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BILL SUMMARY

- Creates two computer "spamming" felonies of (1) illegally transmitting multiple e-mail advertisements and (2) unauthorized access of a protected computer, and provides penalties for each offense.
- Provides enhanced criminal penalties for extensive spamming or repeat offenders.
- Applies existing seizure and forfeiture laws to computer contraband used to commit either spamming felony.
- Provides that an offender who illegally transmits multiple e-mail advertisements may also be charged with conspiracy.
- Permits the Attorney General and e-mail service providers who are injured by the commission of either offense to bring a civil action against offenders, and establishes civil remedies.
- Authorizes the Attorney General to bring a civil action for violations of the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 on behalf of Ohio residents.

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CONTENT AND OPERATION

Overview of the offenses

The bill creates the offenses, both felonies, of (1) illegally transmitting multiple electronic mail advertisements, and (2) unauthorized access of a protected computer (see **COMMENT**).

"Electronic mail," as defined under existing law (R.C. 2307.64) and used in the bill, is an electronic message that is transmitted between two or more telecommunications 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 transmission or stored for later retrieval. "Electronic mail" includes electronic messages that are transmitted through a local, regional, or global computer network (see *Definitions*," below, for the definitions of "computer" and "computer network" that apply throughout the bill). This analysis refers to electronic mail as "e-mail." The bill defines an "advertisement" as a message or material intended to cause the sale of realty, goods, or services.

Under the bill, "multiple" electronic mail messages are more than ten e-mail messages during a 24-hour period, more than 100 e-mail messages during a 30-day period, or more than 1,000 e-mail messages during a one-year period. (R.C. 2913.421(A)(14).) A "protected computer" is (1) a computer exclusively for the use of state government or a financial institution (see *Definitions*," below), (2) a computer used by or for state government or a financial institution when the conduct constituting the violation of illegally transmitting multiple e-mail

advertisements or unauthorized access of a protected computer affects that use by or for the state government or financial institution, or (3) a computer that is used in intrastate or interstate communication (R.C. 2913.421(A)(15)).

Illegally transmitting multiple electronic mail advertisements

(R.C. 2913.421(B)(1) to (4) and (C)(1))

The bill prohibits a person, with regard to e-mail advertisements sent from or to a protected computer in Ohio, from doing any of the following:

(1) Knowingly using a protected computer to relay or retransmit multiple e-mail advertisements, with the intent to deceive or mislead recipients or any e-mail service provider, as to the origin of those advertisements. A "recipient" is a person who receives an e-mail advertisement at a receiving address (a) furnished by an e-mail service provider that bills for furnishing and maintaining that receiving address to a mailing address within Ohio, (b) ordinarily accessed from a computer located in Ohio, (c) ordinarily accessed by a person domiciled within Ohio, **or** (d) with respect to which the obligations imposed by existing law (R.C. 2307.64) regarding e-mail advertisements can be imposed consistent with the United States Constitution. The bill defines an "electronic mail service provider" as any person that is an intermediary in sending and receiving e-mail and that provides to the public electronic mail accounts or online user accounts from which e-mail may be sent. It includes an Internet service provider (R.C. 2913.421(A)(7)).

(2) Knowingly and materially falsifying "header information" (see "**Definitions**," below) in multiple e-mail advertisements and purposely initiating the transmission of those advertisements. Under the bill, "materially falsify" means to alter or conceal in a manner that would impair the ability of a recipient of an advertisement, an e-mail service provider processing an e-mail message on behalf of a recipient, a person alleging a violation of this new felony, or a law enforcement agency to identify, locate, or respond to a person that initiated an e-mail message or to investigate an alleged violation. The bill defines "initiate the transmission," when used with respect to a "commercial e-mail message" (see "**Definitions**," below), as originating or transmitting that message or procuring the origination or transmission of that message, regardless of whether the message reaches its intended recipients (R.C. 2913.421(A)(10)).

(3) Knowingly registering, using information that materially falsifies the identity of the actual registrant, for five or more e-mail accounts or online user accounts or two or more domain names, and purposely initiating the transmission of multiple e-mail advertisements from one, or any combination, of those accounts or domain names;

(4) Knowingly falsely representing the right to use five or more "Internet protocol addresses," and purposely initiating the transmission of multiple e-mail advertisements from those addresses. An "Internet protocol address" is a string of numbers by which locations on the Internet are identified by routers or other computers connected to the Internet (R.C. 2913.421(A)(12)).

