

Hearing Date: August 20, 2001	Bill No: AB 839
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SENATE COMMITTEE ON BUSINESS AND PROFESSIONS
Senator Liz Figueroa, Chair

Bill No: AB 839 Author: Lowenthal
As Amended: April 5, 2001 Fiscal: Yes

SUBJECT: Advertising: facsimile machine.

SUMMARY: Prohibits the use of a facsimile machine to disseminate unsolicited advertising and promotional materials.

Existing state law:

- 1) Regulates false and misleading advertising generally, and subjects violators to both civil and criminal penalties.
- 2) Regulates unfair or deceptive business practices generally, and subjects violators to both civil and criminal penalties.
- 3) Provides that no person or entity conducting business in this state shall fax – documents consisting of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit, unless that person or entity establishes a toll-free telephone number that a recipient of the unsolicited faxed documents may call to notify the sender not to fax the recipient any further unsolicited documents.
- 4) Provides that all unsolicited faxed documents shall include a statement informing the recipient of the toll-free telephone number that the recipient may call, or a valid return address to which the recipient may write or e-mail, as the case may be, notifying the sender not to fax the recipient any further unsolicited documents to the fax number, or numbers specified by the

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recipient. The statement shall be the first text in the body of the message and shall be of the same size as the majority of the text of the message.

- 5) Provides that upon notification by a recipient of his or her request not to receive any further unsolicited faxed documents, no person or entity conducting business in this state shall fax any unsolicited documents to that recipient.

Existing federal law: The Telephone Consumer Protection Act of 1991 (TCPA), prohibits the transmission of unsolicited advertisements by telephone facsimile machines and provides various remedies.

This bill:

1)States the following findings and declarations:

- a) Unlike other forms of advertising media, the use of a fax machine to transmit unsolicited advertising and promotional material imposes a real cost on the recipient of the transmission.
- b) Every fax transmission creates expense for the recipient in the form of paper, ink, and wear and tear on a fax machine.
- c) Unsolicited fax advertising imposes this cost without the knowledge or permission of the recipient.

1)Provides that no person or entity shall disseminate an unsolicited advertisement via any telephone facsimile machine, computer, or other device, to make an electronic or telephonic transmission to a telephone facsimile machine located in California by means of any connection with a telephone network for the purpose of transmitting a commercial solicitation.

2)Defines telephone facsimile as equipment that has the capacity to either: (a) transcribe text or images or both from paper into an electronic signal, and transmit that signal over a regular telephone line; or (b) transcribe text or images or both onto paper from an electronic signal received over a regular telephone line.

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3)Defines commercial solicitation as an electronic or telephonic transmission to a facsimile device of unsolicited advertising material for the lease, sale, rental, gift, offer, or other disposition of any realty, goods, services, or extension of credit.

4)Provides that commercial solicitation does not include an electronic or telephonic transmission to a facsimile device that is any of the following:

- a) Made in the course of prior negotiations between the party sending and the party receiving the materials.
- b) Made to a party with whom the sender has a prior business relationship or an existing business relationship.
- c) Made in the course of a follow-up sales call.

1)Provides that any person or entity aggrieved by a violation of this section may bring an action in the appropriate court and shall be entitled to recover, for each violation, the amount of actual monetary loss, or the sum of five hundred dollars (\$500), whichever is greater.

FISCAL EFFECT: "Potential minor non-reimbursable local costs for investigation and prosecution of violations, potentially offset by fine revenue," according to the May 9, 2001, Assembly Appropriation Committee analysis.

COMMENTS:

1. Measure Heard by this Committee on June 25, 2001. This Committee heard this measure on June 25, 2001, but no vote was taken. When the author presented on the measure, he argued that his measure simply mirrored federal law. Additionally, the author argued, and was supported by Legislative Counsel, that state law is preempted by federal law. The opposition, fax.com, disagreed and argued that not only is the federal law unconstitutional but that the state law is not preempted. The opposition also indicated that the issue of the constitutionality of the federal law is currently being

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deliberated in California and Missouri.

