

Summary of Junk Fax Prevention Act of 2005 Signed by President

The Junk Fax Prevention Act of 2005, legislation intended to halt unwanted commercial faxes while still allowing businesses to communicate with their customers, was signed into law by President Bush on July 9. The new law maintains the "existing business relationship" exemption to general restrictions on sending commercial faxes that has worked well for many years. Sen. Gordon Smith (R-OR), introduced the legislation (S. 714) which passed the Senate by unanimous consent, quickly followed by House approval.

The new law makes some changes in the way business is done by fax. Here are the relevant provisions:

- The Establish Business Relationship (EBR) exemption is now codified. This means that, if you have an existing business relationship with someone, you are considered to have permission to fax them something based on that business relationship. If you do not have an EBR, you must obtain written permission from the recipient prior to sending a fax.
- An EBR can be established by an inquiry and does not require an actual commercial transaction between the sender and recipient. If a Yellow Pages publisher contacts a potential advertiser and the potential advertiser asks for materials via fax, that is considered an EBR. Similarly, if a potential advertiser contacts the publisher asking for information about advertising, an EBR is established.
- If the EBR existed before enactment of the legislation (the date the law was signed, July 9, 2005), it does not matter where you obtain the fax number.
- If the EBR is new, you must obtain the fax number from the recipient directly, or from a publicly available place where the recipient has made their fax number available, such as an advertisement, directory, or website.
- The Federal Communications Commission (FCC) is permitted to initiate an inquiry as early as three-months after enactment to establish time limits on the EBR.
- All unsolicited fax advertisements must contain opt-out language on the first page. (Remember, it is unsolicited if you do not have written permission, but an EBR allows you to send the fax anyway, so long as the opt-out language is on the first page.)
- The opt-out language must be on the first page, clear and conspicuous, and allow the recipient a cost-free way to opt out from future faxes from the sender. That opt-out mechanism must be available to the recipient 24 hours a day, seven days a week. E-mail address, local or toll-free number attached to an answering machine would likely be considered adequate. The first page of the fax must also contain a domestic contact number and fax number for the recipient to opt-out, as well, if they choose that route. A domestic toll-free opt-out number should meet both criteria.
- The FCC is required to issue rules within 270 days of enactment. Those rules will spell out what must be included in the opt-out language, and what mechanisms are acceptable.
- The FCC will send Congress an annual report on junk fax enforcement.
- The General Accounting Office will conduct a study of the FCC's junk fax enforcement.

All outgoing faxes that are offering commercial services (such as Yellow Pages advertising) should have the opt-out language and mechanism as soon as possible. As a practical matter, the FCC rules will not be in place for several months, so there will be some flexibility as to the type of cost-free opt-out mechanism and the exact language. Once the FCC adopts rules, companies may have to make some minor adjustments to their opt-out mechanism or language.