



Independent Insurance Agents



Brokers of America, Inc.



**THE FEDERAL COMMUNICATIONS COMMISSION'S DO NOT CALL RULE:
APPLICATION TO FAXES
UPDATED AS OF APRIL 20, 2006**

This FAQ is not intended to provide specific advice about individual legal, business or other questions. It was prepared solely as a guide, and is not a recommendation that a particular course of action be followed. If specific legal or other expert advice is required or desired, the services of an appropriate, competent professional should be sought.

The Federal Communications Commission ("FCC") published a Do Not Call ("DNC") rule on July 25, 2003 amending its rules implementing the Telephone Consumer Protection Act of 1991. Those rules have now been superseded by the Junk Fax Prevention Act of 2005 (the "Act"). The President signed the Act on July 9, 2005, and the new law became effective immediately upon signing. The Act allows businesses to send unsolicited commercial faxes to anyone with whom the sender has an established business relationship ("EBR"), unless the recipient has requested not to receive such faxes from the sender.

1. What is the new law about unsolicited faxes?

Businesses will be allowed to continue to send unsolicited commercial faxes to EBR recipients (unless the recipient has opted not to receive such faxes) if the sender had the recipient's fax number prior to July 9, 2005, the date the Act became law. Businesses also may send unsolicited commercial faxes to new recipients if the fax number is obtained either directly from the recipient or from a public source to which the recipient gave the number for publication (e.g., website or published directory).

Regardless of whether the unsolicited commercial fax is sent to someone with a new or prior EBR with the sender, the Act will require that all unsolicited commercial faxes include an opt-out provision. In short, insurance agents and brokers, and state associations (and their subsidiaries) can send unsolicited commercial faxes provided 1) they have an EBR with the recipient, and 2) they provide recipients with the opportunity to opt out of receiving future unsolicited commercial faxes. Opt-out messages should be added to the first page of fax advertisements.

2. Is EBR defined under the Act?

EBR means an established business relationship. The Act required the FCC to make new rules defining EBRs by April 5, 2006, and the FCC has done so. The FCC defined “established business relationship” to mean “a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.” Under the FCC rules, a mere inquiry is enough for an EBR, however, the inquiry must be about the products or services. A phone call asking where the business is located is not enough, nor is visiting a website. For an agent or broker, this means that if a potential customer asks the agent about various insurance products, that is enough. The EBR also does not transfer to affiliates of the sender. This means that if an agency is owned by a parent company, and the parent company has an EBR with a recipient, the agency does not have an EBR with that recipient. Notably, the FCC did not limit the duration of the EBR. Unlike the established business relationship definition for telephone solicitations, which requires a purchase or transaction within eighteen months or an inquiry within three months, the fax EBR does not have time limit requirements.

3. Are there any exemptions from compliance with the new law?

No.

4. Does the new law preempt other federal laws or state laws on unsolicited faxes?

Yes and no. The new law preempts the FCC rule from 2003 that was supposed to go into effect on July 1, 2005 that got rid of the EBR rules entirely and required prior written consent before sending an unsolicited fax even when the sender and recipient had an EBR. The new law does not preempt state law for intrastate faxes (that is, faxes sent within a state) if state law is more restrictive on unsolicited faxes. In those situations, state law should be followed. However, if a state law or regulation is less restrictive than the new law or there is no state law or regulation on such faxes, the new law governs those faxes.

5. When does the new law go into effect?

The Junk Fax Prevention Act was effective upon the signing by the President, on July 9, 2005. In order to implement the law, the FCC needed to make certain rules and regulations to provide further guidance on how businesses are supposed to comply with the law. The FCC’s rules and regulations implementing the law and detailing certain provisions were issued on April 5, 2006 and become effective 90 days later.

6. What kind of faxes are covered by the new rule?

The law covers unsolicited commercial advertisements, which are defined as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise.”

