

California Spam Bill Leaves Much Uncertainty, Unanswered Unmail

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In the middle of his heated recall battle with the "Terminator," Gov. Gray Davis of California signed a bill into law that is designed to stop all unsolicited commercial e-mail (UCE), commonly known as spam.

Since the law allows fines of up to \$1 million per incident in private actions and potential criminal liability, direct marketers cannot afford to ignore this overly broad statute.

More than 30 states have some type of anti-UCE law, but California's takes things a step further. Traditional anti-UCE laws require that consumers be given the chance to opt out of receiving future e-mails. But this law, which takes effect Jan. 1, 2004, bars marketers from sending UCE to California residents, except those who opt in by explicitly agreeing to receive the e-mail or who have an ongoing relationship with the advertiser, which is defined as a relationship where the e-mail 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."

The key provisions of the California law state that a person or entity cannot initiate or advertise in a UCE advertisement from California or initiate one sent to a California electronic mail address. How an advertiser is supposed to know that a recipient is located in California is not revealed. Other laws generally permit unsolicited e-mail ads so long as they contain "ADV" or "ADV:ADLT" warnings in the header and do not contain false return address information.

California's anti-UCE law almost certainly will be tested in court. Challenges might include that it violates free speech under the First Amendment or that it impermissibly restricts interstate commerce.

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Unlike most other attempts to stop UCE, which failed because marketers sent from outside the country, the California law empowers state officials to go after bank accounts and other financial holdings of foreign companies convicted of violating the law.

Furthermore, California politicians seem to want to pursue not only the person who actually sends the UCE, but the advertisers who benefit from the marketing derived from the ads as well.

To make matters worse, the law provides a private right of action, meaning that any consumer can sue a marketer if they think the law has been violated. As this column has discussed in the past, California has another unique law that permits a representative action, which lets one plaintiff file suit on behalf of many other consumers as if it were a class action, only with even fewer restrictions than the traditional class action.

Class actions normally require that the suit be filed on behalf of a person with an injury typical to the class that he or she seeks to represent. But the California Unfair Competition Act lets a plaintiff file suit on behalf of all California consumers against a marketer without ever having purchased a product, been injured or even participated in the transaction.

This unique law serves as an invitation to professional plaintiffs to race to the courthouse instead of waiting for the California Attorney General's office to do its job. Here, the law even provides for penalties of \$1,000 per UCE message, with a cap of \$1 million.

Despite the huge potential liabilities created by California, it is difficult to give sound advice on how to comply. First, a look at what is easy to understand. The law regulates "commercial e-mail advertisements," which it broadly defines as 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.

A commercial e-mail ad is unsolicited, and therefore illegal, if either the recipient has not provided direct consent to receive ads from the advertiser and the recipient lacks a pre-existing or current business relationship with the advertiser.

Defining the covered messages are simple enough, but things get tricky in the section of the law that saddles direct marketers with the near-impossible task of stopping unsolicited commercial e-mail ads to "all California electronic mail addresses" because the law does not satisfactorily define what a California e-mail address is or how to determine it.

Until a court can sort things out, there are no guarantees or safe harbor provisions short of limiting UCE ads for customers and in response to inquiries.

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