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October 5, 2004

To Whom It May Concern:

Unsolicited commercial email (UCE, or "Spam") is a huge and still-growing problem that costs consumers and businesses billions of dollars per year. California's original law regulating unsolicited commercial email (UCE, or "Spam"), Business & Professions (B&P) Code Section 17538.4, was signed into law in 1998. In order to correct several omissions in B&P 17538.4 and strengthen California's anti-spam law, I introduced SB 186, which became B&P 17529 in September 2003 and went into effect on January 1, 2004.

This letter shall serve to briefly describe the California Legislature's intent with regard to unsolicited commercial email (UCE), frequently referred to as "Spam."

It was always the intent of the California Legislature, when drafting B&P 17529 that liquidated damages of \$1,000 per violation apply to each violation of ANY part of B&P 17529. This includes violations of B&P 17529.5, which prohibits the use of a third party's domain name without permission; falsity, misrepresentation, or deception in any part of the email header; or misleading subject lines.

By its own language, the federal CAN-SPAM Act, which went into effect on January 1, 2004 – the same day as B&P 17529 – pre-empts state law EXCEPT to the extent that state law prohibits falsity or deception in any part of a commercial email message or information attached thereto. After thoroughly researching the issue, we determined that although CAN-SPAM pre-empts B&P 17529.2, it does NOT pre-empt B&P 17529.5 and the associated damages of \$1,000 per violation. (B&P 17529 was deliberately written so that provisions are severable.)

However, because of some confusion around the pre-emption issue, I introduced SB 1457, which was signed into law in September 2004. This bill does not revise or alter in any way the causes of action or damages of B&P 17529, but merely provides clean-up language to clarify that ever since January 1, 2004, individuals, email service providers, and the Attorney General are authorized to bring suit under B&P 17529.5 and recover liquidated damages of \$1,000 per violation, even in case of a single UCE.



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Examples of violations of B&P 17529.5 could include, but are not limited to:

- Invalid sender name/email addresses, or a sender name/email address that does not accurately identify the sender
- Email addresses in the reply-to or return-path fields are not functional and/or are not operated by the sender
- The use of multiple email addresses and/or domain names created for the sole purpose of bypassing spam-filters and blacklists
- Invalid mailserver domain names
- Unauthorized routing of UCE through other parties' IP addresses
- Falsifying IP addresses to make it appear as if a UCE was routed through certain IP addresses when it did not in fact take that path
- Spoofing (sending emails using the recipient's email address or any part thereof)
- Subject lines that do not clearly identify the nature of the UCE or the specific advertised product/service/website therein
- Subject lines that lack required labeling

The California Legislature recognized that most Internet Service Providers strongly recommend against unsubscribing from a spammer's list, as doing so is typically ineffectual and often a direct method of being placed on even more UCE lists. Indeed, it is widely reported that clicking on an "Opt-out" link in a UCE can place the UCE recipient's computer at high risk of being compromised or infected with malicious software. Therefore, the Legislature never intended that a recipient need try to unsubscribe before bringing suit under any provision of B&P 17529.

Please feel free to contact my office if you need any further information.

Sincerely,



KEVIN MURRAY

Senator
26th District

KM/ys