Unless otherwise specified in the bill, anyone who violates (1), (2), (3), or (4) above is guilty of illegally transmitting multiple e-mail advertisements, a felony of the fifth degree.¹

Unauthorized access of a protected computer

(R.C. 2913.421(B)(5) and (C)(3))

The bill also prohibits a person, with regard to e-mail advertisements sent from or to a protected computer in Ohio, from knowingly accessing a protected computer without authorization and purposely initiating the transmission of multiple e-mail advertisements from or through the protected computer. Whoever violates this provision is guilty of unauthorized access of a protected computer, a felony of the fifth degree.

Actions that enhance the criminal penalties

Penalty enhanced for extensive spamming

(R.C. 2913.421(C)(2)(a)-(f))

The penalty for illegally transmitting multiple e-mail advertisements is increased to a felony of the fourth degree if any of the following apply:²

- Regarding a violation of (3) above, the offender, using information that materially falsifies the identity of the actual registrant, knowingly registers for 20 or more e-mail accounts or online user accounts or ten or more domain names, and purposely initiates, or conspires to initiate, the transmission of multiple e-mail advertisements from the accounts or domain names.

¹ A fifth degree felony may carry a prison term for 6 to 12 months, a fine of not more than \$2,500, or both, and other possible sanctions (see R.C. 2929.14 and 2929.18, not in the bill).

² A fourth degree felony may carry a prison term of 6 to 18 months, a fine of not more than \$5,000, or both, and other possible sanctions (see R.C. 2929.14 and 2929.18, not in the bill).

- Regarding any violation of (1) through (4) above, the volume of e-mail advertisements the offender transmitted in committing the violation exceeds 250 during any 24-hour period, 2,500 during any 30-day period, or 25,000 during any one-year period.
- Regarding any violation of (1) through (4) above, during any one-year period the aggregate loss to the victim or victims of the violation is \$500 or more, or during any one-year period the aggregate value of the property or services obtained by any offender as a result of the violation is \$500 or more.
- Regarding any violation of (1) through (4) above, the offender committed the violation with three or more other persons with respect to whom the offender was the organizer or leader of the activity that resulted in the violation.

The penalty for illegally transmitting multiple e-mail advertisements or for unauthorized access of a protected computer is increased to a felony of the fourth degree if the offender knowingly assisted in a violation of the bill through the provisions or selection of either of the following:

- The addresses to which the message was transmitted, if that person knew that the e-mail address of the recipients was obtained using an automated means from an Internet web site or proprietary online service operated by another person, and that web site or online service included, at the time the address was obtained, a notice stating that the operator of that web site or online service will not transfer addresses maintained by that web site or online service to any other party for the purposes of initiating, or enabling others to initiate, e-mail messages.
- E-mail addresses of the recipients obtained using an automated means that generates possible e-mail addresses by combining names, letters, or numbers into numerous permutations.

Enhanced penalty for repeat offenders

(R.C. 2913.421(C)(4))

Illegally transmitting multiple e-mail advertisements and unauthorized access of a protected computer is raised to a felony of the third degree if the offender was convicted previously of a violation of the bill or of a law of another state or the United States regarding the transmission of multiple e-mail

advertisements or unauthorized access to a computer system, or if the offender committed the violation in the furtherance of a felony.³

Jurisdiction and venue for criminal prosecution

(R.C. 2901.11 and 2901.12)

Under continuing law unchanged by the bill, a person is subject to criminal prosecution and punishment in this state if the person, by means of a computer, computer system, computer network, telecommunication, telecommunications device, telecommunications service, or information service, causes or knowingly permits any writing, data, image, or other telecommunication to be disseminated or transmitted into Ohio. The bill includes a "protected computer" in this list of devices. Similarly, under continuing law unchanged by the bill, when the offense involves one of the devices just listed, the offender may be tried in any jurisdiction containing any location of the computer, computer system, or computer network of the victim of the offense; in any jurisdiction from which or into which, as part of the offense, any writing, data, or image is disseminated or transmitted by means of a computer, computer system, computer network, telecommunication, telecommunications device, telecommunications service, or information service; or in any jurisdiction in which the alleged offender commits any activity that is an essential part of the offense. Under the bill, if the offense involves a "protected computer," the offender may be tried in any jurisdiction containing any location of the protected computer, in any jurisdiction from which or into which any writing, data, or image is disseminated or transmitted by means of the protected computer, or in any jurisdiction in which the alleged offender commits any activity that is an essential part of the offense.

