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August 13, 1992

Hon. Pete Wilson, Governor
State of California
State Capitol, Sacramento

Dear Governor Wilson:

On August 11, the Assembly passed and sent to you my Assembly Bill 2438. I am writing this letter asking that you sign this bill into law.

AB 2438 requires the sender of an unsolicited advertisement by fax machine to include a toll-free number which the receiver could call to request that any further fax transmissions be stopped. If the sender continues to send documents after the request to stop has been made, the bill would subject the sender to a \$500 fine.

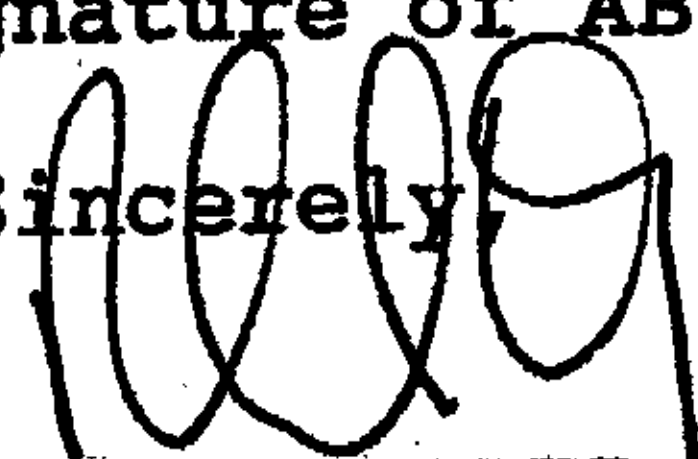
I introduced this bill to provide California's businesses with a mechanism by which they could halt the annoying and expensive flood of unwanted advertisements coming over their fax machines. While junk mail and telephone solicitations have long been a source of irritation for California businesses, it has never directly cost the recipient any money; "junk fax," on the other hand, costs the recipient in time, paper, and energy.

Initially the bill was opposed by Mr. Fax, a tele-marketer who exclusively uses fax machines to advertise his products, however amendments were taken in the Senate that removed that opposition. The bill is now without any opposition, and is actively supported by the National Federation of Independent Businesses, the California Association of Independent Businesses, and the California Retailers Association.

In a report issued by the Public Utilities Commission in December of 1990 it was pointed out that "junk fax" costs consumers and businesses in California about \$17 million annually. In addition, the report found that over half of the businesses surveyed strongly objected to "junk fax," and still more businesses anticipated that the problem was only going to get worse.

On behalf of the supporters, and the many businesses in California that are looking for relief from this costly and irritating burden, I urge your signature of AB 2438.

