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Utah's New Commercial Email Act: A Warning to Businesses Engaged in Internet Marketing

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All businesses who advertise their services or products through any form of email marketing have a new worry: a new Utah state law providing for sweeping remedies and a private right of action that can result in multi-million-dollar claims. This new law is already being leveraged by Utah internet-service-providers ("ISPs") to send demand letters to businesses all over the U.S.

On March 17, 2023, Utah Governor Spencer Cox signed the Utah Commercial Email Act ("Act"), which went into effect on May 3, 2023.[1] Utah joins several states that have passed similar legislation designed to protect consumers and businesses from receiving unwanted or unsolicited emails in addition to the federal "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003" or "CAN-SPAM Act." The Act, modeled after California's False Advertising Law, is crafted to avoid CAN-SPAM's preemption clause.

Under the Act, both email account owners or ISPs may bring claims to recover up to $1,000 per email for violations of the Act, plus recovery of attorney's fees and costs.[2] Maximum damages against any one defendant are capped $2 million. In an effort to avoid CAN-SPAM preemption, the Act is framed at fraud prevention and covers a wide variety of conduct that is commonly found in email marketing, including inaccurate header information and engaging subject lines.[3] Since the Act became effective in May, a number of Utah based ISPs have sent demand letters threatening litigation, although it is unclear whether those companies have standing under the Act.

The Act defines a commercial email as "an email used primarily to advertise or promote a commercial website, product, or service; or solicit money, property, or personal information."[4] Relevant sections prohibit any business from sending, or paying a third-party to send an email from Utah or to a Utah email address that: (1) uses a third party's domain name without the permission of the third party; (2) uses false, misrepresented, or forged header information; or (3) uses a subject line that is likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the identity of the advertiser, the contents or the subject matter of the email.[5]

Claims can be brought against either an advertiser or initiator who violates the Act.[6] An initiator is a person who "originates, transmits, or sends commercial email; or who promises, pays, or provides other consideration

for another person to originate, transmit, or send a commercial email."[7] An advertiser is a person who "advertises the person's product, service, or website through the use of commercial email."[8]

There are a wide range of persons and businesses who can bring claims under the Act, including electronic mail service providers, Utah residents who receive emails, and any person whose brand, trademark, email address, or domain name is used in the header information without permission.[9] Significantly, the Act explicitly places the burden of proof on the defendant to prove that their emails are not prohibited by the Act.[10]

Because of its recent enactment, it remains to be seen how the Act will be interpreted and applied by the courts. Holland & Hart's Business Litigation team will monitor ongoing developments.

[1] Utah Code § 13-65-101, *et seq*.

[2] Utah Code § 13-65-202(2).

[3] *See* § 13-65-201.

[4] Utah Code § 13-65-101(2).

[5] Utah Code § 13-65-201.

[6] Utah Code § 13-65-202(1)(a).

[7] Utah Code § 13-65-101(8)(a).

[8] Utah Code § 13-65-101(1).

[9] Utah Code § 13-65-202(1)(a).

[10] Utah Code § 13-65-202(1)(c).

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