

REPORT OF THE JUDICIAL COUNCIL
CRIMINAL LAW ADVISORY COMMITTEE
ON PREPAID MOBILE DEVICE REGISTRATION

DECEMBER 6, 2013

In May 2013, Senator Jeff King asked the Kansas Judicial Council to study the issue of retailers obtaining information from prepaid mobile device purchasers so that law enforcement could trace the identity of the owner of a prepaid phone used in or connected to the commission of a crime. The burden on retailers and the privacy rights of consumers were listed as components of the issue. The Judicial Council granted Senator King's request and assigned the study to the Criminal Law Advisory Committee.

COMMITTEE MEMBERSHIP

The members of the Judicial Council Criminal Law Advisory Committee are:

Stephen E. Robison, Chair, Member of Fleeson, Goong, Coulson & Kitch, LLC and Member of the Kansas Judicial Council; Wichita

Sen. Terry Bruce, Kansas State Senator and Practicing Attorney; Hutchinson

James W. Clark, Practicing Attorney; Lawrence

Jim D. Garner, Practicing Attorney; Lawrence

Patrick M. Lewis, Criminal Defense Attorney; Olathe

Hon. Michael Malone, District Court Judge in the 7th Judicial District; Lawrence

Prof. Joel Meinecke, Retired Attorney; Topeka

Steven L. Opat, Geary County Attorney; Junction City

Rep. John Rubin, Kansas State Representative, Attorney, and Retired Federal Administrative Law Judge; Shawnee

John Settle, Pawnee County Attorney; Larned

Ann Swegle, Sedgwick County Deputy District Attorney; Wichita

Loren L. Taylor, Attorney and Police Trainer; Kansas City

Ron Wurtz, Retired Public Defender (Federal and Kansas); Topeka

BACKGROUND

On February 18, 2013, the Kansas House Utilities and Telecommunications Committee held a hearing on HB 2026, which proposed registration of prepaid mobile devices. Specifically, the bill suggested that device sellers gather information including names, addresses, and personal identification at the time of sale. Sellers would also gather information such as wireless carrier information and telephone numbers after the sale. A revised bill was offered by Representative Tom Sloan, which reduced the amount of effort required from store employees and the processing cost to the KBI. For instance, this proposal only required purchasers of prepaid mobile devices and SIM cards to provide their names, addresses, and the activation code from the package at the time of sale. Moreover, sellers would only have to provide electronic information to the KBI on a monthly basis. The committee did not work the bill, and the issue of prepaid mobile device registration was later referred to the Kansas Judicial Council. On August 16, 2013, the Criminal Law Advisory Committee met to study the issue of retailers obtaining information from prepaid mobile device purchasers. This meeting was followed by two separate conference calls and a final meeting on November 1, 2013. Representative Tom Sloan, the bill sponsor, and Ed Klumpp, who represented law enforcement, attended the November 1, 2013 meeting as invited guests. Kyle Smith, the Deputy Director and Assistant Attorney General for the KBI, attended all the meetings.

DISCUSSION

The Committee reviewed the bill, the minutes of the hearing, and the written testimony. The Committee reflected on testimony from the proponent of the bill who shared a law enforcement perspective. The Committee agreed that there is a problem with criminals using no-contract phones for nefarious purposes. Moreover, the Committee concurred that this is likely to become a larger problem in the future due to the growing popularity of prepaid phones. (In February of 2013, twenty-eight percent of wireless customers used prepaid cellphones, or no-contract cellphones, and the number was expected to rise).¹ The Committee voted, and the majority agreed that law enforcement should be able to trace owners of prepaid mobile devices.

The Committee determined that law enforcement's need for prepaid phone registration outweighs challenges to retailers and consumers. First, the burden to retailers is small. The time and effort required from retailers is less under Representative Sloan's proposal than for retailers of pseudoephedrine and retailers in other similar systems already in place. Second, the Committee believes that any challenges to the law based on consumer privacy rights would likely fail. Prepaid customers are simply being required to provide identifying information at the time of purchase. Customers who have a contract phone already have to provide some sort of

¹ Alina Tugend, *Cellphone Service Without Signing the Dotted Line*, THE NEW YORK TIMES, August 19, 2013, http://www.nytimes.com/2013/02/09/your-money/cellphone-service-without-signing-on-the-dotted-line.html?_r=0.

identifying information as part of the billing process in order to purchase a contract phone. The contract phone system is well established in the U.S. and has withstood privacy challenges.

