

October 26, 2005

Via Email and Electronic Filing

Monica Desai
Bureau Chief
Consumer and Governmental Affairs Bureau
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Telephone Consumer Protection Act Preemption Issues
Docket No. 02-278

Dear Ms. Desai:

Further to our meeting last month, at which we discussed the need for the Commission to preempt state telemarketing laws that are being applied to interstate calls, I write today to alert you to another example of a state refusing to recognize federal law. California has recently enacted a law imposing restrictions on sending facsimiles that directly contradicts the Junk Fax Prevention Act of 2005 (I have attached a copy of this law for your convenience).

As we discussed at our meeting, my client, the Direct Marketing Association, has laid out in numerous filing with the Commission why the TCPA preempts state laws as they are applied to interstate calls. Nonetheless, both this Commission and the Federal Trade Commission had expressed hope that the states would work to harmonize their laws with the federal standards in order to avoid the need to preempt inconsistent laws. DMA and others have cataloged the list of states that either have not amended their laws to match the requirements of the TCPA or, more egregiously, have enacted laws that directly conflict with the TCPA since the two agencies sought voluntary harmonization. This new law further reinforces the fact that states are not interested in harmonizing their laws with the TCPA.

After nearly two years of discussion and debate about the proper interpretation of the TCPA, and whether an established business relationship should constitute the request level of consent to send an unsolicited advertisement via fax, Congress settled the question by enacting the Junk Fax Prevention Act. Less than four months after this uproar was settled – and after a great deal of uncertainty as to how businesses would be required to conduct their faxing – California has undone the careful compromise struck by Congress. By its terms, the statute applies to faxes sent by “a person or entity, if either the person or entity or the recipient is located

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within California,” and requires express consent in order to send an unsolicited fax and does not recognize an EBR as the basis for sending such a fax.

California’s new law demonstrates that it is essential that the Commission release its interpretation of the proper scope and application of the TCPA to interstate calls. The murky and convoluted system of state laws that existed in 2003 has only become more muddled. The TCPA provides that it is to be the sole law governing the act of placing interstate telephone calls (but certainly not the only law governing the content of the call – that is left to the FTC and states) and it is essential for the Commission to say so. Furthermore, this new law demonstrates why an all-encompassing determination is necessary to prevent confusion as additional states enact inconsistent laws.

A copy of this letter and its attachment have been filed electronically with the Office of the Secretary. Thank you again for your time and consideration of this matter.

Respectfully submitted,



Ian D. Volner

Enclosure

cc: John A. Greco, President, DMA (*via email*)
Jerry Cerasale, Sr. Vice President, DMA (*via email*)

Senate Bill No. 833

CHAPTER 667

An act to add Section 17538.43 to the Business and Professions Code, relating to advertising.

[Approved by Governor October 7, 2005. Filed with
Secretary of State October 7, 2005.]

LEGISLATIVE COUNSEL'S DIGEST

SB 833, Bowen. Unsolicited advertising faxes.

Existing state law imposes various requirements and prohibitions on different forms of advertising. A violation of the provisions governing advertising is a crime.

This bill would make it unlawful for a person or entity, if located in California or if the recipient is located in California, to use any device to send, or cause any other person or entity to use a device to send, an unsolicited advertisement to a telephone facsimile machine, except as specified. The bill would authorize the recipient of an unsolicited advertising fax to bring an action for a violation of these provisions for injunctive relief, actual damages or statutory damages of \$500 per violation, whichever is greater, or both injunctive relief and damages, and, if the violation was willful, would authorize a court to award treble damages. The bill would also make it unlawful for a person or entity, if located in California or the recipient is located in California, to initiate a facsimile communication using a machine that does not provide specified identification, or to use a device to send a message via a telephone facsimile machine unless the message is clearly marked with certain identifying information.

Because a violation of the bill would be a crime, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

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

SECTION 1. Section 17538.43 is added to the Business and Professions Code, to read:

17538.43. (a) As used in this section, the following terms have the following meanings:

(1) “Telephone facsimile machine” means equipment that has the capacity to do either or both of the following:

(A) Transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line.

(B) Transcribe text or images, or both, from an electronic signal received over a regular telephone line onto paper.

(2) “Unsolicited advertisement” means any material advertising the commercial availability or quality of any property, goods, or services that is transmitted to any person or entity without that person’s or entity’s prior express invitation or permission. Prior express invitation or permission may be obtained for a specific or unlimited number of advertisements and may be obtained for a specific or unlimited period of time.

(b) (1) It is unlawful for a person or entity, if either the person or entity or the recipient is located within California, to use any telephone facsimile machine, computer, or other device to send, or cause another person or entity to use such a device to send, an unsolicited advertisement to a telephone facsimile machine.

(2) In addition to any other remedy provided by law, including a remedy provided by the Telephone Consumer Act (47 U.S.C. Sec. 227 and following), a person or entity may bring an action for a violation of this subdivision seeking the following relief:

(A) Injunctive relief against further violations.

(B) Actual damages or statutory damages of five hundred dollars (\$500) per violation, whichever amount is greater.

(C) Both injunctive relief and damages as set forth in subparagraphs (A) and (B).

If the court finds that the defendant willfully or knowingly violated this subdivision, the court may, in its discretion, increase the amount of the award to an amount equal to not more than three times the amount otherwise available under subparagraph (B).

(c) It is unlawful for a person or entity, if either the person or entity or the recipient is located in California, to do either of the following:

(1) Initiate any communication using a telephone facsimile machine that does not clearly mark, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of the business, other entity, or individual.

(2) Use a computer or other electronic device to send any message via a telephone facsimile machine unless it is clearly marked, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and the identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of the business, other entity, or individual.

(d) This section shall not apply to a facsimile sent by or on behalf of a professional or trade association that is a tax-exempt nonprofit

organization and in furtherance of the association's tax-exempt purpose to a member of the association, provided that all of the following conditions are met:

- (1) The member voluntarily provided the association the facsimile number to which the facsimile was sent.
- (2) The facsimile is not primarily for the purpose of advertising the commercial availability or quality of any property, goods, or services of one or more third parties.
- (3) The member who is sent the facsimile has not requested that the association stop sending facsimiles for the purpose of advertising the commercial availability or quality of any property, goods, or services of one or more third parties.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.