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BILL ANALYSIS

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Senate Bill 1025 (Substitute S-3 as passed by the Senate)  
Sponsor: Senator Michael D. Bishop  
Committee: Technology and Energy

Date Completed: 5-25-04

### **RATIONALE**

As the use of e-mail as a critical mode of communication has increased, so has the practice of "spamming", in which an e-mail marketer (or "spammer") sends unsolicited advertising to millions of people. Reportedly, between 40% and 50% of all e-mail sent is spam. Spammers apparently do not limit themselves to e-mail, however, sending unsolicited advertisements to users of instant messaging services and to mobile phones in the form of text messages. A significant portion of spam evidently contains pornography or other material that is inappropriate for children. Although anti-spam legislation (described under **BACKGROUND**, below) recently has been enacted both in Michigan and at the Federal level, some people believe that a special registry should be created in order to prevent messages containing sexual content or advertisements for gambling, cigarettes, and alcohol from reaching children.

### **CONTENT**

**The bill would create the "Michigan Children's Protection Registry Act" to do the following:**

- **Require the Department of Labor and Economic Growth (DLEG) to establish and operate a "Child Protection Registry" on which a person or school could register contact points (e.g., e-mail addresses) belonging to a minor or to which a minor could have access.**
- **Prohibit a person from sending to a registered contact point a communication that contained, advertised, or linked to a product or service that a minor is prohibited by**

**law from purchasing, viewing, possessing, or otherwise receiving.**

- **Require a person who wanted to send such a communication to pay a fee set by DLEG to verify compliance with the Registry.**
- **Prohibit the release of information contained on the Registry.**
- **Prescribe criminal penalties for violating the proposed Act; and allow a recipient, a person through whose facilities the illegal communications were transmitted, or the Attorney General to bring a civil action against a violator.**
- **Provide that the Registry's operation would be funded completely from the fees, fines, and civil penalties collected by DLEG under the proposed Act.**

The bill would define "contact points" as any electronic identification to which messages could be sent, including an electronic mail (e-mail) address, an instant message identity, a telephone number, a facsimile number, or other electronic addresses subject to rules promulgated under the proposed Act by DLEG.

The bill is described below in further detail.

#### Child Protection Registry

The bill would require DLEG to establish and operate, or contract with a third party to establish and operate, the Child Protection Registry. (If DLEG elected to contract with a third party, it would have to give due consideration to any party located in Michigan.) A person with control of a contact point belonging to a minor, or to

which a minor could have access, could register that contact point with DLEG under rules it promulgated under the Administrative Procedures Act. Schools and other institutions or entities primarily serving minors also could register, and make one registration for all of their contact points.

The Registry would have to be fully operational by July 1, 2005. It would not be subject to the Freedom of Information Act.

#### Communications

A person could not, directly or indirectly, send, cause to be sent, or conspire with a third party to send a communication to a contact point that had been registered for more than 30 calendar days if the communication contained, advertised, or linked to a product or service that a minor is prohibited by law from purchasing, viewing, possessing, or otherwise receiving. The consent of a minor or third party to receive the communication would not be a defense to a violation.

A person who desired to send such a communication would have to use a mechanism as required by DLEG to verify compliance with the Registry and remove registered contact points for any communications. The sender would have to pay DLEG a fee for access to the verification mechanism. The Department would have to set the fee based on the number of contact points the person checked. The mechanism and fee would have to be established by the rules promulgated under the Act.

#### Children's Protection Registry Fund

The bill would create the "Children's Protection Registry Fund" as a separate fund within the Department of Treasury to be administered by DLEG. The fees, fines, and civil penalties collected under the Act would have to be deposited into the Fund. The Department would have to spend money from the Fund only for the purposes of administering the Registry. If the amount in the Fund for a fiscal year exceeded the Registry's administration costs, the excess amount would have to be deposited into the General Fund.

#### Penalties & Damages

A person who violated the proposed Act would be guilty of a misdemeanor punishable by one of the following:

- For the first violation, imprisonment for up to six months and/or a maximum fine of \$5,000.
- For the second violation, imprisonment for up to one year and/or a maximum fine of \$10,000.
- For the third and any subsequent violation, imprisonment for up to one year and/or a maximum fine of \$25,000.

Additionally, all money and other income, including all proceeds earned but not yet received by a defendant from a third party as a result of the defendant's violations, and all computer equipment, computer software, and all personal property known by the owner to have been used in a violation would be subject to lawful seizure and forfeiture in the same manner as provided under the Revised Judicature Act.

