

New Federal Fax Legislation

The Junk Fax Prevention Act, S. 714, was passed by the Senate on Friday, June 24, passed by the House on Tuesday, June 28, 2005, and signed by the president on Saturday, July 9, 2005. The Junk Fax Prevention Act restores the "established business relationship" (EBR) exception that allows associations and businesses to send unsolicited commercial faxes to their members and clients without advance written consent (advance written consent would have been required under the rules developed by the FCC). The Act also establishes a new requirement for an opt-out message on the first page of all unsolicited advertisements that are faxed.

What does this mean for REALTORS® and REALTOR® Associations?

The bill **does not** legalize unsolicited fax advertisements or solicitations. You still must have permission or an EBR.

1. ESTABLISHED BUSINESS RELATIONSHIP EXCEPTION RESTORED. Businesses and associations do not have to worry about advance written consents for faxes containing advertising or commercial material if there is an EBR. REALTORS® will not have to get written permission from consumers with whom they have an EBR before faxing property listings or other information to them, and associations will not have to get advance written consent to fax its members, provided that either


- ◆ There is an EBR that was already in existence when the Junk Fax Prevention Act became law (July 9), or
- ◆ For a new "EBR," the fax number was provided voluntarily by the recipient or is publicly available in a published directory, advertisement or web site.


2. NEW!!! OPT-OUT REQUIRED ON FIRST PAGE OF FAXES. The Act creates a new right for recipients to opt-out of receiving future faxes. All REALTORS® and associations that send any unsolicited commercial faxes – including faxes sent to recipients in an EBR – must include opt-out instructions on the first page of the fax in clear and conspicuous terms that indicate that the recipient has the right to opt out of future unsolicited advertisements faxed to specified facsimile numbers and that the sender's failure to comply within a reasonable time is illegal. The opt-out message must provide (1) a telephone number and a facsimile number to which the recipient may send its opt-out request, and (2) a no-cost means for recipients to opt-out, all which must be available 24/7. Examples of a cost-free opt-out mechanism include a local or toll-free telephone number. A phone number that is a long-distance or a toll call would not meet the requirements. It is not clear at this point whether an e-mail address ultimately will qualify as a cost-free mechanism, but an e-mail address may be included as a second cost-free alternative.

The FCC will be developing new rules within the next nine months to provide required opt-out language and define "reasonable time" and "cost-free mechanism." The FCC also has the discretion to exempt nonprofit organizations from having to use the opt-out message and to put a time cut-off on EBRs.

- ▶ **ACTION REQUIRED: Put an opt-out provision with a telephone number and a fax number (one of these should be toll-free or local) on your fax cover pages or on the first page of all unsolicited commercial faxes.**

- ▶ **POSSIBLE OPT-OUT LANGUAGE UNTIL THE FCC PROVIDES SPECIFIC WORDING:** “You may request that the sender of this faxed message not send any future unsolicited advertisements to any facsimile number(s) that you designate. The sender is required by law to comply with your opt-out request within the shortest reasonable time. To opt out of further facsimile advertisements from this sender, please call _____ or fax _____ [the phone or fax number must be toll-free or local] [or e-mail _____ (if desired)] at any time on any day of the week.”

 **REALTOR® Practice Tips:** Prudent practice dictates that companies and associations use fax cover pages with the opt-out message for all outgoing faxes to ensure compliance with the Act.

 **REALTOR® Practice Tips:** Real estate brokers/companies may wish to establish office policies limiting the authority to opt out of faxed messages to office fax numbers to office managers or Designated REALTORS®.

3. PERMISSION TO FAX MAY BE VERBAL. The bill also clarifies that verbal permission to fax is an allowed means of granting express permission to fax. If a consumer calls in and asks that a property data sheet be faxed, the data sheet may lawfully be faxed, with the appropriate cover sheet containing the opt-out message, even though there is no EBR.

DEFINITIONS

An “**established business relationship**” (EBR) is a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential or business subscriber, with or without an exchange of consideration, on the basis of the subscriber’s purchase or transaction with the entity or on the basis of the subscriber’s inquiry or application regarding products or services offered by the entity, which relationship has not been previously terminated by either party. There are no time limits for an EBR in the legislation, but time limits may be imposed in the upcoming months by the FCC.

An “**unsolicited advertisement**” is “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.”

The **penalties** for violating the federal fax law are \$500 per facsimile and treble damages may be imposed for willful violations. Consumers have a private right of action, so violators may be sued by consumers, state attorney generals or the FCC.

For further information and compliance pointers, go to NAR’s *Field Guide to Do-Not-Call, Do-Not-Fax, and Do-Not-E-Mail Laws* at <http://www.realtor.org/libweb.nsf/pages/fg707#nofax>.