

Junk Fax Prevention Act Becomes Law

July 2005

On July 9, 2005, President Bush signed into law S. 714, the Junk Fax Prevention Act of 2005 (Act). The Act immediately came into force, substantially amending the Telephone Consumer Protection Act ("TCPA"; 47 U.S.C. § 227). Since 1992, the TCPA has largely prohibited junk faxes. Now, organizations lawfully may fax advertisements to consumers and businesses with which the organization has a qualifying "established business relationship" (EBR). Organizations must meet each condition of a qualifying EBR before sending any ad fax pursuant to the EBR exception.

In June 2005, the Federal Communications Commission (FCC) announced it would stop recognizing an EBR exception to its do-not-fax rules after January 9, 2006. Passage of the Act appears to supercede this FCC decision. Accordingly, for the foreseeable future, the EBR exception will provide a legal basis for sending advertising faxes.

The TCPA generally restricts individuals, businesses and organizations from faxing "unsolicited advertisements, " a broad category encompassing "any material advertising the commercial availability or quality of any property, goods or services." As amended, the TCPA allows two exceptions to this prohibition: (1) where the fax recipient previously gave express consent to receive a fax and (2) as newly established by the Act, where the EBR exception applies to the fax.

The precise requirements of the EBR exception will not be known until the FCC issues implementing rules. But in broad strokes, the new EBR exception requires meeting the following three conditions:

1. A valid EBR must exist between the fax sender and the fax recipient. An EBR is formed by a "voluntary two-way communication" between the sender and the recipient in the context of an inquiry, application, purchase or transaction. The Act does not limit the duration of an EBR, but gives the FCC authority to set an expiration date. Also, recipients may terminate an EBR at any time by asking the sender to stop transmitting fax ads.
2. The recipient must voluntarily disclose the fax number to use. Such disclosures could be made directly to the sender or to the public generally. However, no separate voluntary disclosure is necessary if, as of July 9, 2005, the sender already had a valid EBR with the recipient as well as the recipient's fax number.

3. Senders must provide notice in ad faxes that recipients can "opt-out" from such faxes at any time. Such notice must conspicuously appear on the first page of the fax and clearly provide instructions and contact information for making a cost-free opt-out request. Senders must honor such opt-outs, even if the recipient continues to do business with the sender.