



TO: JCOTS EXECUTIVE COMMITTEE
FROM: PATRICK CUSHING, STAFF ATTORNEY, JCOTS
SUBJECT: HB 2973 (2007) - UNSOLICITED BULK ELECTRONIC MESSAGES;
CELL PHONE SPAM; PENALTY
DATE: 10/1/07

Executive Summary

If 'cell phone spam' legislation is to move forward without preemption on the federal level, the first option is to develop more stringent requirements for unsolicited commercial messages that originate from automatic dialing devices or for persons who initiate telephone solicitations in general, both of which are currently covered by the Telephone Consumer Protection Act (TCPA). At least one case has found that the TCPA does not preempt state regulation of automatic dialers that is not in actual conflict with the TCPA.¹ The second option would be to implement a state-based do-not-call list, which is expressly authorized under the TCPA and which over 38 states have adopted as of July 2003.

The Controlling of Non-Solicited Pornography and Marketing Act (CAN-SPAM) expressly preempts any state legislation addressing commercial mail messages sent to cell phones through websites. However, the CAN-SPAM Act does not directly address a relatively new technology, referred to as SMS gateways, which bypass the typical "xxxx@xxx.com" format used by websites. Therefore, it is possible the CAN-SPAM Act does not preempt state legislation targeted at SMS gateways if the message does not include an Internet domain reference.

Background

Cell phone 'spam' primarily comes from two sources: automatic dialers and websites. Consequently, the two major federal laws that regulate or restrict cell phone spam retain this technology-centric approach. The two major bodies of federal law at issue are the Telephone Consumer Protection Act (TCPA) of 1991,

¹ 68 F.R. 441555. See Van Bergen v. Minnesota, 59 F.3d 1541, 1547-48 (8th Cir. 1995).



which regulates (1) cell phone spam that originates from automatic dialing machines and (2) other telephone solicitations, and the Controlling of Non-Solicited Pornography and Marketing Act (CAN-SPAM) of 2003, which regulates commercial messages that originate from a website and contain a domain name.² Together, these two laws cover a majority of the types of cell phone spam that HB 2973 attempts to restrict. Finally, the Do-Not-Call Registry (DNCR), promulgated under the TCPA, restricts all telephone solicitations, whether voice or text, to those consumers who place their wireless or land-line phone numbers on the registry. In addition to the federal DNCR, states are free to operate their own DNCR (Virginia is not one of them).

CAN-SPAM Act³

Scope: The Federal Communications Commission's (FCC) ban on sending unwanted e-mail messages to wireless devices applies to all "commercial messages." The CAN-SPAM Act defines commercial messages as those for which the primary purpose is to advertise or promote a commercial product or service. The FCC's ban does not cover "transactional or relationship" messages, or notices to facilitate a transaction a person has already agreed to.⁴

The FCC's ban covers messages sent to cell phones and pagers only if the message uses an Internet address that includes an Internet domain name. Under the FCC's rules, commercial e-mail messages may only be sent to a wireless device via the Internet if the person provided "express prior authorization."⁵

Limitations: The FCC's ban does not explicitly cover "short messages," typically sent from one mobile phone to another, that do not use an Internet address.⁶ These are sometimes referred to as peer-to-peer messages. The CAN-SPAM Act is also silent on SMS gateways, which are software programs that can simulate SMS messages typically sent from one cell phone to another. In the FCC order promulgating regulations for the CAN-SPAM Act the FCC is clear that the CAN-SPAM Act anticipates new technologies but remains limited in scope by

² As mentioned above, this is the "xxxx@xxxx.com" format.

³ 15 U.S.C. §§ 7701-7713.

⁴ "CAN-SPAM: Unwanted Text Messages and E-mail on Wireless Phones and Other Mobile Devices", <http://www.fcc.gov/cgb/consumerfacts/canspam.html> (website last updated 1/25/06; last accessed on 1/26/05).

⁵ 47 C.F.R. § 64.3100(a)(1). Subdivision (a) includes other narrower exceptions.

⁶ Id.



the requirement that the message contain a reference to an Internet domain name, whether visible or not.

