



Sub. S.B. 8*

124th General Assembly

(As Reported by H. Economic Development and Small Business)

Sens. Amstutz, Harris, Austria, Blessing, Brady, Spada, Mumper

Reps. Collier, Hagan, McGregor, G. Smith

BILL SUMMARY

- Generally requires an e-mail advertisement to include the transmitter's name, address, and e-mail address, and a notice that the recipient may decline to receive further e-mail advertisements by following a specified procedure.
- Requires that if a person declines to receive additional e-mail advertisements, the person transmitting or causing the transmission of that advertisement must cease transmitting additional advertisements to the receiving address.
- Provides an exemption from the bill's information requirements in specified situations.
- Prohibits a person from transmitting an e-mail advertisement in contravention of the authority granted by, or in violation of an e-mail service provider's policies, if the person has received notice of those policies as specified in the bill.
- Establishes civil remedies of monetary awards and injunctive relief for recipients of e-mail advertisements sent in violation of the bill's provisions and for e-mail service providers whose authority or policies are contravened in violation of the bill.

* *This analysis was prepared before the report of the House Economic Development and Small Business Committee appeared in the House Journal. Note that the list of cosponsors and the legislative history may be incomplete.*

- Relieves an e-mail service provider from liability for transmitting an advertisement that violates the bill's provisions when that advertisement is sent by another person.
- Establishes that a person is guilty of the criminal offense of forgery if that person uses a computer, a computer network, a computer program, or the computer services of an e-mail service provider with the intent to forge an originating address or other routing information in connection with an e-mail advertisement's transmission through or into the network of an e-mail service provider or its subscribers.

CONTENT AND OPERATION

Overview

The bill enacts requirements that focus on the transmission of unsolicited "electronic mail advertisements" (e-mail advertisements) and establishes civil enforcement remedies of monetary awards and injunctive relief as well as criminal penalties.¹

Requirements for e-mail advertisements

Required information

The bill generally requires a person that transmits or causes an e-mail advertisement to be transmitted to clearly and conspicuously provide the following within the advertisement's body (sec. 2307.64(B)(1)):

(1) The person's name and complete residence or business address, and the e-mail address of the person transmitting the advertisement;

(2) A notice that the recipient may decline to receive from the person transmitting the e-mail advertisement or causing that advertisement to be transmitted any additional e-mail advertisements;

(3) A detailed procedure for declining to receive further e-mail advertisements at no cost. The notice must be the same size of type as the

¹ *The interstate operation of the bill is discussed in COMMENT 1.*

The meanings of key computer-related terms defined in the bill are set forth under "Definitions," below. Terms used in the bill with existing statutory definitions are explained in COMMENT 2.

majority of the text of the message and may not require that the recipient provide any information other than the receiving address.

Cessation requirement

The bill specifies that, if a recipient uses the bill's procedure to decline to receive further e-mail advertisements, the person that transmitted or caused the original e-mail advertisement to be transmitted must cease, within a reasonable period of time, transmitting or causing the transmission of any additional e-mail advertisements to the receiving address (sec. 2307.64(B)(2)).

The bill's information requirements are not violated if a person transmits or causes an e-mail advertisement to be transmitted to a recipient, and any of the following apply: (1) the person has a preexisting business or personal relationship with the recipient, (2) the recipient has consented or has agreed as a condition of service to receive the e-mail advertisement, or (3) the recipient receives the advertisement because another recipient forwarded the advertisement to that recipient via an Internet web site, or another recipient made a direct referral of that recipient to receive the advertisement. (Sec. 2307.64(B)(3).)

Prohibition against violating service provider authority or policies

The bill prohibits any person from using a computer, a computer network, or the computer services of an e-mail service provider to transmit an e-mail advertisement in contravention of the authority granted by, or in violation of the policies related to, e-mail advertisements that the service provider establishes if the service provider has provided the person notice of those policies. The bill specifies that notice is sufficient if an e-mail service provider maintains an easily accessible web page containing its policies regarding e-mail advertisements and can demonstrate that notice was supplied via electronic means between the sending and receiving computers. (Sec. 2307.64(C).)

Civil actions

Remedies available to the recipient

Under the bill, a person who receives an e-mail advertisement sent in violation of the bill's provisions may bring a civil action against the person who transmitted or caused the transmission of that advertisement and may recover the following: (1) \$100 per e-mail advertisement received in violation of the bill's provisions, not to exceed a total \$50,000, and (2) reasonable attorney's fees, court costs, and other costs of bringing the action. (Sec. 2307.64(E).)

Remedies available to e-mail service providers

The bill authorizes an e-mail service provider whose authority or policies have been contravened in violation of the bill to bring a civil action against a person who transmitted that advertisement or caused it to be transmitted. In a civil action, the e-mail service provider may recover the following monetary amounts: (1) \$50 for each violation, not to exceed \$50,000, (2) if a violation is a willful or knowing violation, the court may increase the amount recoverable to an amount not to exceed \$500,000, (c) if a violation is accompanied by a violation of the bill's prohibition against forging of originating address or other routing information in connection with the transmission of an e-mail advertisement, there is no limit on the amount that may be recovered. In addition, the e-mail service provider may recover reasonable attorney's fees, court costs, and other costs of bringing the action. (Sec. 2307.64(G).)

Injunctive relief

In addition to monetary recovery, the bill permits the recipient to apply to the court of common pleas of the county in which the recipient resides or the service provider is located for an order enjoining the person from transmitting or causing to be transmitted any other e-mail advertisement to the recipient. (Sec. 2307.64(E).)

