

SFA

BILL ANALYSIS

Senate Fiscal Agency

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House Bill 4432 (Substitute S-1 as reported)

Sponsor: Representative Terry London

House Committee: Consumers

Senate Committee: Judiciary

Date Completed: 3-7-90

RATIONALE

The growing popularity of facsimile (fax) machines has been a boon to companies and individuals at times when business needs involve the rapid receipt or transmission of certain information. As the use of these machines has increased, however, some claim that "junk fax mail" has become a problem because owners of fax machines receive advertisements and other information for which they have no use or desire. Also, since fax machine owners have no choice but to accept messages that are transmitted to them, the time necessary for a fax machine to accept messages and the relatively high cost of paper used on these machines add to the inconvenience. Some feel that limits should be placed on the use of fax machines for advertising purposes.

CONTENT

The bill would create a new Act to prohibit the use of a fax machine to transmit unsolicited advertising messages. A person could not send such an advertisement without first obtaining the receiver's consent, by means other than a fax. Consent could be given by telephone to a particular vendor, or by general notification to marketing or trade associations. Consent to have a fax number published in a directory or otherwise disseminated could not be construed as consent to receive fax advertising.

If the Attorney General had reason to believe that a person was violating or was about to violate the proposed Act, he or she would have

to notify that person and order the person to cease and desist. The person would have to be given the opportunity to confer with the Attorney General. The notice could be delivered by mail to the person's place of business, or to his or her last known address if the person had no usual place of business. Notice to a corporation would have to be delivered to the agent who was designated to receive service of process, or to an officer of the corporation. A prosecuting attorney or law enforcement officer who suspected that a violation had occurred would have to forward written notice of the alleged violation to the Attorney General.

The Attorney General could accept an assurance of discontinuance from an alleged violator, but that assurance would not constitute an admission and would not be introduced in any proceeding except an action accusing violation of the assurance. An assurance of discontinuance would have to be in writing and filed with the Department of Attorney General and the Department would have to maintain a record of all such filings.

If the Attorney General had probable cause to believe a person continued to violate the bill after a cease and desist notice was issued or that there had been a violation of an assurance of discontinuance, the Attorney General could bring an action to restrain the practice by temporary or permanent injunction. The action could be brought in the Circuit Court of the county in which the person was established or conducted business, or in the Circuit Court of

H.B. 4432 (3-7-90)

Ingham County. If a person knowingly violated an injunction, decree, or judgment, or the terms of an assurance of discontinuance, he or she would have to pay a civil fine or up to \$500 for each violation. The court that issued the injunction, order, decree, or judgment would retain jurisdiction and the Attorney General could petition that court for recovery of the civil fine.

In addition, a receiver of a fax advertisement sent in violation of the bill could file a civil suit to recover \$250 or actual damages, whichever was greater, if the Attorney General had issued a cease and desist notice, the person who sent the advertisement had provided an assurance of discontinuance, or the receiver had provided written notice to the sender that the sender did not have the receiver's consent to send the advertisement.

SENATE COMMITTEE ACTION

The Senate Judiciary Committee adopted a substitute (S-1) to the bill that added the notice responsibilities of the Attorney General, the provision that would allow a party who received such notice to file an assurance of discontinuance, the provision to permit the Attorney General to bring a civil action to seek civil penalties, and the restrictions on individuals seeking damages. The substitute also removed criminal penalties that were included in the House-passed version of the bill. The House-passed version simply would require the Department of Attorney General to investigate complaints of illegal fax advertising and allow the Department to seek injunctive relief. Under the House-passed version, a violation of the proposed Act would be a misdemeanor, punishable by a maximum fine of \$500, up to 90 days' imprisonment, or both.

FISCAL IMPACT

The bill would have an indeterminate impact on State and local government. Enforcement costs and fine revenue would depend on the number of violations and convictions.

ARGUMENTS

Supporting Argument

The sending of unsolicited fax messages is an invasion of privacy, and forces costs upon the

receiver. The practice of fax advertising has been compared to direct mail advertising, but direct mail advertising recipients are not forced to accept and bear the cost of receiving the messages. Further, those recipients have the option of discarding mail for which they have no use. Postal customers also can notify direct mail marketing associations through the post office to remove their name from certain mailing lists. The bill would correct this junk fax inequity by allowing businesses and individuals to choose which advertising messages they want to receive.

Opposing Argument

While some regulation of junk fax mail may be needed, the bill would go too far. Advertising through fax machines has been beneficial for small businesses seeking new markets. Those who operate their businesses out of their home, for example, may not be able to afford membership in a direct mail advertising service or to mail samples to potential customers. Fax advertising provides them with a viable option. Rather than ban all unsolicited fax advertising messages, a law such as one recently enacted in New York State should be considered. Under the New York law, messages may be transmitted, whether solicited or not, if a prior business relationship existed between the two businesses or individuals, and advertising messages also may be faxed at times other than normal business hours (e.g., between 9:00 p.m. and 6:00 a.m.). Under such an arrangement, customers have the option of notifying the advertiser of whether they wanted to receive additional information or whether they are not interested.

Response: Allowing the transmission of unsolicited fax messages during nonbusiness hours still would force the receiver to incur the cost of the messages. In addition, businesses could face a daily backlog of messages each morning.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.