

DMA ALERT: CALIFORNIA FAX LAW

In October 2005, California passed a fax law that says businesses must obtain prior express permission before sending an unsolicited fax advertisement, regardless of whether the fax recipient is an existing customer. Specifically, the law makes it illegal for businesses:

- Located in California to send commercial faxes within California OR to other states without prior express consent from recipients.

Q1: When is the Law Effective?

The California law was scheduled to go into effect on January 1, 2006. **However, in late February 2006, a US District Court ruled that the California law applies to intrastate faxes only, and that federal law, namely the FCC's Telephone Consumer Protection Act (TCPA), preempts the application of California's law to interstate faxes.** This decision is likely to be appealed, but based on the opinion the current state of the law is that:

- Faxes sent entirely within California must comply with the California law and the TCPA
- Faxes sent into or out of California must comply with the TCPA (there is some risk that a different court could reach a different conclusion)

Please be sure to check back with DMA for updates to this litigation.

Q2: What Does This Mean for Businesses?

What this means for businesses sending faxes within California is that having an established business relationship is not enough. Companies must either get permission from all their customers (regardless of where their customer is located), or carefully ensure that they do not fax any customers in California unless they have gotten permission from those customers. Please note that the latter option may not be feasible because of the difficulty with properly identifying fax exchanges.

Q3: What if I Have Offices in California and in Another State?

With the court's decision, the law applies only to faxes sent entirely within the state of California. Even if you have an office in California, if you send the fax from another state, the TCPA applies and not the California law.

Q4: How To Obtain Permission?

Because the burden of proof is on the sender of the faxes, companies should carefully document that they received prior express permission from recipients. Companies could, for instance, obtain written consent or taped oral consent to satisfy this requirement.

Q5: What Should Businesses Include In Each Fax They Send?

Faxes sent entirely within California must satisfy both the California law and the TCPA. California's fax law requires that each fax include the sender's identifying information. The fax should clearly identify:

- the date and time the fax was sent,
- the sender of the fax, and

- the telephone number of the sending machine or of the organization responsible for sending the message.

This information must appear in the top or bottom margin of every transmitted page, or on the first page of the fax.

The TCPA, as well as DMA's Guidelines **include additional requirements.** To comply with DMA's Guidelines and **federal fax rules**, senders of commercial solicitation faxes must:

- identify the sender and the date and time the fax was sent (consistent with California's rules); AND
- include an **opt-out notice** and contact information on the first page of the fax, so recipients may opt out of receiving any future faxes from the sender.
 - For more information on opt-out notice requirements, please see DMA's Matter of Fax Alert: http://www.the-dma.org/guidelines/Fax_Alert.pdf.

Q6: Does California's Fax Law Apply to Nonprofit Organizations?

Yes, nonprofit organizations must comply with California's fax law, although see Q8 below for important limits to the law.

Q7: Does California's Fax Law Apply to Business-to-Business Marketers?

Yes, business-to-business marketers must comply with California's fax law.

Q8: Are There Any Exemptions?

The California law exempts faxes sent by tax-exempt, nonprofit trade associations to their members as long as:

- the fax is sent in "furtherance of the association's tax exempt purposes;"
- the member has voluntarily provided the fax number;
- the member has not asked the association to stop sending such faxes; and
- the fax's primary purpose is not to advertise property, goods or services of a third party.

Q9: What are the Penalties for Not Complying?

California's law allows fax recipients to seek:

- injunctive relief,
- actual damages, or
- statutory damages of **\$500 per violation**, whichever is greater.

If the violation was willful, a court may award treble damages.

Q10: Resources: Where Can I Find More Information?

For more on how to comply with the Junk Fax Prevention Act, please see DMA's Alert on faxing:

- **A Matter of Fax: What Direct Marketers Need to Know About Sending Commercial Faxes:** http://www.the-dma.org/guidelines/Fax_Alert.pdf