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BUSINESS AND PROFESSIONS CODE - BPC

DIVISION 7. GENERAL BUSINESS REGULATIONS [16000 - 18107] (*Division 7 added by Stats. 1941, Ch. 61.*)

PART 3. REPRESENTATIONS TO THE PUBLIC [17500 - 17943] (*Part 3 added by Stats. 1941, Ch. 63.*)

CHAPTER 1. Advertising [17500 - 17606] (*Chapter 1 added by Stats. 1941, Ch. 63.*)

ARTICLE 1.8. Restrictions On Unsolicited Commercial E-mail Advertisers [17529 - 17529.9] (*Article 1.8 added by Stats. 2003, Ch. 487, Sec. 1.*)

17529. The Legislature hereby finds and declares all of the following:

- (a) Roughly 40 percent of all e-mail traffic in the United States is comprised of unsolicited commercial e-mail advertisements (hereafter spam) and industry experts predict that by the end of 2003 half of all e-mail traffic will be comprised of spam.
- (b) The increase in spam is not only an annoyance but is also an increasing drain on corporate budgets and possibly a threat to the continued usefulness of the most successful tool of the computer age.
- (c) Complaints from irate business and home-computer users regarding spam have skyrocketed, and polls have reported that 74 percent of respondents favor making mass spamming illegal and only 12 percent are opposed, and that 80 percent of respondents consider spam very annoying.
- (d) According to Ferris Research Inc., a San Francisco consulting group, spam will cost United States organizations more than ten billion dollars (\$10,000,000,000) this year, including lost productivity and the additional equipment, software, and manpower needed to combat the problem. California is 12 percent of the United States population with an emphasis on technology business, and it is therefore estimated that spam costs California organizations well over 1.2 billion dollars (\$1,200,000,000).
- (e) Like junk faxes, spam imposes a cost on users, using up valuable storage space in e-mail inboxes, as well as costly computer band width, and on networks and the computer servers that power them, and discourages people from using e-mail.
- (f) Spam filters have not proven effective.
- (g) Like traditional paper "junk" mail, spam can be annoying and waste time, but it also causes many additional problems because it is easy and inexpensive to create, but difficult and costly to eliminate.
- (h) The "cost shifting" from deceptive spammers to Internet business and e-mail users has been likened to sending junk mail with postage due or making telemarketing calls to someone's pay-per-minute cellular phone.
- (i) Many spammers have become so adept at masking their tracks that they are rarely found, and are so technologically sophisticated that they can adjust their systems to counter special filters and other barriers against spam and can even electronically commandeer unprotected computers, turning them into spam-launching weapons of mass production.
- (j) There is a need to regulate the advertisers who use spam, as well as the actual spammers, because the actual spammers can be difficult to track down due to some return addresses that show up on the display as "unknown" and many others being obvious fakes and they are often located offshore.
- (k) The true beneficiaries of spam are the advertisers who benefit from the marketing derived from the advertisements.
- (l) In addition, spam is responsible for virus proliferation that can cause tremendous damage both to individual computers and to business systems.
- (m) Because of the above problems, it is necessary that spam be prohibited and that commercial advertising e-mails be regulated as set forth in this article.

(*Added by Stats. 2003, Ch. 487, Sec. 1. Effective January 1, 2004.*)

17529.1. For the purpose of this article, the following definitions apply:

- (a) "Advertiser" means a person or entity that advertises through the use of commercial e-mail advertisements.

(b) "California electronic mail address" or "California e-mail address" means any of the following:

(1) An e-mail address furnished by an electronic mail service provider that sends bills for furnishing and maintaining that e-mail address to a mailing address in this state.

(2) An e-mail address ordinarily accessed from a computer located in this state.

(3) An e-mail address furnished to a resident of this state.

(c) "Commercial e-mail advertisement" means any electronic mail message initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

(d) "Direct consent" means that the recipient has expressly consented to receive e-mail advertisements from the advertiser, either in response to a clear and conspicuous request for the consent or at the recipient's own initiative.

(e) "Domain name" means any alphanumeric designation that is registered with or assigned by any domain name registrar as part of an electronic address on the Internet.

(f) "Electronic mail" or "e-mail" means an electronic message that is sent to an e-mail address and transmitted between two or more telecommunications devices, computers, or electronic devices capable of receiving electronic messages, whether or not the message is converted to hard copy format after receipt, viewed upon transmission, or stored for later retrieval. "Electronic mail" or "e-mail" includes electronic messages that are transmitted through a local, regional, or global computer network.