Sincerely,


RICHARD KATZ
39th Assembly District

RK:jl

Legislative Counsel of California

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Sacramento, California

August 22, 1992

Honorable Pete Wilson
Governor of California
Sacramento, CA 95814

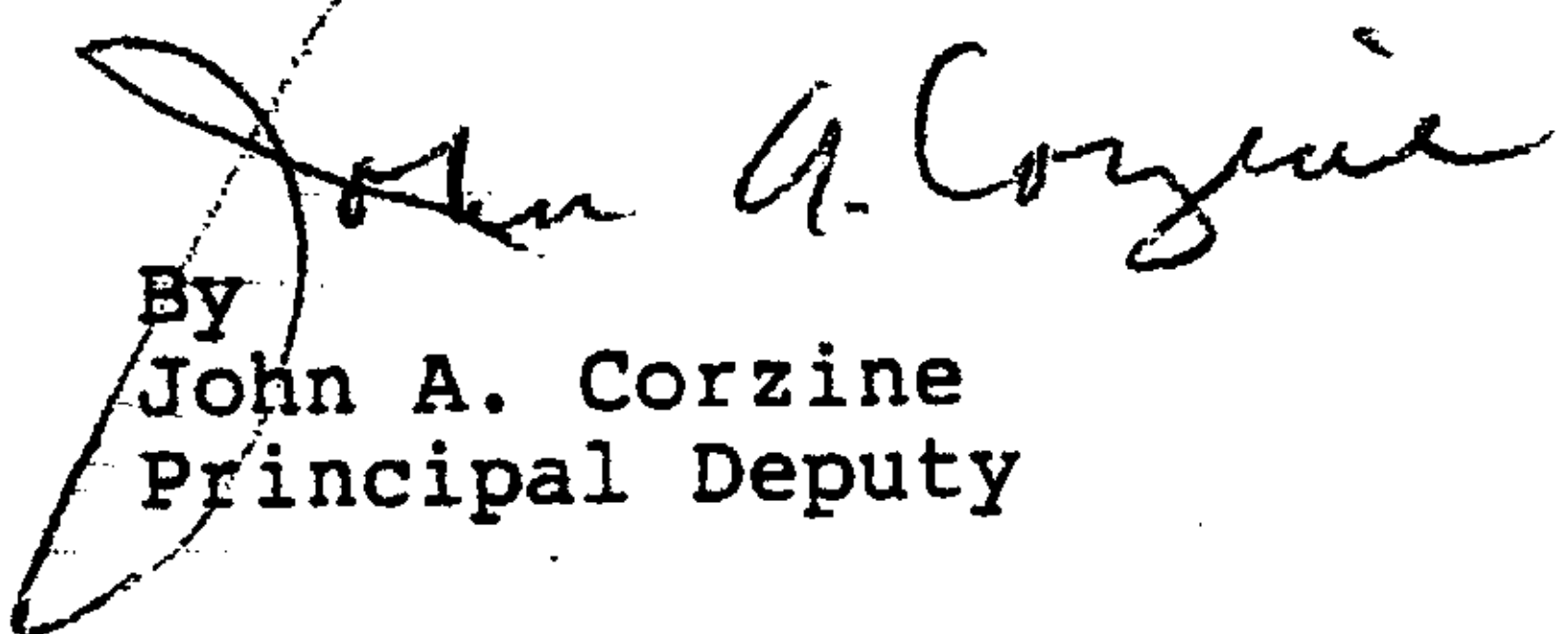
Assembly Bill No. 2438

Dear Governor Wilson:

Pursuant to your request, we have reviewed the above-numbered bill authored by Assembly Member Katz and, in our opinion, the title and form are sufficient and the bill, if chaptered, will be constitutional. The digest on the printed bill as adopted correctly reflects the views of this office.

Very truly yours,

Bion M. Gregory
Legislative Counsel


By
John A. Corzine
Principal Deputy

JAC:wld

Two copies to Honorable Richard Katz
pursuant to Joint Rule 34.

ENROLLED BILL REPORT

Analyst: Gale Baker
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AGENCY: State and Consumer Services Agency	BILL NUMBER: AB 2438
DEPARTMENT: Department of Consumer Affairs	AUTHOR: Katz

BILL SUMMARY

This bill would prohibit the sending of unsolicited advertisements by fax machine, unless the sender has a toll-free telephone number which the recipient can call to stop further faxed ads. The phone number and address of the sender must be printed on the faxed ad.

Failure to honor a request to stop faxing unsolicited ads would be an infraction, subject to a \$500 fine per transmission.

In addition, by virtue of its placement in Business and Professions Code §§ 17500 et seq. (relating to false and misleading advertising), violations would be subject to civil penalties of up to \$2,500 per violation, injunctive relief and restitution to the injured party. (Such actions are brought by the Attorney General and local prosecutors.)

BACKGROUND

Assemblyman Katz carried a "fax" bill in the 1989-90 session but it was not moved out of the Senate Appropriations Committee. Another fax bill, SB 487 (Kopp), was vetoed by Governor Deukmejian in 1989. The governor instead signed SB 993 (Ch. 345, Stats. 89), which required a study of the practice of faxing unsolicited advertisements. His veto message of SB 487 read:

I have approved Chapter 345, Statutes of 1989 (SB 993), which requires the Public Utilities Commission to report to the Legislature by January 1, 1991, on the issues relating to the reported growth of unsolicited telefacsimile marketing communications. At the very least, there should be some documented evidence of a problem before a law is enacted to prohibit unsolicited telefaxes.

The PUC studied the issue, as directed by SB 993. Its findings are summarized as follows:

VOTE:	Assembly Partisan		Senate Partisan	
	R	D	R	D
Floor:	46-21	conc. 46-26	Floor:	25-3
Policy Committee:	8-0		Policy Committee:	6-0
Fiscal Committee:	21-2		Fiscal Committee:	28.8 Cal.

RECOMMENDATION TO GOVERNOR:
 SIGN VETO NO POSITION _____ DEFER TO OTHER AGENCY _____

. . . it appears that unsolicited telefacsimile telecommunications are not currently a significant problem in California. However, California fax owners do not like unsolicited faxes, almost irrespective of their source, and believe that the problem will get worse in the next few years. The current cost of "junk fax" to users is estimated to be over \$17 million a year. There is strong support for a variety of possible legislative actions to limit unsolicited faxes. While some of these actions may have a positive effect of curbing some unsolicited faxes, the success of such measures depends highly upon self-enforcement by the senders of unsolicited faxes. ("Report on Unsolicited Telefacsimile Marketing Communications," 1991; emphasis added.)

In the meantime, the issue was also being addressed at the federal level. On December 20, 1991, the President signed PL 102-243, which (among other things) prohibits unsolicited fax advertisements. "Unsolicited" is defined in the federal law as "without the recipient's prior express invitation or permission." The precise meaning of "express invitation or permission" will have to be addressed in the implementing regulations which will be adopted by the Federal Communications Commission (FCC). The federal law goes into effect on December 20, 1992 (but the prohibition will have no effect until the implementing regulations are in place, which could take a couple of years).

SPECIFIC FINDINGS

This bill began as an effort to ban unsolicited faxes. The bill was opposed by Mr. Fax (who also opposed SB 487, mentioned above), a company that relies on unsolicited fax advertisements to generate business. The bill now permits unsolicited faxes within certain guidelines.

