Ohio Legislative Service Commission

Bill Analysis

Lisa Sandberg

Sub. S.B. 223*

129th General Assembly
(As Reported by S. Judiciary)

Sen. Bacon

BILL SUMMARY

- Regarding the offense of "telecommunications fraud":

  --Changes the increased penalties so that: (1) if the value of the benefit obtained by the offender or of the detriment to the victim of the fraud is $1,000 or more but less than $7,500, telecommunications fraud is a fourth degree felony, (2) if the value or the detriment is $7,500 or more but less than $150,000, it is a third degree felony, (3) if the value of the benefit or detriment is $150,000 or more but less than $1 million , it is a second degree felony, and (4) if the value of the benefit or detriment is $1 million or more, it is a first degree felony.

  --If the victim of the offense is an elderly person or disabled adult and the offender knows or has reasonable cause to know that the victim is an elderly person or disabled adult, changes the name of the offense to "telecommunications fraud perpetrated against an elderly person or disabled adult" and provides that the offense generally is a fourth degree felony, but that: (1) if the value of the benefit obtained by the offender or of the detriment to the victims of the fraud is $1,000 or more but less than $7,500, it is a felony of the third degree, (2) if the value of the benefit or detriment is $7,500 or more but less than $150,000, it is a second degree felony, and (3) if the value of the benefit or detriment is $150,000 or more, it is a first degree felony.

  --Provides that, if an offender commits the offense as part of a course of conduct involving other specified theft-related or fraud-related offenses, the court, in determining the degree of the offense, may aggregate the value of the benefit

* This analysis was prepared before the report of the Senate Judiciary Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.

obtained by the offender or of the detriment to the victim of the fraud in the offenses involved in that course of conduct.

- Specifies that, if the Attorney General (the AG) has reasonable cause to believe that a person or enterprise has engaged in, is engaging in, or is preparing to engage in "telecommunications fraud," "telecommunications fraud perpetrated against an elderly person or disabled adult," "unauthorized use of property," "unauthorized use of computer, cable, or telecommunications property," "unauthorized use of the law enforcement automated data system," or "unauthorized use of the Ohio law enforcement gateway," the AG may investigate the alleged violation.

- Provides the AG with investigative powers regarding an investigation authorized under the prior dot point and specifies that information the AG gathers during the course of such an investigation is a confidential law enforcement investigatory record for purposes of the state's Public Records Law.

- Provides that a subpoena or subpoena *duces tecum* issued by the Attorney General to a provider of electronic communication services is subject to the limitations set forth in the "Electronic Communications Privacy Act of 1986."

- Changes the required uses of the moneys in the Telemarketing Fraud Enforcement Fund, so that moneys in the Fund must be used to pay for expenses reasonably related to the administration of R.C. Chapter 4719., the investigation or prosecution of crimes investigated by the AG's Consumer Protection Section, or educational activities that advance the specified purposes of R.C. Chapter 4719. as set forth in R.C. 4719.18.

CONTENT AND OPERATION

Telecommunications fraud – in general and if perpetrated against an elderly person or disabled adult

Prohibition

Existing law, unchanged by the bill, prohibits a person, having devised a scheme to "defraud," from knowingly disseminating, transmitting, or causing to be disseminated or transmitted by means of a wire, radio, satellite, "telecommunication," "telecommunications device," or "telecommunications service" any writing, "data," sign, signal, picture, sound, or image with purpose to execute or otherwise further the

scheme to defraud[1] (see "**Definitions**" under "**Background**," below, for definitions of the terms in quotation marks).

Name of offense and penalty

Existing law

Currently, a violation of the prohibition described above is the offense of "telecommunications fraud." Telecommunications fraud generally is a fifth degree felony. If the value of the benefit obtained by the offender or of the detriment to the victim of the fraud is $5,000 or more but less than $100,000, it is a fourth degree felony. If the value of the benefit obtained by the offender or of the detriment to the victim of the fraud is $100,000 or more, it is a third degree felony.[2]

Operation of the bill

The bill modifies the penalties for, and name of, a violation of the prohibition described above as follows:[3]

(1) It specifies that a violation of the prohibition generally remains the offense of "telecommunications fraud" if the victim is not an elderly person or disabled adult. It retains the default penalty as a fifth degree felony, but it changes the increased penalties that are linked to the value of the benefit obtained or the detriment suffered. Under the bill's increased penalties:

(a) If the value of the benefit obtained by the offender or of the detriment to the victim of the fraud is $1,000 or more but less than $7,500, telecommunications fraud is a fourth degree felony.

(b) If the value or the detriment is $7,500 or more but less than $150,000, it is a third degree felony.

(c) If the value of the benefit or detriment is $150,000 or more but less than $1 million, it is a second degree felony.