(g) "Electronic mail address" or "e-mail address" means a destination, commonly expressed as a string of characters, to which electronic mail can be sent or delivered. An "electronic mail address" or "e-mail address" consists of a user name or mailbox and a reference to an Internet domain.

(h) "Electronic mail service provider" means any person, including an Internet service provider, that is an intermediary in sending or receiving electronic mail or that provides to end users of the electronic mail service the ability to send or receive electronic mail.

(i) "Initiate" means to transmit or cause to be transmitted a commercial e-mail advertisement or assist in the transmission of a commercial e-mail advertisement by providing electronic mail addresses where the advertisement may be sent, but does not include the routine transmission of the advertisement through the network or system of a telecommunications utility or an electronic mail service provider through its network or system.

(j) "Incident" means a single transmission or delivery to a single recipient or to multiple recipients of an unsolicited commercial e-mail advertisement containing substantially similar content.

(k) "Internet" has the meaning set forth in paragraph (6) of subdivision (e) of Section 17538.

(l) "Preexisting or current business relationship," as used in connection with the sending of a commercial e-mail advertisement, means that the recipient has made an inquiry and has provided his or her e-mail address, or has made an application, purchase, or transaction, with or without consideration, regarding products or services offered by the advertiser.

Commercial e-mail advertisements sent pursuant to the exemption provided for a preexisting or current business relationship shall provide the recipient of the commercial e-mail advertisement with the ability to "opt-out" from receiving further commercial e-mail advertisements by calling a toll-free telephone number or by sending an "unsubscribe" e-mail to the advertiser offering the products or services in the commercial e-mail advertisement. This opt-out provision does not apply to recipients who are receiving free e-mail service with regard to commercial e-mail advertisements sent by the provider of the e-mail service.

(m) "Recipient" means the addressee of an unsolicited commercial e-mail advertisement. If an addressee of an unsolicited commercial e-mail advertisement has one or more e-mail addresses to which an unsolicited commercial e-mail advertisement is sent, the addressee shall be deemed to be a separate recipient for each e-mail address to which the e-mail advertisement is sent.

(n) "Routine transmission" means the transmission, routing, relaying, handling, or storing of an electronic mail message through an automatic technical process. "Routine transmission" shall not include the sending, or the knowing participation in the sending, of unsolicited commercial e-mail advertisements.

(o) "Unsolicited commercial e-mail advertisement" means a commercial e-mail advertisement sent to a recipient who meets both of the following criteria:

(1) The recipient has not provided direct consent to receive advertisements from the advertiser.

(2) The recipient does not have a preexisting or current business relationship, as defined in subdivision (l), with the advertiser promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

(Amended by Stats. 2004, Ch. 183, Sec. 14. Effective January 1, 2005.)

17529.2. Notwithstanding any other provision of law, a person or entity may not do any of the following:

(a) Initiate or advertise in an unsolicited commercial e-mail advertisement from California or advertise in an unsolicited commercial e-mail advertisement sent from California.

(b) Initiate or advertise in an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a California electronic mail address.

(c) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect any other provision or application that can be given effect without the invalid provision or application.

(Added by Stats. 2003, Ch. 487, Sec. 1. Effective January 1, 2004.)

17529.3. Nothing in this article shall be construed to limit or restrict the adoption, implementation, or enforcement by a provider of Internet access service of a policy of declining to transmit, receive, route, relay, handle, or store certain types of electronic mail messages.

(Added by Stats. 2003, Ch. 487, Sec. 1. Effective January 1, 2004.)

17529.4. (a) It is unlawful for any person or entity to collect electronic mail addresses posted on the Internet if the purpose of the collection is for the electronic mail addresses to be used to do either of the following:

(1) Initiate or advertise in an unsolicited commercial e-mail advertisement from California, or advertise in an unsolicited commercial e-mail advertisement sent from California.

(2) Initiate or advertise in an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to California electronic mail address.

(b) It is unlawful for any person or entity to use an electronic mail address obtained by using automated means based on a combination of names, letters, or numbers to do either of the following:

(1) Initiate or advertise in an unsolicited commercial e-mail advertisement from California, or advertise in an unsolicited commercial e-mail advertisement sent from California.

(2) Initiate or advertise in an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a California electronic mail address.