Nonliability of e-mail service providers

The bill relieves an e-mail service provider of liability for transmitting another person's e-mail advertisement that violates the bill's provisions. Additionally, an e-mail service provider is not liable for any action it voluntarily takes in good faith to block the receipt or transmission through its service of any e-mail advertisement that it believes is, or will be sent, in violation of the bill. (Sec. 2307.64(D).)

Forgery of originating address: criminal prohibition

The bill prohibits a person from using a computer, a computer network, a computer program, or the computer services of an e-mail service provider with the intent to forge an originating address or other routing information, in any manner, in connection with the transmission of an e-mail advertisement through or into the network of an e-mail service provider or its subscribers. Each use that violates this prohibition is a separate offense and constitutes the criminal offense of forgery, which, under ongoing law (not in the bill), generally is a felony of the fifth degree but can be a felony of the second, third, or fourth degree under certain circumstances. (Secs. 2307.64(H) and 2913.31 (not in the bill).)

Definitions

The bill defines the following terms (sec. 2307.64(A)):

"Electronic mail" means an electronic message that is transmitted between two or more telecommunication devices or electronic devices capable of receiving electronic messages, whether or not the message is converted to hard copy format after receipt, and whether or not the message is viewed upon the transmission or stored for later retrieval. "Electronic mail" includes electronic messages that are transmitted through a local, regional, or global computer network.

"Electronic mail advertisement" means electronic mail containing an advertisement.

"Electronic mail service provider" means any person that is an intermediary in sending and receiving e-mail and that provides to users of e-mail services the ability to send or receive e-mail. "Electronic mail service provider" includes an Internet service provider.

"Originating address" means the string of characters used to specify the source of an e-mail message.

"Person" has the same meaning as in section 1.59 of the Revised Code, but when a person is not an individual, the person responsible for transmitting or causing to be transmitted an electronic mail advertisement is the particular division of the partnership, corporation, or other business entity actually responsible for the transmission of the electronic mail advertisement.

"Pre-existing business relationship" means that there was a business transaction between the initiator and the recipient of a commercial electronic mail message during the five-year period preceding the receipt of that message. A pre-existing business relationship includes a transaction involving the free provision of information, goods, or services requested by the recipient. A pre-existing business relationship does not exist after a recipient requests to be removed from the distribution lists of an initiator pursuant to the bill's provisions and a reasonable amount of time has expired since that request.

"Receiving address" means the string of characters used to specify a recipient with each receiving address creating a unique and separate recipient.

"Recipient" means a person who receives an e-mail advertisement at any one of the following: (a) a receiving address furnished by an e-mail service provider that bills for furnishing and maintaining that receiving address to a mailing address within Ohio, (b) a receiving address ordinarily accessed from a computer located within Ohio, (c) a receiving address ordinarily accessed by a

person domiciled within Ohio, or (d) any other receiving address with respect to which the obligations imposed by the bill can be imposed consistent with the United States Constitution.

COMMENT

1. The bill's regulation of e-mail advertisements is a form of regulating commerce. Any state regulation that impacts international or interstate commerce raises the possibility that the regulation violates the Commerce Clause of the United States Constitution (Art. I, § 8, cl. 3). The Commerce Clause prohibits states from regulating foreign commerce, the regulation of which lies exclusively with the U.S. Congress.

States may, however, regulate some aspects of interstate commerce without violating the Commerce Clause if the state regulation is not contrary to federal regulations, does not discriminate against out-of-state competition, and is not unduly burdensome on commerce. To determine whether the bill's provisions are an undue burden on commerce, a court could be expected to apply a balancing test to decide whether the burden of the regulation outweighs the benefits. That determination would depend in part on the court's findings on whether less restrictive alternatives to the regulation are available to achieve the desired result and whether the regulation conflicts with the regulations of other states.

2. The bill uses terms defined in ongoing law as follows:

"Advertisement," as defined by R.C. 4931.55, means a message or material intended to cause the sale of realty, goods, or services.

"Computer," as defined in R.C. 2913.01(M), means an electronic device that performs logical, arithmetic, and memory functions by the manipulation of electronic or magnetic impulses. "Computer" includes, but is not limited to, all input, output, processing, storage, computer program, or communication facilities that are connected, or related, in a computer system or network to an electronic device of that nature.

"Computer network," as defined in R.C. 2913.01(O), means a set of related and remotely connected computers and communication facilities that includes more than one computer system that has the capability to transmit among the connected computers and communication facilities through the use of computer facilities.

"Computer program," as defined by R.C. 2913.01(P), means an ordered set of data representing coded instructions or statements that, when executed by a computer, cause the computer to process data.

"Computer services," as defined by R.C. 2913.01(L), includes the use of a computer system, computer network, computer program, data that is prepared for computer use, or data that is contained within a computer system or computer network.

"Internet," as defined by R.C. 341.42, means the international computer network of both federal and nonfederal interoperable packet switched data networks, including the graphical subnetwork called the World Wide Web.

"Person, " as defined in R.C. 1.59(C), includes an individual, corporation, business trust, estate, trust, partnership, and association.

"Telecommunications device," as defined by R.C. 2913.01(Y), means any instrument, equipment, machine, or other device that facilitates telecommunication, including, but not limited to, a computer, computer network, computer chip, computer circuit, scanner, telephone, cellular telephone, pager, personal communications device, transponder, receiver, radio, modem, or device that enables the use of a modem.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	01-30-01	p. 91
Reported, S. Economic Development, Technology, & Aerospace	03-13-01	p. 200
Passed Senate (25-8)	03-14-01	pp. 217-218
Reported, H. Economic Development & Small Business	---	---

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