The Committee agreed that prepaid mobile devices should be registered and examined the problem in relation to federal legislation. First, members were very concerned that United States Senate Bill 3427, which would have required registration for prepaid mobile devices, died in 2010. Without a federal umbrella, prepaid mobile devices can enter Kansas through numerous avenues. Of greatest concern is the web-based market for prepaid phones and unlocked phones. No-contract phones can be purchased online from big retail chains such as Best Buy and directly from phone manufacturers.² Second, when the Committee met during the fall of 2013, Congress was considering the Marketplace Fairness Act of 2013. The purpose of the Marketplace Fairness Act of 2013 was to change the tax structure for the remote sale of goods and the act targeted online retailers. The Committee decided that while products sold online should be registered, it may be premature to draft legislation regulating online sellers until the tax structure for the remote sale of goods is more predictable. Thus, the Committee recommended passing prepaid mobile device legislation in two phases. The legislation should start by regulating brick and mortar stores, which was the intent of HB 2026. After this system is established and the tax structure for the remote sale of goods is more certain, then a second bill regulating online sellers should be drafted.

After the Committee decided the larger philosophical issues, the Committee reviewed Representative Sloan's fall 2013 proposal. The Committee supported many aspects of his legislation. The recommended legislation heavily reflects Representative Sloan's latest proposal.

CONCLUSION

In conclusion, the Committee recommends against passage of HB 2026, and suggests passage of the recommended legislation instead. The Committee supports the basic premise of HB 2026, but suggests improvements to the bill.

RECOMMENDED LEGISLATION

AN ACT concerning criminal procedure; relating to telecommunications; mobile communications devices identification system.

Be it enacted by the Legislature of the State of Kansas:

Section 1. On and after January 1, 2015:

(a) The Kansas bureau of investigation shall establish a mobile communications devices identification system which shall be a central repository of information received by sellers from

² Best Buy, August 26, 2013, http://www.bestbuy.com/site/searchpage.jsp?_dyncharset=ISO88591&_dynSessConf=6092193101261533965&id=pcat17071&type=page&st=unlocked&sc=Global&cp=1&nrp=15&sp=&qp=&list=n&iht=y&fs=saas&usc=All+Categories&ks=960&saas=saas; Apple, August 26, 2013, <http://store.apple.com/us/buy-iphone/iphone5>.

purchasers and maintained for the purpose of providing information to law enforcement. The mobile communications devices identification system, all information contained therein and any records maintained by the bureau, or by any entity contracting with the bureau, submitted to, maintained or stored as a part of the system, shall be confidential, may only be used for investigatory or evidentiary purposes related to criminal violations of state or federal law, shall not be a public record and shall not be subject to the Kansas open records act, K.S.A. 45-215 et seq., and amendments thereto, and only shall be released to law enforcement in response to an official investigation.

(b) (1) All sellers in this state, prior to the completion of any sale to a purchaser, shall:

(A) Require a purchaser to provide a government issued identification card; and

(B) record the purchaser's full name, complete home address and the mobile equipment identifier or the international mobile station equipment identity of the pre-paid mobile device or SIM card to be purchased, or, if neither are available, the activation code of such device or SIM card.

(2) The seller shall report the record of the sale of a pre-paid mobile device or SIM card to the Kansas bureau of investigation through an electronic filing process at the time of such sale. Such reports shall be made in accordance with rules and regulations adopted pursuant to this section.

(c) The information in the mobile communications devices identification system established pursuant to this section shall be available to all law enforcement officers who have a need for information relating to prepaid mobile devices or SIM cards, in accordance with rules and regulations adopted pursuant to this section.

(d) The director of the Kansas bureau of investigation shall adopt rules and regulations to effectuate this act.

(e) Any seller that fails to make any report required by this section shall be liable to the state for the payment of a civil penalty, recoverable in an action brought by the attorney general, in an amount not exceeding \$100 for each failure to report. The seller shall be liable for an additional civil penalty of up to \$1,000 for subsequent failures to report. Any civil penalty recovered under this subsection shall be paid into the Attorney General's litigation fund.