(d) If the value of the benefit or detriment is $1 million or more, it is a first degree felony.

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[1] R.C. 2913.05(A).

[2] R.C. 2913.05(B).

[3] R.C. 2913.05(C) and (D).

(2) It changes the name of a violation of the prohibition and provides new penalties if the victim of the offense is an "elderly person" or "disabled adult" (see "**Definitions**" under "**Background**," below) and provides that the penalties are linked to the value of the benefit obtained or the detriment suffered. Under the bill, if the victim of a violation of the prohibition is an elderly person or disabled adult and the offender knows or has reasonable cause to know that the victim of the offense is an elderly person or disabled adult, the offense is "telecommunications fraud perpetrated against an elderly person or disabled adult." Telecommunications fraud perpetrated against an elderly person or disabled adult generally is a fourth degree felony. If the value of the benefit obtained by the offender or of the detriment to the victims of the fraud is $1,000 or more but less than $7,500, it is a felony of the third degree. If the value of the benefit or detriment is $7,500 or more but less than $150,000, it is a second degree felony. If the value of the benefit or detriment is $150,000 or more, it is a first degree felony.

Aggregation for purposes of prosecution

The bill provides that, if an offender commits a violation of the prohibition described above and the violation occurs as part of a course of conduct involving other violations of that prohibition or violations of, attempts to violate, conspiracies to violate, or complicity in violations of R.C. 2913.02, 2913.04, 2913.11, 2913.21, 2913.31, 2913.42, 2913.43, or 2921.13 (see below – none of the sections are in the bill), the court, in determining the degree of the offense, may aggregate the value of the benefit obtained by the offender or of the detriment to the victim of the fraud in the violations involved in that course of conduct. The course of conduct may involve one victim or more than one victim.[4]

The violations, other than R.C. 2913.51, that are cited in the preceding paragraph are the offenses of "theft" and other theft-related offenses, "unauthorized use of property," "unauthorized use of computer, cable, or telecommunications property," "unauthorized use of the law enforcement automated data system," "unauthorized use of the Ohio law enforcement gateway," "passing bad checks," "misuse of credit cards," "forgery," "forging identification cards or selling or distributing forged identification cards," "tampering with records," "securing writings by deception," and "falsification" and other falsification-related offenses.

Attorney General investigations

The bill specifies that, if the Attorney General (the AG) has reasonable cause to believe that a person or enterprise has engaged in, is engaging in, or is preparing to engage in a violation of any provision of R.C. 2913.04 or 2913.05, the AG may

[4] R.C. 2913.05(B).

investigate the alleged violation.[5] R.C. 2913.05 is described above in "**Telecommunications fraud – in general and if perpetrated against an elderly person or disabled adult**" and R.C. 2913.04, not in the bill, sets forth the offenses of "unauthorized use of property," "unauthorized use of computer, cable, or telecommunications property," "unauthorized use of the law enforcement automated data system," and "unauthorized use of the Ohio law enforcement gateway."

For purposes of an investigation described in the preceding paragraph, the AG may issue subpoenas and subpoenas *duces tecum*. The AG may compel the attendance of witnesses and the production of records and papers of all kinds and description that are relevant to the investigation, including, but not limited to, any books, accounts, documents, and memoranda pertaining to the subject of the investigation. Upon the failure of any person to comply with any subpoena or subpoena *duces tecum* issued by the AG under this provision, the AG may apply to the court of common pleas in Franklin County or in any county in which an element of the crime occurred for a contempt order as in the case of disobedience of the requirements of a subpoena issued from the court of common pleas or a refusal to testify on a subpoena. A subpoena or subpoena *duces tecum* issued by the AG to a provider of electronic communications services is subject to the limitations set forth in the "Electronic Communications Privacy Act of 1986."

Any information the AG gathers during the course of an investigation described in the second preceding paragraph that is in the possession of the AG, a prosecuting attorney, a law enforcement agency, or a special prosecutor is a "confidential law enforcement investigatory record" for purposes of the state's Public Records Law (see "**Confidential law enforcement investigatory records under the Public Records Law**" under "**Background**," below). The bill states that no provision described in this paragraph or the preceding two paragraphs affects or limits any right of discovery granted to any person under the Revised Code, the Rules of Criminal Procedure, or the Rules of Juvenile Procedure.[6]

Telemarketing Fraud Enforcement Fund

Existing law, unchanged by the bill, establishes the Telemarketing Fraud Enforcement Fund, requires the State Treasurer to deposit into the Fund registration fees paid pursuant to R.C. 4719.02(A) and (D), neither of which is in the bill (see

[5] R.C. 109.88(A).

[6] R.C. 109.88(B) and (C).

