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THE GENERAL ASSEMBLY OF PENNSYLVANIA

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HOUSE BILL

No. 530 Session of  
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K. SMITH, SWANGER, J. TAYLOR, TOEPEL AND YOUNGBLOOD,  
FEBRUARY 8, 2011

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REFERRED TO COMMITTEE ON CONSUMER AFFAIRS, FEBRUARY 8, 2011

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AN ACT

1 Providing for the protection of consumers from having spyware  
2 deceptively installed on wireless communication devices and  
3 for criminal enforcement.

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14 The General Assembly of the Commonwealth of Pennsylvania  
15 hereby enacts as follows:

1 Section 1. Short title.

2 This act shall be known and may be cited as the Consumer  
3 Protection Against Spyware on Wireless Devices Act.

4 Section 2. Definitions.

5 The following words and phrases when used in this act shall  
6 have the meanings given to them in this section unless the  
7 context clearly indicates otherwise:

8 "Authorized user." With respect to a wireless communication  
9 device, a person who is the account subscriber or is authorized  
10 by the account subscriber to use the device.

11 "Deceptive" or "deception." The term includes:

12 (1) An intentionally and materially false or fraudulent  
13 statement.

14 (2) A statement or description that intentionally omits  
15 or misrepresents material information in order to deceive the  
16 authorized user.

17 (3) An intentional and material failure to provide any  
18 notice to an authorized user regarding the download or  
19 installation of software in order to deceive the authorized  
20 user.

21 "Download." Transfer, transmit, install or otherwise cause  
22 software to be received and stored on a wireless communication  
23 device.

24 "Electronic communication." As defined in 18 Pa.C.S. § 5702  
25 (relating to definitions).

26 "Execute." With respect to software, the performance of the  
27 functions or the carrying out of the instructions of the  
28 software.

29 "Internet." The global information system that is logically  
30 linked together by a globally unique address space based on the

1 Internet Protocol (IP), or its subsequent extensions, and that  
2 is able to support communications using the Transmission Control  
3 Protocol/Internet Protocol (TCP/IP) suite, or its subsequent  
4 extensions, or other IP-compatible protocols, and that provides,  
5 uses or makes accessible, either publicly or privately, high-  
6 level services layered on the communications and related  
7 infrastructure described in this act.

8 "Message." A graphical, electronic or text communication  
9 presented to an authorized user other than communications  
10 originated and sent by the operating system or communications  
11 presented for any of the purposes described in section 6.

12 "Oral communication." As defined in 18 Pa.C.S. § 5702  
13 (relating to definitions).

14 "Person." Any individual, partnership, corporation, limited  
15 liability company or other organization, or any combination  
16 thereof.

17 "Software." A sequence of instructions or data, written in  
18 any programming language, executed on a wireless communication  
19 device.

20 "Spyware." Any software designed to be downloaded on a  
21 wireless communication device and permit remote monitoring of  
22 oral communications, text messages, electronic communications  
23 usage patterns, photographic or video functionality or the  
24 location of the user of the device on which it has been  
25 installed.

26 "Wireless communication." Any oral, electronic text or  
27 graphic communication or message sent or received by the  
28 authorized user of a wireless communication device.

29 "Wireless communication device." Any cellular device or  
30 handset capable of:

1           (1) Sending or receiving, in analog or digital format,  
2 oral text or electronic communications and messaging.

3           (2) Connecting to the Internet.

4           (3) Taking, sending and receiving photographs or video.

5        "Wireless communications service provider." An entity  
6 providing wireless communications networks or services that  
7 enable users to send and receive oral, electronic text or  
8 graphic communications; access the Internet; and download  
9 applications and software directly to a wireless communication  
10 device.

11 Section 3. Spyware prohibition.

12        Subject to the nonapplicability provisions of section 5, no  
13 person shall cause spyware to be installed or downloaded onto a  
14 wireless communication device without the express consent of the  
15 authorized user,

16 Section 4. Misrepresentation and deception.

17        A person or entity who is not an authorized user shall not  
18 induce an authorized user to install spyware onto a wireless  
19 communication device by misrepresenting that installing software  
20 is necessary for security or privacy reasons or in order to  
21 open, view or play a particular type of content, or commit any  
22 other misrepresenting or deceptive act with regard to a wireless  
23 communication device of an authorized user in this Commonwealth.

