

## ***UNSOLICITED COMMERCIAL FAXES***

The House today approved S. 714, legislation to restore pre-2003 rules for sending unsolicited commercial faxes. This follows Senate passage last week. The bill will be sent to the President Bush for signature and he is expected to sign it, thus ending the long running debate over whether a business can send unsolicited advertisement faxes to a recipient with which the business had "established business relationship" (EBR).

Under the "Telephone and Consumer Protection Act of 1991" (TCPA), the law that regulates telemarketing calls and junk faxes, businesses were allowed to send faxes to those with which they have an EBR. The term "established business relationship" meant a prior or existing relationship formed by a voluntary two-way communication between the sender and recipient with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the recipient regarding products or services offered by the sender, which relationship has not been previously terminated by either party. There was no time limit on the duration of the established business relationship.

In 2003, the Federal Communications Commission (FCC) rule decided to eliminate the EBR exemption, thus requiring all businesses to have prior written consent from anyone to whom they wanted to send a business-related fax. This new legislation, when signed into law, will reverse that FCC rule. However, the new law puts in place some restrictions for senders as well as creating an opt-out mechanism for recipients.

The sender must obtain the number of the telephone facsimile machine through the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution.

All unsolicited advertisement faxes must have an opt-out notice.

- The notice must be clear and conspicuous and on the first page of the unsolicited advertisement.
- The notice must state that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, (the FCC is charged with the responsibility of establishing what is a reasonable time) with such a request is unlawful.
- The notice must include the legal requirements for how the recipient must make the opt-out request. Those requirements are that the request identifies the telephone number or numbers of the facsimile machine or machines to which the request relates; the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement and the person making the request has

not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine.

- The notice must include a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender and a cost-free mechanism for a recipient to transmit a request.
- The telephone and facsimile machine numbers and the cost-free mechanism must permit an individual or business to make such a request at any time on any day of the week.

Finally, the opt-out notice must comply with the other requirements of current law, which requires that any unsolicited fax being sent contain in the margins at the top or bottom of each page the date and time the fax was sent, the identification of the sender of the message, and the telephone number of the sending machine.

Current fax lists are grandfathered from the rules regarding how and from where the sender obtained the fax number. You can send an unsolicited advertisement, which is sent based on an established business relationship with the recipient that was in existence before the date of enactment of the Junk Fax Prevention Act of 2005, if you possessed the facsimile machine number of the recipient before the date of enactment. The fax, however, must include the opt-out notice.

Congress has given the FCC discretion to decide whether to impose time limitations on how long a sender can rely on the initial contact that created the established business relationship.

With respect to providing the cost free method of opting out, Congress has granted the FCC authority to exempt classes of small businesses from that requirement if it decides the cost of providing a cost-free mechanism is unduly burdensome.