

**Introduced by Senator Bowen**

February 6, 2002

An act to amend Section 17538.4 of, and to add Section 17538.45 to, the Business and Professions Code, relating to advertising.

LEGISLATIVE COUNSEL'S DIGEST

SB 1358, as introduced, Bowen. Advertising: facsimile machine.

Existing state law prohibits a person conducting business in this state from faxing or electronically mailing unsolicited advertising material, unless certain conditions are met.

This bill would delete the existing state law prohibition relative to faxing unsolicited advertising material. The bill would authorize a person or entity to recover damages for violations of specified federal laws and regulations relating to unsolicited advertising faxes through the bringing of an action in the appropriate state court.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. The Legislature hereby finds and declares the
- 2 following:
- 3 (a) Unsolicited facsimile (fax) advertisements are a nuisance,
- 4 are an invasion of privacy, and interfere with a person's ability to
- 5 conduct business. The cost of these faxes is largely borne by the
- 6 recipient, who must pay for the paper, toner, and maintenance of
- 7 the fax machine used for printing the unsolicited advertisement.
- 8 Small businesses and self-employed individuals, who have limited
- 9 resources and few telephone lines to their offices are forced to bear



1 the cost of having their business interrupted while their fax line is  
2 occupied receiving unsolicited fax advertisements.

3 (b) In 1991, the California Public Utilities Commission (PUC)  
4 reported that receiving unsolicited faxes cost California  
5 consumers and businesses an estimated seventeen million dollars  
6 (\$17,000,000) a year. Since that time, the volume of junk faxes  
7 received at California homes and businesses has grown  
8 dramatically.

9 (c) Congress banned junk faxes in 1991, enacting a federal law  
10 to prohibit the transmission of unsolicited advertisements to fax  
11 machines. Specifically, under federal law no person may transmit  
12 an advertisement describing the commercial availability or quality  
13 of any property, goods, or services to another person's fax machine  
14 without prior express permission or invitation.

15 (d) Federal law permits unsolicited faxes where the sender and  
16 recipient have an established business relationship, meaning the  
17 recipient has made an inquiry, application, purchase, or  
18 transaction regarding products or services offered by the sender.  
19 In this case, federal law gives the recipient the right to "opt-out,"  
20 or contact the sender and request that no further faxes be sent.

21 (e) The federal junk fax ban preempts California's opt-out law.  
22 In 1992, the Legislature passed AB 2438 (Katz), Chapter 1064  
23 Statutes of 1992, which established an opt-out junk fax law to  
24 protect Californians during the estimated two-year interim  
25 between the passage of the federal ban and the time when Federal  
26 Communications Commission (FCC) regulations implementing  
27 the federal ban became effective.

28 (f) Federal junk fax law states only one case in which it does not  
29 preempt state law, and that is when a state law is more restrictive  
30 than the federal law.

31 (g) While opponents of the federal junk fax ban have  
32 challenged the law raising First Amendment issues, courts around  
33 the United States have consistently upheld the federal ban as a  
34 constitutional regulation of commercial speech.

35 (h) Because California's opt-out law is still in statute even with  
36 the federal ban in effect, certain direct marketers use the California  
37 law to send tens of thousands of unsolicited fax advertisements to  
38 California residents and businesses.

39 (i) In order to prevent the shifting of advertising costs to  
40 unwilling consumers and businesses and to prevent the unwanted



1 occupation of consumer and business fax machines, it is therefore  
2 the intent of the Legislature to repeal California’s opt-out junk fax  
3 law and rely solely on the federal law that bans junk faxes, except  
4 when there is an existing business relationship.

5 (j) Further, it is the intent of the Legislature to pass legislation  
6 enabling Californians to pursue the private right-of-action  
7 provided under the federal junk fax law to enjoin violators of the  
8 federal junk fax law and to recover actual damages or five hundred  
9 dollars (\$500) per violation of the federal junk fax law.

10 SEC. 2. Section 17538.4 of the Business and Professions  
11 Code is amended to read:

12 17538.4. (a) No person or entity conducting business in this  
13 state shall ~~facsimile (fax) or cause to be faxed, or~~ electronically  
14 mail (e-mail) or cause to be e-mailed, documents consisting of  
15 unsolicited advertising material for the lease, sale, rental, gift  
16 offer, or other disposition of any realty, goods, services, or  
17 extension of credit unless:

18 ~~(1) In the case of a fax, that person or entity establishes a~~  
19 ~~toll-free telephone number that a recipient of the unsolicited faxed~~  
20 ~~documents may call to notify the sender not to fax the recipient any~~  
21 ~~further unsolicited documents.~~

22 ~~(2) In the case of e-mail, that person or entity establishes a~~  
23 ~~toll-free telephone number or valid sender operated return e-mail~~  
24 ~~address that the recipient of the unsolicited documents may call or~~  
25 ~~e-mail to notify the sender not to e-mail any further unsolicited~~  
26 ~~documents.~~

27 (b) All unsolicited ~~faxed or~~ e-mailed documents subject to this  
28 section shall include a statement informing the recipient of the  
29 toll-free telephone number that the recipient may call, or a valid  
30 return address to which the recipient may write or e-mail, as the  
31 case may be, notifying the sender not to ~~fax or~~ e-mail the recipient  
32 any further unsolicited documents to the ~~fax number, or numbers,~~  
33 ~~or~~ e-mail address, or addresses, specified by the recipient.