Seizure and forfeiture as contraband

(R.C. 2913.421(E))

Under the bill, any equipment, software, or other technology of a person who commits the felony of illegally transmitting multiple e-mail advertisements or unauthorized access of a protected computer that is used or intended to be used in the commission of the felony, is contraband. Any real or personal property that constitutes or is traceable to the gross proceeds obtained from the commission of those felonies also is contraband. Contraband is subject to seizure and forfeiture under existing law that establishes the procedures for seizure and forfeiture of contraband (R.C. 2933.42 and 2933.43, not in the bill).

³ A third degree felony carries a prison term of 1 to 5 years, a fine of not more than \$10,000, and other possible sanctions (see R.C. 2929.14 and 2929.18, not in the bill).

Conspiracy to transmit multiple e-mail advertisements

(R.C. 2923.01(A) and (J))

Continuing law prohibits any person with purpose to commit or to promote or facilitate the commission of specified offenses from either planning or aiding in the planning of the commission of the offenses specified with another person or persons, or agreeing with another person or persons that one or more of them will engage in conduct that facilitates the commission of any of the specified offenses. A person who violates this prohibition is guilty of conspiracy. The list of specified offenses includes aggravated murder, murder, engaging in a pattern of corrupt activity, and robbery, among others. The bill adds illegally transmitting multiple e-mail advertisements to the list of offenses for which a person may be convicted of conspiracy. Under continuing law, a conviction of conspiracy is a felony of the next lesser degree than the most serious offense that is the object of the conspiracy, when the most serious offense that is the object of the conspiracy is a felony of the first, second, third, or fourth degree, unless otherwise specified in the law.⁴

Civil action may be brought for committing the felonies

(R.C. 2913.421(D))

The bill authorizes the Attorney General, or any person engaged in the business of an e-mail service provider that is injured by handling or receiving e-mail sent in violation of illegally transmitting multiple e-mail advertisements or unauthorized access of a protected computer, or by the use of e-mail addresses obtained from that e-mail service provider in a manner described under the bill, to bring a civil action in an appropriate common pleas court in Ohio or the appropriate federal district court that has jurisdiction for a violation of illegally transmitting multiple e-mail messages or unauthorized access of a public computer, or a violation of the federal "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003" (the CAN-SPAM Act of 2003), Pub. L. No. 108-187, but not in both courts. The Attorney General or e-mail service provider may bring the civil action for the violation of illegally transmitting multiple e-mail messages or unauthorized access of a public computer within one

⁴ Under continuing law, when a person is convicted of committing or attempting to commit a specific offense or of complicity in the commission of or attempt to commit the specific offense, the person is not convicted of conspiracy involving the same offense (R.C. 2923.01(G)).

year of the act that is the basis for the civil action.⁵ But the bill does not authorize the Attorney General or an e-mail service provider to bring a civil action against a person convicted of conspiracy to commit either of the bill's new felonies.

Under the bill, in a civil action brought by the Attorney General for a violation of illegally transmitting multiple e-mail messages or unauthorized access of a protected computer, a court may award temporary, preliminary, or permanent injunctive relief. In addition, a court may impose a civil penalty against the offender in an amount not to exceed \$25,000 for each day a violation occurs, or not less than \$2 but not more than \$8 for each e-mail advertisement that is initiated, as the court considers just.

In an action brought by a person engaged in the business of an e-mail service provider (but evidently not a person who is injured by the use of e-mail addresses obtained from an e-mail service provider), the court may award temporary, preliminary, or permanent injunctive relief, and may award damages in an amount equal to whichever of the following is greater:

(1) The sum of the actual damages incurred by the e-mail service provider as a result of the violation of illegally transmitting multiple e-mail advertisements or unauthorized access of a protected computer, plus any receipts of the offender that are attributable to the violation of those offenses and that were not taken into account in computing actual damages;

(2) Statutory damages in an amount not exceeding \$25,000 for each day a violation occurs, or not less than \$2 but not more than \$8 for each e-mail advertisement initiated in violation of the bill.

In assessing damages awarded against an offender in a civil action brought by an e-mail service provider, the court may consider (1) whether the offender has established and implemented, with due care, commercially reasonable practices and procedures designed to effectively prevent the violations or (2) the violation occurred despite commercially reasonable efforts to maintain the practices and procedures established.