7. How do I comply with the new law?

Agents and brokers should include opt-out language on all unsolicited commercial faxes being sent to recipients with whom they have an EBR. This opt-out should:

- Be clear and conspicuous, which means be apparent to a reasonable consumer;
- Be distinguishable from the solicitation or advertising copy by, for instance, if the solicitation is in unbolded regular arial typeface, be in a times new roman italicized typeface that is bold.
- Be on the first page of the faxed advertisement or solicitation;
- Clearly state that the recipient may request that the sender of the unsolicited advertisement not send any future unsolicited advertisements to a particular fax/telephone number(s);
- Provide a cost-free mechanism for the recipient to request to be removed from the fax distribution list (e.g., an e-mail address to which a recipient can reply or a toll-free number);
- Provide a contact telephone and facsimile machine number in the United States for the recipient to transmit an opt-out request to the sender; and
- Ensure that the telephone and facsimile machine numbers and the cost-free mechanism for opt-outs are available 24 hours per day, 7 days per week.

A sample opt-out clause is attached as Attachment A.

Once you receive an opt-out, you have 30 days to comply and cease sending unsolicited commercial faxes to the person who opted out.

8. To which individuals will I still be able to send commercial faxes?

Provided the recipient has not elected to opt-out of receiving unsolicited commercial faxes, businesses will be allowed to continue to send unsolicited commercial faxes to recipients with whom they have an EBR (unless the recipient has opted-out of receiving such faxes) if the sender had the recipient’s fax number prior to July 9, 2005, the date the Act became law. Businesses also may send unsolicited commercial faxes to recipients if the fax number is obtained either directly from the recipient or from a public source to which the recipient gave the number for publication (e.g., website or published directory). Unsolicited commercial faxes may not be sent to recipients with whom the sender does not have an EBR.

9. Does the new law apply to unsolicited commercial emails?

No. The new rule addresses only unsolicited commercial faxes.

10. Does this federal law supercede state laws dealing with the sending of unsolicited commercial faxes?

Yes, unless the state law is more restrictive than the federal law, and then agents and brokers must comply with the more restrictive state law when sending intrastate faxes (that is faxes sent from a sender to a recipient in the same state). There is some uncertainty if states can enact state law that is more restrictive concerning interstate faxes (that is, faxes from outside the state sent in or vice versa). A federal trial court in California has ruled that the JFPA supercedes state law concerning interstate faxes. This case is on appeal and may either be upheld or overturned. The trial court's decision is on the Legal Advocacy page of the IIABA website at www.independentagent.com. If this determination is overturned on appeal, the Office of General Counsel will update these FAQ's accordingly.

In that case, on October 7, California Governor Arnold Schwarzenegger signed a bill into law that makes it unlawful for a person or entity, if located in California, to send an unsolicited advertisement via fax unless the sender has first obtained the recipient's express permission. The law also makes it unlawful to fax an unsolicited advertisement to any California recipient from any other state unless the sender has first obtained the recipient's express permission. The interstate portion of this law has been declared unconstitutional by the federal trial court. However, to the extent it applies to intrastate faxes, the court held it is not unconstitutional. The case is currently on appeal.

The California law:

- Authorizes the recipient of a faxed unsolicited advertisement to bring an action for injunctive relief, actual damages or statutory damages of \$500 per violation (whichever is greater) or treble damages if the violation is willful.
- Provides that fax communications must clearly mark, in a margin at the top or bottom of each transmitted page or on the first page of each transmission 1) the date and time sent, 2) the identity of the sender of the fax, and 3) the telephone number of the sending machine.
- Does not apply to faxes sent by or on behalf of a non-profit professional or trade association as long as the fax is sent to a member in furtherance of the association's tax-exempt purpose and the following conditions are met: 1) the member has voluntarily provided the association with his fax number, 2) the primary purpose of the fax is not the advertising of goods or services of any third party, and 3) the member has not asked that the association stop sending him faxes advertising the goods or services of any third party.

California agents should follow the California law to the extent that it is more restrictive than the federal law.

IIABA does not keep track of the law in all 50 states on the issue of unsolicited commercial faxes. Check the law of the state from which or into which you plan send such a fax prior to doing so.

ATTACHMENT A

The following language is provided solely as a guide. Please seek legal counsel, as appropriate.

Sample Opt-Out Language

You may request not to receive future faxes advertising goods or services from [*insert business entity name*]. To stop receiving such faxes, please call [*insert phone number*] or send a fax to [*insert fax number*] at any time. You may also send an e-mail to [*insert e-mail address*] or call [*insert number, using a toll-free number if available*]. Your fax or communication must include the specific telephone number of the fax machine at which you do not wish to receive faxes from us. We will remove your fax number from our lists and will not send you additional faxes advertising goods or services unless you request that we do so.