Enforcement: The attorney general of a state has enforcement authority under the CAN-SPAM Act to bring civil actions on behalf of affected residents. The remedy for violations of the CAN-SPAM Act is an injunction, actual loss suffered by the resident, or up to \$250 per violation (\$2,000,000 limit).⁷

Preemption: The CAN-SPAM Act expressly preempts state laws that restrict electronic mail used to send commercial messages to wireless devices.⁸ The CAN-SPAM Act does not preempt the applicability of:

1. State laws that are not specific to electronic mail, including state trespass, contract, or tort law; or
2. Other state laws to the extent that those laws relate to acts of fraud or computer crime.⁹

Although not inclusive of SMS messages without a domain name reference, there is still uncertainty as to whether the CAN-SPAM Act preempts state laws directed at restricting spam sent through SMS gateways.

Conclusion: Because the language in the CAN-SPAM Act is very specific in defining its scope, it is unlikely the Act applies to text messages sent from a SMS gateway if the message sent does not contain a reference to a domain name. Unlike the TCPA's general description of applicable technologies, the CAN-SPAM Act specifically identifies messages that carry a domain name reference, which would exclude messages sent from certain SMS gateways. With no cases to indicate a broader reading of the CAN-SPAM Act and given the narrowly drawn text of the Act, it is possible the Act would not preempt state regulation of text messages sent from SMS gateways if the message does not contain a reference to an internet domain name.

Telephone Consumer Protection Act¹⁰

Scope: The TCPA restricts (1) all automated or prerecorded calls from telemarketers, whether voice or text, to land-based and wireless numbers; (2)

⁷ 15 U.S.C. § 7706(f).

⁸ 47 C.F.R. § 64.3100.

⁹ 15 U.S.C. § 7707(b)(2). An example of a computer crime not covered by CAN-SPAM would be a message sent from a website that fraudulently disguised the domain name of the sender.

¹⁰ 47 U.S.C. §227.

The Virginia Joint Commission
JCOTS
on Technology and Science

telephone solicitations between the hours of 9:00 pm and 8:00 am; and (3) telephone solicitations, at any time of day, to a telephone number that has been placed on the DNCR.¹¹ By registering with the DNCR, a consumer is completely protected from most types of telephone solicitations, whether voice or text.

Limitations: The limitation of the TCPA is that it only applies to calls originating from automated dialing devices. The DNCR, which is promulgated under the TCPA, restricts all calls, regardless of origin.

Enforcement of the TCPA: The TCPA authorizes both a private right of action and one brought by a state on behalf of a citizen. If permitted under state law, either party may recover actual monetary loss or receive \$500 in damages for each violation, whichever is greater, or both actions.¹² If a defendant is found to have willfully or knowingly violated regulations promulgated under the TCPA 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.¹³

Enforcement of the DNCR: The TCPA also authorizes a public and private right of action, similar to those under the TCPA in general, for violations of the DNCR if a person receives more than one call from the same entity within a 12 month period.¹⁴

Preemption: While the CAN-SPAM act expressly preempts state law from addressing commercial messages that originate from domain names, the TCPA expressly permits states to pass more stringent requirements for any of the following¹⁵:

1. The use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
2. The use of automatic telephone dialing systems;
3. The use of artificial or prerecorded voice messages; or
4. The making of telephone solicitations.

¹¹ The Federal Communications Commission (FCC) and the Federal Trade Commission (FTC) promulgated regulations establishing DNCR. Despite placement on the list, a consumer can still receive communications from an entity if the consumer consents or there was a prior established business relationship.

¹² 47 U.S.C. § 227(b)(3).

¹³ Id.

¹⁴ 47 U.S.C. § 227(c)(5).

¹⁵ 47 U.S.C. § 227(e).

JCOTS

on Technology and Science

Conclusion: Recent litigation involving the TCPA indicates automatic dialing machines include a wide variety of machines and technologies. In Joffe v Acacia Mortgage Company the Arizona Court of Appeals held that the TCPA was not technology specific when it defined automatic dialing machines and ultimately concluded that the TCPA covers both voice and text messages sent from internet based applications.¹⁶ It appears the trend is to give the TCPA a broad reading and courts would likely read the TCPA to cover text messages sent to wireless numbers from SMS gateways. Although this type of 'cell phone spam' would be covered by the TCPA, the TCPA expressly permits state regulation in this area, allowing the Commonwealth to pursue its own form of regulation that does not conflict with the TCPA, such as establishing a state operated DNCR.

¹⁶ Joffe v. Acacia Mortgage Corporation, 121 P.3d 831 (2005).