In contrast, the federal act [47 USC 227(b)(1)(C)] prohibits unsolicited faxed advertisements altogether. As previously noted, the federal ban will not go into effect until the FCC has adopted implementing regulations. This process could take a couple of years. Assuming that any definitions the FCC adopts (e.g., what constitutes "express invitation" to send a faxed ad) do not undermine the prohibition, once the FCC's regulations are in place the federal law and regulations will supersede AB 2438 since they will be more protective. But until that time, AB 2438 would give California fax machine owners more protection than they currently have against unsolicited faxed ads.

Meant to protect CA until the FCC Regs come out

FISCAL IMPACT

None to the department. Creates a crime punishable by an infraction. By virtue of its proposed location in the Business and Professions Code, repeated and willful violations would be subject to the penalties for false and misleading advertising: civil penalties of up to \$2,500 per violation (redirected in whole or in part to the county or state, depending on who enforces it), injunctive relief, restitution and a misdemeanor penalty. These provisions are enforced locally and by the Attorney General.

ARGUMENT

Proponents: Author (sponsor)
California Association of Independent Business
California Retailers Association
Guardian Business Forms
National Federation of Independent Business
Otis Group

Opponents: None on enrolled version

Proponents argue that whereas with telephone and mail solicitations the caller or sender pays the cost, with faxed solicitations the recipient must pay part of the costs and furthermore, cannot use his or her own machine or receive other transmissions while the unsolicited message is being sent.

The author's office is aware of the federal legislation but is concerned that it may not entirely prohibit unsolicited fax transmissions (because the FCC will be adopting regulations to further define terms in the federal law) and because of the time delay in the effective date due to the need to adopt implementing regulations.

We agree with proponents. We view unsolicited faxed ads as an invasion of privacy and an infringement on personal property. We know of no other advertising situation where the recipient is forced to bear a portion of the advertiser's costs.

The Assembly concurrence vote was 56-26. All 26 negative votes were Republican. The Assembly minority consultants' analysis recommended opposing the bill on the basis that there was insufficient evidence to demonstrate that a problem existed, and that it was an unnecessary intrusion of government into the marketplace. The analysis further argued that the \$500 fine for each unsolicited fax appeared excessive.

In response to these arguments, we argue that the federal government has seen the need to adopt legislation on this issue. We further note that while the PUC found no evidence of a "significant" problem in California, it also stated that:

California fax owners do not like unsolicited faxes, almost irrespective of their source, and believe that the problem will get worse in the next few years. The current cost of "junk fax" to users is estimated to be over \$17 million a year. There is strong support for a variety of possible legislative actions to limit unsolicited faxes.

We disagree that this bill is an unnecessary government intrusion into the marketplace. If anything, unsolicited faxed ads are an intrusion into business and private property rights.

Last, we disagree that the \$500 fine is excessive. The fine would only be imposed if the sender continues to send unsolicited faxed ads to a recipient who has requested that no further faxed ads be sent. We believe that it is more than generous to allow businesses to fax unsolicited ads in the first place, and believe that the penalty is warranted when a business disregards a request not to send any more faxed ads.

We also note that as a practical matter, it seems unlikely that the infraction fine would actually be imposed based on one incident, because infractions generally run low on law enforcement's priority list. If the sender makes a practice of sending unsolicited faxes and ignores requests to stop sending them, it is more likely that local government would bring an action under Bus.&Prof.C. §§ 17500 et seq. (civil penalties, injunctive relief).

Besides, it seems that from the sender's perspective, there would be no point in sending faxed ads to someone who has expressed a wish not to receive any more, since another faxed ad would only anger the recipient and would not result in a sale.

RECOMMENDATION

SIGN. We believe that fax owners -- businesses and consumers -- would benefit by the restrictions this bill would impose on unsolicited faxed advertisements until the FCC adopts regulations to implement the new federal ban on unsolicited faxed advertisements. After that, the federal law will probably supersede the state law since it will be more protective.

(For further arguments in support of signature, see Specific Findings and Argument.)

DEPARTMENT OF FINANCE ENROLLED BILL REPORT

AMENDMENT DATE: June 30, 1992
 RECOMMENDATION: Sign

BILL NUMBER: AB 2438
 AUTHOR: Katz

Assembly: N/A
 Senate: 25/3

BILL SUMMARY

AB 2438 would impose specified restrictions and requirements on senders of unsolicited FAX transmissions.

FISCAL SUMMARY

Code/Department Agency or Revenue Type	SO LA CO RV LC LR	(Fiscal Impact by Fiscal Year)						Code Fund
		(Dollars in Thousands)						
		PROP 98	FC 1991-92	FC 1992-93	FC 1993-94			

-----No/Minor Fiscal Impact-----

COMMENTS

This bill would have no fiscal impact on any State agency or program.

Any local government costs resulting from the mandate in this measure would not be state-reimbursable, because the mandate only involves the definition of a crime or the penalty for conviction of a crime.

Analyst/Principal (651) Young <i>Robert H. Wiens</i>	Date 8/13/92	Program Budget Manager Fred Klass <i>Fred Klass</i>	Date 8/13/92
Department Deputy Director		<i>[Signature]</i>	Date 8.14.92