(c) It is unlawful for any person to use scripts or other automated means to register for multiple electronic mail accounts from which to do, or to enable another person to do, either of the following:

(1) Initiate or advertise in an unsolicited commercial e-mail advertisement from California, or advertise in an unsolicited commercial e-mail advertisement sent from California.

(2) Initiate or advertise in an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a California electronic mail address.

(Added by Stats. 2003, Ch. 487, Sec. 1. Effective January 1, 2004.)

17529.5. (a) It is unlawful for any person or entity to advertise in a commercial e-mail advertisement either sent from California or sent to a California electronic mail address under any of the following circumstances:

(1) The e-mail advertisement contains or is accompanied by a third-party's domain name without the permission of the third party.

(2) The e-mail advertisement contains or is accompanied by falsified, misrepresented, or forged header information. This paragraph does not apply to truthful information used by a third party who has been lawfully authorized by the advertiser to use that information.

(3) The e-mail advertisement has a subject line that a person knows would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.

(b) (1) (A) In addition to any other remedies provided by any other provision of law, the following may bring an action against a person or entity that violates any provision of this section:

(i) The Attorney General.

(ii) An electronic mail service provider.

(iii) A recipient of an unsolicited commercial e-mail advertisement, as defined in Section 17529.1.

(B) A person or entity bringing an action pursuant to subparagraph (A) may recover either or both of the following:

(i) Actual damages.

(ii) Liquidated damages of one thousand dollars (\$1,000) for each unsolicited commercial e-mail advertisement transmitted in violation of this section, up to one million dollars (\$1,000,000) per incident.

(C) The recipient, an electronic mail service provider, or the Attorney General, if the prevailing plaintiff, may also recover reasonable attorney's fees and costs.

(D) However, there shall not be a cause of action under this section against an electronic mail service provider that is only involved in the routine transmission of the e-mail advertisement over its computer network.

(2) If the court finds that the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent unsolicited commercial e-mail advertisements that are in violation of this section, the court shall reduce the liquidated damages recoverable under paragraph (1) to a maximum of one hundred dollars (\$100) for each unsolicited commercial e-mail advertisement, or a maximum of one hundred thousand dollars (\$100,000) per incident.

(3) (A) A person who has brought an action against a party under this section shall not bring an action against that party under Section 17529.8 or 17538.45 for the same commercial e-mail advertisement, as defined in subdivision (c) of Section 17529.1.

(B) A person who has brought an action against a party under Section 17529.8 or 17538.45 shall not bring an action against that party under this section for the same commercial e-mail advertisement, as defined in subdivision (c) of Section 17529.1.

(c) A violation of this section is a misdemeanor, punishable by a fine of not more than one thousand dollars (\$1,000), imprisonment in a county jail for not more than six months, or both that fine and imprisonment.

(Amended by Stats. 2005, Ch. 247, Sec. 1. Effective January 1, 2006.)

17529.8. (a) (1) In addition to any other remedies provided by this article or by any other provisions of law, a recipient of an unsolicited commercial e-mail advertisement transmitted in violation of this article, an electronic mail service provider, or the Attorney General may bring an action against an entity that violates any provision of this article to recover either or both of the following:

(A) Actual damages.

(B) Liquidated damages of one thousand dollars (\$1,000) for each unsolicited commercial e-mail advertisement transmitted in violation of Section 17529.2, up to one million dollars (\$1,000,000) per incident.

(2) The recipient, an electronic mail service provider, or the Attorney General, if the prevailing plaintiff, may also recover reasonable attorney's fees and costs.

(3) However, there shall not be a cause of action against an electronic mail service provider that is only involved in the routine transmission of the unsolicited commercial e-mail advertisement over its computer network.

(b) If the court finds that the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent unsolicited commercial e-mail advertisements that are in violation of this article, the court shall reduce the liquidated damages recoverable under subdivision (a) to a maximum of one hundred dollars (\$100) for each unsolicited commercial e-mail advertisement, or a maximum of one hundred thousand dollars (\$100,000) per incident.

(Added by Stats. 2003, Ch. 487, Sec. 1. Effective January 1, 2004.)

17529.9. The provisions of this article are severable. If any provision of this article or its application is held invalid, that invalidity shall not affect any other provision or application that can be given effect without the invalid provision or application.

(Added by Stats. 2003, Ch. 487, Sec. 1. Effective January 1, 2004.)