

Review of Texas HB 1282/SB 698

The Texas Anti-Spam Bill

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46.001(2): Concern with definition of "electronic mail."

Problem: Vague definition of "electronic mail." A web page could be considered electronic mail under this definition.

Proposal: Remove or replace.

46.003 (a)(1): Problem with labelling of adult materials.

Problem: The requirement for labelling of adult materials actually makes it more likely, not less, that people will receive such messages. The labelling requirement is inconsistent with that of most other states, making it less useful for recipients. Also, concern the inconsistency may open challenge under the Commerce Clause.

Proposal: Change from "'ADULT-ADVERTISEMENT' is used as the first word" to "'ADV:ADLT' is used as the first eight characters". This is the "California" convention, used more frequently than any other.

46.003 (b): Prompt removal.

Problem: The lack of requirement for prompt removal jeopardizes the effectiveness of the law. The law gives spammers the right to continue sending unsolicited email for three months after removal is requested, which could result in dozens, if not hundreds, of additional unwanted messages. This is not consumer protection, this is solid business plan for spammers: setup shop, spam for 90 days, go away.

Moreover, the 90 day requirement is consistent with a manual process, not a completely automated one such as bulk email transmission. 90 days makes sense for something like the Texas Do Not Call list, which is compiled by the state and distributed periodically. It does not make sense in this case. The Arizona law, for instance, specifies three days.

Proposal: Change from "90th day" to "3rd day."

46.008(b) and (c): Insufficient penalties.

Problem: The bill sets limits so ludicrously low--as little as \$10--as to discourage individual action. For comparison, TCPA junk fax is \$500 apiece. California provides for \$50/message. Washington sets a minimum of \$500 for recipients, \$1000 for mail service providers.

Proposal: Change "\$10 for each unlawful message" to \$100 for the first and \$10 for each additional.

46.009(c): Notification penalty out of proportion to damages collected.

Problem: The bill requires notice to the Attorney General, yet makes the penalty for failure to report *twenty times more severe* than the penalty to spam. This creates a further disincentive for individual action.

Proposal: Make the penalty for failure to report equal to the penalty one can recover for a single email message.

46.011(e): The spammer "Oops!" defense.

Problem: This section allows a spammer to claim a mistake was made as an affirmative defense to any action under this bill, rendering it meaningless.

Proposal: Drop this and trust the courts to treat defendants fairly. This bill establishes maximum penalties and allows the court to use its discretion. We should hold spammers responsible for their mistakes, and trust the court will be able to distinguish between an inadvertent error and malicious spamming attempt when setting penalties.