34 ~~In the case of faxed material, the statement shall be in at least~~  
35 ~~nine-point type. In the case of e-mail, the~~

36 *The* statement shall be the first text in the body of the message  
37 and shall be of the same size as the majority of the text of the  
38 message.

39 (c) Upon notification by a recipient of his or her request not to  
40 receive any further unsolicited ~~faxed or~~ e-mailed documents, no



1 person or entity conducting business in this state shall ~~fax or cause~~  
2 ~~to be faxed or~~ e-mail or cause to be e-mailed any unsolicited  
3 documents to that recipient.

4 (d) ~~In the case of e-mail, this~~ *This* section shall apply when the  
5 unsolicited e-mailed documents are delivered to a California  
6 resident via an electronic mail service provider’s service or  
7 equipment located in this state. For these purposes “electronic  
8 mail service provider” means any business or organization  
9 qualified to do business in this state that provides individuals,  
10 corporations, or other entities the ability to send or receive  
11 electronic mail through equipment located in this state and that is  
12 an intermediary in sending or receiving electronic mail.

13 (e) As used in this section, “unsolicited e-mailed documents”  
14 means any e-mailed document or documents consisting of  
15 advertising material for the lease, sale, rental, gift offer, or other  
16 disposition of any realty, goods, services, or extension of credit  
17 that meet both of the following requirements:

18 (1) The documents are addressed to a recipient with whom the  
19 initiator does not have an existing business or personal  
20 relationship.

21 (2) The documents are not sent at the request of, or with the  
22 express consent of, the recipient.

23 (f) As used in this section, ~~“fax” or “cause to be faxed” or~~  
24 ~~“e-mail” or “cause to be e-mailed”~~ does not include or refer to the  
25 transmission of any documents by a telecommunications utility or  
26 Internet service provider to the extent that the telecommunications  
27 utility or Internet service provider merely carries that transmission  
28 over its network.

29 (g) In the case of e-mail that consists of unsolicited advertising  
30 material for the lease, sale, rental, gift offer, or other disposition  
31 of any realty, goods, services, or extension of credit, the subject  
32 line of each and every message shall include “ADV:” as the first  
33 four characters. If these messages contain information that  
34 consists of unsolicited advertising material for the lease, sale,  
35 rental, gift offer, or other disposition of any realty, goods, services,  
36 or extension of credit, that may only be viewed, purchased, rented,  
37 leased, or held in possession by an individual 18 years of age and  
38 older, the subject line of each and every message shall include  
39 “ADV:ADLT” as the first eight characters.



1 (h) An employer who is the registered owner of more than one  
2 e-mail address may notify the person or entity conducting business  
3 in this state e-mailing or causing to be e-mailed, documents  
4 consisting of unsolicited advertising material for the lease, sale,  
5 rental, gift offer, or other disposition of any realty, goods, services,  
6 or extension of credit of the desire to cease e-mailing on behalf of  
7 all of the employees who may use employer-provided and  
8 employer-controlled e-mail addresses.

9 (i) This section, or any part of this section, shall become  
10 inoperative on and after the date that federal law is enacted that  
11 prohibits or otherwise regulates the transmission of unsolicited  
12 advertising by electronic mail (e-mail).

13 SEC. 3. Section 17538.45 is added to the Business and  
14 Professions Code, to read:

15 17538.45. (a) As permitted under subsection (b) of Section  
16 227 of Title 47 of the United States Code, a person or entity may  
17 bring the following actions in an appropriate court in the State of  
18 California:

19 (1) An action based on a violation of subsection (b) of Section  
20 227 of Title 47 of the United States Code or the regulations  
21 prescribed under subsection (c) of Section 227 of Title 47 of the  
22 United States Code and promulgated by the Federal  
23 Communications Commission to enjoin these violations.

24 (2) An action to recover for actual monetary loss from a  
25 violation, or to receive five hundred dollars (\$500) in damages for  
26 each such violation, whichever is greater.

27 (b) If the court finds that the defendant willfully or knowingly  
28 violated subsection (b) of Section 227 of Title 47 of the United  
29 States Code or the regulations prescribed under Section 227 of  
30 Title 47 of the United States Code, the court may, in its discretion,  
31 increase the amount of the award to an amount equal to not more  
32 than three times the amount available under paragraph (2) of  
33 subdivision (a).

