
Proposed Massachusetts Anti-Spam Law Adds to Debate Over State Regulation

2002-12-11

Massachusetts' Attorney General recently proposed legislation that would prohibit certain types of unsolicited commercial email, commonly known as "spam." [The proposed legislation](#) would bring Massachusetts in line with 26 other states, including California, that have previously enacted some form of anti-spam legislation. It would also add to the confusion created by the patchwork of state laws regulating unsolicited commercial email.

The proposed Massachusetts law would not prohibit all unsolicited commercial email, a step that would probably violate commercial speech rights under the First Amendment. Rather, the law would prohibit certain types of misleading commercial email. In general, the proposed law would:

- Require email marketers to indicate that the message is an advertisement by prefacing the subject line of the message with "ADV:";
- Require email marketers whose messages contain or refer to adult content to indicate so by prefacing the subject line of the message with "ADV:ADLT";
- Prohibit email from containing misleading information regarding the email's origin, routing information, or subject matter;
- Require email marketers to permit recipients to opt-out of receiving future emails;
- Create a private right of action for any individual, business or Internet Service Provider to sue the sender of any unsolicited commercial email that violates the law; and
- Prohibit the sale or distribution of software that is used to falsify an email's sending or routing information.

The proposed law is similar to several other states' anti-spam laws, including California's anti-spam statute, Calif. Bus. & Prof. Code, §§ [17538.4](#) and [17538.45](#), which, among other things, also requires labeling certain spam "ADV:" or "ADV:ADLT." See our [October 26, 1999 Internet Alert](#).

Violation of the proposed law would entitle recipients of prohibited spam to recover statutory damages of \$500 per message (one of the heftiest fines in the nation) or actual damages, whichever is greater. In addition, violation of the proposed law would be classified as an unfair and deceptive trade practice under Massachusetts' consumer protection statute, [Chapter 93A](#), which authorizes the recovery of up to treble damages, plus costs and reasonable attorneys' fees.

The proposed law would apply to any sender of unlawful spam who uses a computer or email server located in Massachusetts. It would also prohibit a sender located outside Massachusetts from sending unlawful spam to a Massachusetts resident when the sender has actual knowledge that a recipient is a Massachusetts resident or when that information is "reasonably obtainable" by the sender. This standard appears to place a burden on senders of unsolicited commercial email to know where the recipients of their solicitations reside, although it is unclear from the proposed law how a sender would make that determination, since email addresses do not normally contain geographic information. Accordingly, many legitimate businesses (both inside and outside Massachusetts) that use mass emailings to reach new customers may be exposed to potential liability under the proposed statute.

State regulation of unsolicited commercial email has been inconsistent, and at least two other states' anti-spam statutes have come under constitutional scrutiny. As discussed in our [November 29, 2000](#) Internet Alert, trial courts in both California and Washington initially struck down those states' anti-spam statutes as unconstitutional under the so-called "dormant commerce clause."

The Constitution's Commerce Clause empowers Congress to regulate interstate commerce. The dormant commerce clause is the legal doctrine stating that if Congress has not acted with respect to an area of interstate commerce, states may enact their own regulations, provided that the regulation is rationally related to a legitimate state purpose and the burden on interstate commerce is outweighed by the state's interest in enforcing the regulation.

More recently, appellate courts in both California and Washington reversed those trial court judgments and have held that the statutes in question were not unconstitutional.

In *Ferguson v. FriendFinder, Inc.*, the California Court of Appeal reversed the trial court's judgment and reasoned that the California anti-spam statute was permissible under the dormant commerce clause because the statute only applied when spam is sent to a California resident by means of computers or email servers located in California. Similar to the proposed Massachusetts statute, the California statute regulates individuals and entities who (1) do business in California; (2) utilize equipment located in California; or (3) send spam to California residents. Although the email sender argued that such geographic limitations are meaningless when applied to the Internet, the appellate court disagreed, noting that: "The equipment used by electronic-mail service providers does have a geographic location. And e-mail recipients are people or businesses who function in the real world and have a geographic residence." The California Supreme Court declined to hear an appeal of that ruling.

Similarly, in *State of Washington v. Heckel*, the Washington Supreme Court held that Washington's anti-spam statute was permissible under the dormant commerce clause because its local benefits exceeded any alleged burden on interstate commerce. The court balanced the local benefits created by the statute (shifting costs away from spam recipients to spam senders) against the burden on interstate commerce. According to the Washington Supreme Court, the only interstate "burden" was the requirement that senders of unsolicited commercial email be "truthful" in their subject lines and return email addresses. Such "truthfulness," according to the court, does not

burden commerce at all, but actually facilitates it by eliminating fraud and deception.

Ultimately, a federal solution to the issue of spam may be required. Congress has considered, but has not enacted, any federal legislation restricting unsolicited commercial email. The Federal Trade Commission, under its general powers to combat fraudulent or deceptive commercial and advertising practices, has taken the lead among federal agencies to investigate and sue the most flagrant spammers. The FTC [recently announced](#) that in the past few months it has filed more than 30 enforcement actions and sent approximately 100 cease-and-desist letters to senders of misleading or deceptive unsolicited commercial email.

In light of the many and varied state restrictions on unsolicited commercial email, businesses who use email to reach new customers in different states would be well-advised to determine whether their business practices need to be altered to conform with the increasingly muddled body of spam laws.

Contributors



Barry J. Hurewitz

PARTNER