Ultimately, the Chair suggested that maybe the author may want to consider coming back to Committee in August to see if either the California or Missouri court ruled in the meantime. The author agreed. It should be noted that while the California court has recently ruled on the matter before it for consideration, it is unclear whether that ruling sheds any light on the potential implications of supporting this measure. Additionally, it appears that the Missouri court has not ruled on the matter before it.

2. Measure Aimed at Prohibiting the Transmission of Unsolicited Fax Advertising Material. According to information provided by the author's office, unlike more traditional media, the use of a fax machine to transmit unsolicited advertising and promotional material imposes a hard cost on the recipient of the fax. Additionally, the information provided by the author's office states that a faxed advertisement or "junk fax" is a form of advertising that is delivered C.O.D. to the recipient. Also, the information points out that every fax transmission imposes a real expense for the recipient in the form of paper, ink, and wear and tear on the fax machine.

3. Background.

- a) State Law - Business and Professions Code Section 17538.4. In 1992, the Legislature passed and the Governor signed AB 2438 (Katz, Chap. 564, statutes of 1992). As originally introduced, the measure looked quite similar to AB 839. As enacted, it allowed unsolicited faxing provided certain conditions were met. It also provided that violations were an infraction punishable by a fine of \$500.00.

In 1998, Sec. 17538.4 was amended by AB 1676 (Bowen, Chap. 865, Statutes of 1998). AB 1676 focused on electronic email and does not appear to have addressed unsolicited faxes. However, since Sec. 17538.4 deals

with both emails and faxes, and the penalty provision applied to both equally, when the author took amendments to apparently appease opposition, the violation provision was deleted. It is unclear

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whether the Legislature recognized that such an amendment also impacted unsolicited faxes.

- b) Federal Law -- The Telephone Consumer Protection Act of 1991 (TCPA). On December 20, 1991, the U.S. Congress enacted the TCPA. The TCPA mandated that the Federal Communications Commission (FCC) implement regulations to protect the privacy rights of citizens by restricting the use of the telephone network for unsolicited advertising. On September 17, 1992, the FCC adopted a Report and Order which established rules governing unwanted telephone solicitations and regulated the use of automatic telephone dialing systems, prerecorded or artificial voice messages, and telephone facsimile machines. These regulations prohibit the transmission of unsolicited advertisements by telephone facsimile machines among other things.

The TCPA provides consumers with several options to enforce limitations against unsolicited telemarketing contacts. Absent state law to the contrary, the TCPA permits consumers to file suit in state court if an entity violates the TCPA prohibitions on the use of facsimile machines, automatic telephone dialing systems, and artificial or prerecorded voice messages and telephone solicitation. Consumers may also bring their complaints regarding TCPA violations to the attention of the state attorney general or an official designated by the state. This state entity may bring a civil action on behalf of its residents to enjoin a person or entity engaged in a pattern of telephone calls or other transmissions in violation of the TCPA.

Additionally, a consumer may request that the FCC take enforcement actions regarding violations of TCPA and the regulations adopted to enforce it.

1. Is California Law -- Business and Professions Code Section 17538.4-- preempted by the TCPA? It is the Author's opinion, and Legislative Counsel has confirmed, that Section 17538.4 is preempted by the TCPA. Therefore, the author believes that his measure simply clarifies existing federal law. However, it should be noted that the opposition believes that California law is not preempted by the federal law.

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2.If the Author Feels that the TCPA Is the Law, Why Is This Measure Needed? According to the author's office, the TCPA has failed to deter companies from sending unsolicited faxes. Additionally, the author's office indicates that although it may be possible for a business or individual to seek legal redress in state court under the federal law, it would be easier and more user friendly to have a similar state law on the books. The author believes that consumers are more likely to recognize a state prohibition as offering the opportunity to pursue the violation in small claims court. The author's office indicates that states such as Oklahoma, Connecticut, Nebraska and South Carolina have enacted similar prohibitions on junk faxes and have seen a decrease in such activity.

In their letter of support, the Foundation for Taxpayer and Consumer Rights (FTCR) states that while California consumers can currently avail themselves of the federal law in California state courts, it makes sense to amend state law so that consumers will not mistakenly think they have no right of action in California.