⁵ *It is not clear, under the bill, as to which court (federal or state) may have jurisdiction over which (federal or state) claim in all possible circumstances. The bill also seems to dictate what type of relief a federal court may award, a power that a state does not have over the federal judiciary.*

Additional civil action under federal law

(R.C. 2913.421(F))

The bill provides that the Attorney General may bring a civil action, pursuant to the federal CAN-SPAM Act, on behalf of Ohio residents in a federal district court that has jurisdiction for (1) a violation of illegally transmitting multiple e-mail advertisements or unauthorized access of a protected computer or (2) a violation of the CAN-SPAM Act. (The CAN-SPAM Act prohibits predatory and abusive commercial e-mail in a manner similar to the bill, and does not supersede state laws that prohibit falsity or deception in commercial e-mail messages, or that relate to acts of fraud or computer crime. The CAN-SPAM Act also authorizes the attorney general of a state, or an official or agency of a state, to bring a civil action on behalf of the state's residents in the appropriate federal district court to enjoin further violations of the Act or obtain monetary damages on behalf of the residents.)

Effect of bill on e-mail service providers

(R.C. 2913.421(G))

The bill specifies that it does not require an e-mail service provider to block, transmit, route, relay, handle, or store certain types of e-mail messages. The bill cannot be construed to prevent or limit, in any way, an e-mail service provider from adopting a policy regarding commercial or other e-mail, including a policy of declining to transmit certain types of e-mail messages, or from enforcing that policy through technical means, through contract, or pursuant to any remedy available under any other federal, state, or local criminal or civil law.⁶ The bill also specifies that it does not render lawful any policy that is unlawful under any other provision of law.

Definitions

The bill applies the following definitions, which already exist in the theft and fraud laws (R.C. 2913.01), to the bill's felonies of illegally transmitting multiple e-mail advertisements and unauthorized access of a protected computer:

(1) "Computer" is an electronic device that performs logical, arithmetic, and memory functions by the manipulation of electronic or magnetic impulses, including all input, output, processing, storage, computer program, or

⁶ *It is not clear whether "commercial or other email" is the same as "commercial electronic mail message" defined by the bill, which purportedly receives special treatment under the bill, although that treatment also is not clear.*

communication facilities that are connected, or related, in a computer system or network to an electronic device of that nature.

(2) "Computer network" 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.

(3) "Computer system" is a computer and related devices, whether connected or unconnected, including data input, output, and storage devices, data communications links, and computer programs and data that make the system capable of performing specified special purpose data processing tasks.

The bill also defines the following terms that are used in the law regarding illegally transmitting multiple e-mail advertisements and unauthorized access of a protected computer:

(1) "Commercial electronic mail message" means any e-mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product, including content on an Internet web site operated for a commercial purpose, but does not include a transactional or relationship message. The inclusion of a reference to a commercial entity or a link to the web site of a commercial entity does not, by itself, cause that message to be treated as a commercial mail message for the purpose of the bill, if the contents or circumstances of the message indicate a primary purpose other than commercial advertisement or of a commercial product or service (R.C. 2913.421(A)(3)).

(2) "Financial institution" means any banking corporation, trust company, insurance company, savings and loan association, building and loan association, or corporation, partnership, federal lending agency, foundation, or other institution engaged in lending or investing funds for industrial or business purposes (R.C. 2913.421(A)(8), and R.C. 122.39, not in bill).

(3) "Header information" is defined as the source, destination, and routing information attached to an e-mail message, including the "originating domain name" (the alphanumeric designation registered with or assigned by a domain name registrar, registry, or other domain name registration authority, and that is included in an e-mail message), the "originating address" (the string of characters used to specify the source of the message), and technical information that authenticates the sender of an e-mail message for network security or network management purposes (R.C. 2913.421(A)(9)).

(4) "Internet" means the international computer network of both federal and nonfederal interoperable packet switched data networks, including the

graphical subnetwork called the World Wide Web (R.C. 2913.421(A)(11), and R.C. 341.42, not in bill.)

The term "routine conveyance" is defined as the transmission, routing, relaying, handling, or storing through an automated technical process, of an electronic mail message for which another person has identified the recipients or provided the recipient addresses. (This term is not used anywhere in the bill.)

COMMENT

The federal "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003" (CAN-SPAM Act of 2003), Pub. L. 108-187, states that it expressly supercedes any statute, regulation, or rule of a state or political subdivision that expressly regulates the use of e-mail to send commercial messages, except to the extent that any statute, regulation, or rule of a state or political subdivision prohibits falsity or deception in any portion of a commercial e-mail message or attachment (CAN-SPAM Act, § 8(b)). The general effective date of the Act was January 1, 2004. Because of the recent effective date, court cases that have been brought under the Act have not been decided, and therefore, the effect of the Act on this bill is uncertain.

HISTORY

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