"**Telephone solicitor fees**" under "**Background**," below), and specifies required uses of the moneys in the Fund.[7]

The bill changes the required uses of the moneys in the Fund. Under the bill, the Consumer Protection Section of the AG's Office is required to use the moneys in the Fund to pay for any expenses reasonably related to the administration of R.C. Chapter 4719., the investigation or prosecution of any crimes investigated by the Section, or educational activities that advance the purposes of R.C. Chapter 4719. as set forth in R.C. 4719.18.[8] R.C. Chapter 4719., not in the bill except for R.C. 4717.17, is Ohio's law regulating telephone solicitors and their salespersons. R.C. 4719.18, not in the bill, specifies that the purposes and objectives of R.C. 4719.01 to 4719.18 are to protect purchasers from telephone solicitors and salespersons that commit unfair, unlawful, deceptive, or unconscionable acts or practices and to encourage the development of reasonable and fair telephone solicitation sales practices.

Currently, the Consumer Protection Section of the AG's Office is required to use the moneys in the Fund for the administration and enforcement of the program of registration established in R.C. 4719.01 to 4719.18 and also for educational activities that advance the purposes of those sections as set forth in R.C. 4719.18.[9] The section range of R.C. 4719.01 to 4719.18 does not include R.C. 4719.21 and 4719.99, neither of which is in the bill. R.C. 4719.21 prohibits telephone solicitors from intentionally blocking or intentionally authorizing or causing to be blocked the disclosure of the telephone number from which a telephone solicitation is made and specifies enforcement options under the Ohio's Consumer Sales Practices Law based on violations of the prohibition. R.C. 4719.99 provides criminal penalties for violations of R.C. 4719.02, 4719.05, and 4719.06 to 4719.09.

Background

Definitions

Existing law defines the following terms that are used in the bill's telecommunications fraud provisions:[10]

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[7] R.C. 4719.17.

[8] R.C. 4719.17.

[9] R.C. 4719.17.

[10] R.C. 2913.01, not in the bill.

"***Data***" means a representation of information, knowledge, facts, concepts, or instructions that are being or have been prepared in a formalized manner and that are intended for use in a computer, computer system, or computer network.

"***Defraud***" means to knowingly obtain, by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another.

"***Disabled adult***" means a person who is 18 or older and has some impairment of body or mind that makes the person unable to work at any substantially remunerative employment that the person otherwise would be able to perform and that will, with reasonable probability, continue for a period of at least 12 months without any present indication of recovery from the impairment, or who is 18 or older and has been certified as permanently and totally disabled by an agency of Ohio or the United States that has the function of so classifying persons.

"***Elderly person***" means a person who is 65 or older.

"***Telecommunication***" means the origination, emission, dissemination, transmission, or reception of data, images, signals, sounds, or other intelligence or equivalence of intelligence of any nature over any communications system by any method, including, but not limited to, a fiber optic, electronic, magnetic, optical, digital, or analog method.

"***Telecommunications device***" 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.

"***Telecommunications service***" means the providing, allowing, facilitating, or generating of any form of telecommunication through the use of a telecommunications device over a telecommunications system.

Confidential law enforcement investigatory records under the Public Records Law

Ohio's Public Records Law provides that, upon request and subject to an exception regarding certain incarcerated persons, all "public records" responsive to the request must be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Upon request and subject to that exception, a public office or person responsible for public records must make copies of the requested public record available at cost and within a reasonable period of time.

The Law sets forth procedures regarding public records and the satisfaction of a request for them.

As used in the Public Records Law, except as described below, "public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in Ohio kept by the nonprofit or for profit entity operating the alternative school. The Public Records Law excludes many types of records from the definition of "public record," including "confidential law enforcement investigatory records." For purposes of the Public Records Law, "confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following: (1) the identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised, (2) information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity, (3) specific confidential investigatory techniques or procedures or specific investigatory work product, or (4) information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.[11]

Telephone solicitor fees

R.C. 4719.02(A), not in the bill, prohibits a person from acting as a telephone solicitor without having first obtained a certificate of registration or registration renewal from the AG under R.C. 4719.03. R.C. 4719.02(D), not in the bill, prohibits a nonresident telephone solicitor from failing to maintain an Ohio resident as its statutory agent for the purpose of service of process (the agent's name and street address must be provided on the solicitor's application for a certificate of registration or registration renewal). Neither division expressly refers to the payment of fees. R.C. 4719.03, not in the bill, requires the AG, subject to specified exceptions, to issue a certificate of registration or registration renewal as a telephone solicitor to an applicant or registrant that submits a completed application pursuant to R.C. 4719.02 and pays, as applicable, the registration fee or renewal fee prescribed by the AG pursuant to rule.

[11] R.C. 149.43, not in the bill.

HISTORY

ACTION	DATE
Introduced	09-15-11
Reported, S. Judiciary	–-

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