3.Should the Exemption for Prior and Existing Business Relationships Be Allowed? This measure, in essence, exempts electronic and telephonic transmissions to a fax device made to a party with whom the sender has a prior business relationship or an existing business relationship. In a publication provided by the FCC entitled, "What You Can Do About Unsolicited Telephone Marketing Calls and Faxes," the FCC states that an individual has an established business relationship with a person or entity if they have made an inquiry, application, purchase or transaction regarding products or services offered by such person or entity. Additionally, the FCC states that if the individual has an established business relationship with the person or entity sending the message, an invitation or permission to receive unsolicited fax advertisements is presumed to exist. Finally, the FCC states that an individual can end this relationship by telling the person or entity that they do not want them to send any more unsolicited advertisements to their fax machine.

The author should ensure that the exemptions provided in this measure conform to the TCPA.

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4.Amendments to Be Proposed by the Author in Committee.
Per conversations between the author's office and Committee staff, the author intends to submit two amendments in Committee.

a) Findings and Declarations. At the request of Committee staff, the author intends to amend this measure to delete Section 1. Section 1 states three findings and declarations. Committee staffs' internal policy on findings and declarations is to require that they be backed by a recognized study. In this case, while the findings and declarations might be accurate, author's staff was unable to produce a recognized

study. Therefore, Committee staff recommended that they be deleted from the bill.

- b) Exclusion from the Measure's Provisions. At the request of Pacific Bell, the author intends to offer the following amendment: As used in this section, "disseminate" does not include or refer to the transmission of any documents by a telecommunications utility or Internet service provider to the extent that the telecommunications utility or Internet service provider merely carries that transmission over its network. According to Pacific Bell, it would be unfair to expose a telecommunications utility or Internet service provider to liability under this section merely because it provides the conduit for transmitting a fax. Pacific Bell indicates that current law affords this "exemption." Additionally, it should be noted that it appears this amendment would be consistent with the TCPA.

1.Arguments in Support. In their letter of support, the Office of the Attorney General argues that this measure would bring California in line with the federal government and provide better protections for consumers. Additionally, they argue that they believe that the decision by the Court of Appeals of the Ninth Circuit Court, declaring the TCPA constitutional, is a very sound decision.

In their letter of support, the FTC states that they have received numerous complaints from individuals who say that their home fax machines are inundated with

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dozens of junk faxes per day. In a week's time, this quickly adds up to hundreds of wasted pages of fax paper and the need to replace toner cartridges far too frequently. The FTC argues that there is no reason that a consumer or business who has no prior relationship with the junk fax company should be forced to pay that company's advertising costs.

In a letter of support from a small business located in Davis, California, the business states that they have been a victim of junk faxes for approximately the last six months and they have been unable to stop them. They point out that calls made to the toll free opt-out phone numbers have been ignored in most cases. Furthermore, none of these faxes have a return address or originating fax number on them. They indicate that as a small business, junk faxes waste time and supplies and are simply an annoyance.

2.Arguments in Opposition. In their letter of opposition, Fax.com indicates that there are several reasons for their opposition. Initially, they believe that the federal legislation is an invitation to the type of jackpot litigation that has clogged the courts and will ultimately be ruled unconstitutional. Additionally, Fax.com's letter states that they believe it makes more sense for the Legislature to have an interim hearing after the court rules this Fall and that it does not make

sense to conform legislation to a federal statute that could possibly be ruled unconstitutional.

Fax.com argues that, while they recognize that commerce isn't always convenient, consumers also have the right to receive product notices that they send to consumers from reputable companies, legally doing business in California. However, they do believe consumers have the right to say, "enough is enough." They believe that in California a provision should be enforced so that consumers who call an 800 number can be removed from the fax list. Fax.com indicates that they put an 800 number on their faxes.

SUPPORT AND OPPOSITION:

Support:

Attorney General Bill Lockyer

The Foundation for Taxpayer and Consumer Rights

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Opposition:

Fax.com

Consultant: Kristin J. Triepke