

SUBJECT: Restricting unsolicited electronic transmission of advertising materials

COMMITTEE: Business and Industry — committee substitute recommended

VOTE: 5 ayes — Brimer, George, Siebert, Solomons, Woolley
0 nays
4 absent — Dukes, Corte, Giddings, Ritter

WITNESSES: For — Mike Pollard, Texas Association of Life and Health Insurers; Bill Stinson, Texas Association of Realtors
Against — None

BACKGROUND: Under Business and Commerce Code, chapter 35, sending an unsolicited fax transmission in Texas is a Class C misdemeanor, punishable by a maximum fine of \$500. The law requires a county or district attorney to investigate complaints and file charges if necessary.

DIGEST: CSHB 2420 would prohibit a person from using a fax machine, computer, or other device to send to a fax machine an unsolicited advertisement or an advertisement that did not contain, in at least 12-point type, a toll-free number and address that the recipient could call or write to request that no additional advertisements be sent. Upon receipt of the request, the solicitor would have to send a written confirmation to the recipient. The confirmation could be sent by fax. Thereafter, the solicitor would be prohibited from sending any more transmissions to that recipient.

A person could not send an advertisement to a fax machine before noon or after 9 p.m. on Sunday or before 9 a.m. or after 9 p.m. on a weekday or Saturday.

The provisions of CSHB 2420 would not apply to:

- ! an advertisement sent at the request of the recipient;
- ! an advertisement sent by a trade association to its members; or
- ! an advertisement for the sale or lease of real estate or brokerage services

sent by a licensed real estate broker or salesperson to another real estate broker or salesperson, to a previous client or customer, or to a prospective buyer, tenant, or lessor who had asked to received the advertisement.

CSHB 2420 would take effect September 1, 1999.

**SUPPORTERS
SAY:**

Unsolicited faxes are wasteful because they use the recipient's fax machine supplies and tie up telephone lines. They are especially a nuisance if transmitted late at night.

CSHB 2420 would improve protection of Texas consumers from unwanted intrastate fax transmissions. The bill would not place burdensome restrictions on the ability of people to market their goods and services. It simply would prohibit them from sending faxes unless they have the consumer's permission and from sending faxes during the evening hours.

By incorporating restrictions on unsolicited advertisements by fax into the law that restricts telephone solicitations, the bill would allow the attorney general, who investigates complaints relating to telephone solicitation, also to investigate complaints relating to unsolicited advertisements sent by fax. The attorney general could seek injunctive relief to halt the continued harassment and could levy fines of up to \$10,000 for each violation. A consumer injured by a violation could bring any civil action for recovery of damages, plus reasonable attorney fees and court costs.

In 1991, Congress enacted the Telephone Consumer Protection Act, which allows citizens to take civil action against advertisers who transmit unwanted advertising via fax machines and automated dialing systems. However, the act applies only to interstate transmissions, and each state must decide separately whether to permit its citizens to bring civil actions for violations. CSHB 2420 would allow for such a suit to be filed in state court for recovery of damages.

Requiring a solicitor to send written confirmation of receipt of a consumer's request to stop receiving faxes would provide documented protection for both parties. The consumer's wish not to be bothered would be unmistakable, and the solicitor would have a defense against prosecution.

In 1994, the Ninth U.S. Circuit Court of Appeals affirmed a lower court decision that the prohibition against unsolicited advertisement by fax does not

violate the right to free speech under the First Amendment. Since other methods of direct advertising exist, including by telephone and mail, this bill would not put a significant dent in the advertiser's First Amendment rights.

OPPONENTS
SAY:

No apparent opposition.

NOTES:

The committee substitute added the provisions that would:

- ! require an advertiser to put the telephone number and address in 12-point type or larger;
- ! require an advertiser who received a request not to send further faxes to acknowledge the request with a written confirmation; and
- ! limit the hours during which faxed advertisements could be sent.

The substitute also added the exemptions for certain transmissions.

A related bill, HB 23 by Goolsby, would allow an individual to bring a civil cause of action against a person who made continued unsolicited intrastate transmissions to a mobile telephone, fax, or telecopier. Recoverable damages could not exceed the greater of \$500 for each violation or the person's actual damages. If a court found that a solicitor knowingly or intentionally violated federal law restricting the use of telephone equipment or the provisions of CSHB 23, the award could be increased not to exceed the greater of \$1,500 for each violation or three times the actual damages. HB 23 passed the House on April 23 and was scheduled for public hearing in the Senate Economic Development Committee on May 6.