(f) There is hereby imposed a mobile communications devices identification fee of 0.4% per retail transaction effective January 1, 2015 and ending January 1, 2016. There is hereby imposed a mobile communications devices identification fee of 0.05% effective January 1, 2016. The fees shall be collected by the seller from the purchaser with respect to each retail transaction occurring in this state. The amount of the mobile communications devices identification fee shall be either separately stated on an invoice, receipt or other similar document that is provided to the purchaser by the seller, or otherwise disclosed to the purchaser. The amount of the fee that is collected by a seller from a purchaser, if such amount is separately stated on an invoice, receipt or other similar document provided to the purchaser, shall not be included in the base for measuring any tax, fee, surcharge or other charge that is imposed by this state, any political subdivision of this state or any intergovernmental agency.

(g) A seller may charge up to a \$2 administrative fee per retail transaction to compensate the seller for expenses associated with reporting the required sales information.

(h) For the purposes of this section, a retail transaction that is effected in person by a purchaser in a business location of the seller shall be treated as occurring in this state if that business location is in this state, and any other retail transaction shall be treated as occurring in

this state if the retail transaction is treated as occurring in this state for the purposes of subsection (c)(3) of K.S.A. 79-3673, and amendments thereto.

(i) The mobile communications devices identification fee is the liability of the purchaser and not the seller, except that the seller shall be liable to remit all mobile communications devices identification fees that the seller collects from purchasers pursuant to this section, including all such fees that the seller is deemed to collect where the amount of the charge has not been separately stated in an invoice, receipt or other similar document provided by the seller.

(j) All mobile communications devices identification fees collected by sellers shall be remitted to the department by electronic filing that is consistent with the provisions of article 36 of chapter 79 of the Kansas Statutes Annotated, and amendments thereto. The department shall establish registration and payment procedures for the collection of the mobile communications devices identification fee. The department shall establish procedures by which a seller may document that a sale is not a retail sale, which procedures shall substantially coincide with procedures for documenting sale for resale transactions for article 36 of chapter 79 of the Kansas Statutes Annotated, and amendments thereto.

(k) The department shall transfer all remitted mobile communications devices identification fees to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury to the credit of the mobile communications devices identification system fee fund, which is hereby established in the state treasury, to be administered by the Kansas bureau of investigation and used for the creation and maintenance of the mobile communications devices identification system established in this section. During fiscal year 2015, the department may retain up to \$70,000 of remitted funds only for use in paying for programming and other one-time costs for establishing a system for collecting the mobile communications devices identification fee. During any fiscal year hereafter, the department shall not retain any remitted funds.

(l) To minimize additional costs to the department, the department may conduct audits of sellers in conjunction with sales and use tax audits. The department is authorized to provide the Kansas bureau of investigation and the attorney general with information obtained in such audits if such information indicates that a seller may not be complying with the provisions of this. The Kansas bureau of investigation may request the department to initiate collection or audit procedures on individual sellers if collection efforts have been unsuccessful.

(m) As used in this section: (1) "Department" means the department of revenue;

(2) "international mobile station equipment identity" means an equipment identification number, similar to a serial number, used to identify a mobile station;

(3) "mobile equipment identifier" means a globally unique number for a physical piece of mobile station equipment;

(4) "mobile station" means all user equipment and software needed for communication with a mobile network;

(5) "pre-paid mobile device" means any cellular phone or similar wireless communication device for which the mobile device user purchases a set allotment of wireless communication services provided by a wireless carrier;

(6) "purchaser" means any person that purchases a pre-paid mobile device or SIM card from a seller;

(7) “retail transaction” means the purchase of a pre-paid mobile device or SIM card from a seller for any purpose other than resale, not including the use, storage or consumption of such services.

(8) “seller” means any person subject to the provisions of article 36 of chapter 79 of the Kansas Statutes Annotated, and amendments thereto, that sells pre-paid mobile devices or SIM cards;

(9) “SIM card” means a subscriber identity module or functionally equivalent data storage device; and

(10) “wireless carrier” has the meaning provided in 47 U.S.C. § 615b(4), as in effect on the effective date of this act.

Sec. 2. This act shall take effect and be in force from January 1, 2015.