24 Section 5. Nonapplicability.

25        Nothing in this act shall:

26           (1) Apply to installation of any software or hardware on  
27 a wireless communication device by a wireless communications  
28 device manufacturer or wireless communications service  
29 provider, provided that the software or hardware is:

30           (i) Necessary or incident to the provision of

1 wireless communications service or the equipment or  
2 facilities used, in the ordinary course of business, to  
3 provide wireless communications service.

4 (ii) Used, pursuant to court order or exigent  
5 circumstances, to assist an investigative or law  
6 enforcement officer or locate persons suspected of  
7 involvement in criminal activities.

8 (iii) Used by police and emergency communications  
9 systems to locate any person calling 911 or a police  
10 department, fire department or county emergency center.

11 (2) Apply to monitoring of or interaction with a user's  
12 wireless communication device, including the Internet or  
13 other network connection or service, by a wireless  
14 communications service provider for the purpose of network  
15 security, diagnostics, technical support, repair, authorized  
16 updates of software, network management or maintenance or any  
17 other administrative, commercial, technical or business  
18 purpose.

19 (3) Apply to monitoring of or interaction with a user's  
20 wireless communication device, including the Internet or  
21 other network connection or service, by a wireless  
22 communications service provider for the purpose of detecting  
23 or preventing unauthorized use, fraud or other illegal  
24 activity in connection with a network, service or computer  
25 software, including scanning for and removing spyware  
26 proscribed under this act.

27 (4) Impact or limit the rights of providers of  
28 electronic communications under 18 U.S.C. § 2511 (relating to  
29 interception and disclosure of wire, oral, or electronic  
30 communications prohibited), 18 U.S.C. § 2701 et seq.

1 (relating to stored wire and electronic communications and  
2 transactional records access), 18 U.S.C. § 3117 (relating to  
3 mobile tracking devices), 18 U.S.C. § 3121 et seq. (relating  
4 to pen registers and trap and trace devices), or 18 Pa.C.S. §  
5 5704 (relating to exceptions to prohibition of interception  
6 and disclosure of communications).

7 Section 6. Criminal enforcement.

8 (a) District attorneys.--The district attorneys of the  
9 several counties shall have authority to investigate and to  
10 institute criminal proceedings for any violations of this act.

11 (b) Attorney General.--In addition to the authority  
12 conferred upon the Attorney General under the act of October 15,  
13 1980 (P.L.950, No.164), known as the Commonwealth Attorneys Act,  
14 the Attorney General shall have the authority to investigate and  
15 institute criminal proceedings for any violation of this act. A  
16 person charged with a violation of this act by the Attorney  
17 General shall not have standing to challenge the authority of  
18 the Attorney General to investigate or prosecute the case and,  
19 if a challenge is made, the challenge shall be dismissed and no  
20 relief shall be available in the courts of this Commonwealth to  
21 the person making the challenge.

22 (c) Proceedings against persons outside Commonwealth.--In  
23 addition to powers conferred upon district attorneys and the  
24 Attorney General under subsections (a) and (b), district  
25 attorneys and the Attorney General shall have the authority to  
26 investigate and initiate criminal proceedings against persons  
27 for violations of this act in accordance with 18 Pa.C.S. § 102  
28 (relating to territorial applicability).

29 Section 7. Penalty.

30 Any person that violates section 3 or 4 commits a felony of

1 the second degree and shall, upon conviction, be sentenced to  
2 imprisonment for not more than ten years or to pay a fine,  
3 notwithstanding 18 Pa.C.S. § 1101 (relating to fines), of not  
4 more than \$25,000, or both.

5 Section 8. Construction.

6 The provisions of this act shall not be construed to limit  
7 the jurisdiction and authority of the Office of Attorney  
8 General, including the jurisdiction and authority granted  
9 pursuant to the act of October 15, 1980 (P.L.950, No.164), known  
10 as the Commonwealth Attorneys Act, and the act of December 17,  
11 1968 (P.L.1224, No.387), known as the Unfair Trade Practices and  
12 Consumer Protection Law.

13 Section 20. Effective date.

14 This act shall take effect in 60 days.