

A25: As a general rule, companies that merely transmit fax messages on behalf of others are not liable for TCPA compliance. However, if the fax broadcaster has a high degree of involvement or actual knowledge of a TCPA violation and hasn't taken any steps to prevent it, then the FCC, in its amended rules, could hold the fax broadcaster liable.

Specifically, the FCC explained that if the broadcaster supplied the fax numbers without first obtaining consent it will be liable for the violation. The FCC noted that other indicia of a high degree of involvement include designing the fax or exercising editorial control over the fax (even if the broadcaster is using the customer's number list, the FCC presumes that in situations where the broadcaster has significant involvement, it should take steps to ensure compliance with the rules).

V. Resources

Q26: Where may I find more information?

A26: You may visit the following links for more information:

- **Federal Communications Commission**
 - http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-42A1.pdf
 - http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-208A1.doc
 - <http://ftp.fcc.gov/cgb/consumerfacts/unwantedfaxes.html>
 - http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-259689A1.doc