A civil action could be brought by a person who received a communication in violation of the proposed Act, a person through whose facilities the communications were transmitted, or the Attorney General. In each action, the prevailing party could be awarded reasonable attorney fees, and a recipient or the Attorney General could recover either actual damages or the lesser of the following: \$5,000 per communication received by a recipient or transmitted through the e-mail service provider, or \$250,000 for each day that the violation occurred.

The bill specifies that a person would not violate the Act solely by being an intermediary between the sender and recipient in the transmission of communication that violated the Act. It would be a defense to an action that the communication was transmitted accidentally. The burden of proving that the communication was sent accidentally would be on the sender.

## **BACKGROUND**

### **State Legislation**

Public Act 42 of 2003 (House Bill 4519) created the "Unsolicited Commercial E-mail Protection Act" to regulate e-mail messages that contain advertisements and are sent without the recipient's express opinion. The Act took effect on September 1, 2003. Under the Act, senders of unsolicited commercial e-mail must identify themselves truthfully, include in the subject line the letters "ADV:" to identify the message as an advertisement, and provide a convenient, free way for recipients to opt out of receiving future e-mails.

Additionally, the Act prohibits a sender from misrepresenting or failing to include information necessary to identify the e-mail's point of origin or transmission path; using a third party's domain name or e-mail address in identifying the point of origin or transmission path without the third party's consent; and providing another person with software designed to falsify transmission information.

A violation of the Act is a misdemeanor punishable by imprisonment for up to one year and/or a maximum fine of \$10,000. A person who violates the prohibitions relating to the disclosure of transmission information, or violates the Act in furtherance of another crime, is guilty of a felony punishable by imprisonment for up to four years and/or a maximum fine \$25,000. In addition, a recipient of an e-mail sent in violation of the Act, an e-mail service provider through whose facilities the e-mail was sent, or the Attorney General may bring a civil action against a sender. The recipient, service provider, or Attorney General may recover actual damages, or the lesser of either \$500 per e-mail received or \$250,000 for each day the violation occurred. The prevailing recipient or service provider also must be awarded actual costs and reasonable attorney fees.

### **Federal Legislation**

President George W. Bush signed the CAN-SPAM (Controlling the Assault of Non-Solicited Pornography and Marketing) Act into law in December 2003. The law authorizes the Federal Trade Commission

(FTC) to create a "Do Not E-Mail" registry. Similar to the State legislation, it requires senders to include an opt-out mechanism for recipients, and prohibits spammers from providing deceptive information about their identities. The law also prohibits false or misleading subject lines, and requires a sender to identify the message as an advertisement or a solicitation and, if applicable, to indicate that it contains sexually oriented material. Additionally, the law prohibits spammers from "harvesting" multiple e-mail addresses from websites. It allows the FTC, state Attorneys General, and internet service providers to bring actions against violators, and provides for a penalty of imprisonment for up to five years under certain circumstances. Unlike Michigan's law, the CAN-SPAM Act does not contain a private right of action for recipients.

As required by the Act, the Federal Trade Commission promulgated a rule under which spam that contains sexually oriented material must include the warning "SEXUALLY-EXPLICIT:" in the subject line. The rule took effect on May 19, 2004.

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

Although many people consider e-mail an essential asset now, it will lose its value over time and become an annoyance if action is not taken. As the amount of spam being sent grows, so does the potential that a child will be exposed to inappropriate material. According to Unspam, an advocacy organization for effective anti-spam laws, 80% of children online report receiving inappropriate unsolicited e-mail messages on a daily basis. In addition, it is estimated that 791,000,000 text messages containing sexual content will be sent to cell phones in the United States by 2007, and approximately 60% of teen-agers in this country already have cell phones. Marketing "adult" material via electronic means is an easy way for spammers to make a profit, as potential customers no longer must deal with the embarrassment of having others see them go behind a curtain to obtain pornography.

Anti-spam laws enacted in several states have proven largely ineffective because they do not provide the state with jurisdiction to prosecute a person who violates the law from another state or country. Even under the Federal CAN-SPAM Act, a spammer can continue sending unsolicited e-mail as long as he or she labels the message as spam in the subject line, supplies truthful sender identification, and provides a method for the recipient to opt out of receiving future e-mails. The Act does not actually prohibit spam, nor does it provide any protection specifically for children or provide for a private cause of action against a violator. Under Senate Bill 1025 (S-3), however, the Registry would make it clear which contact points were off limits to spammers and provide the State with jurisdiction, which is critical to prosecuting a violator.

Because many children grow up with cell phones and computers, they often are more adept at using technology than their parents are. They should not be subjected to advertisements for drugs and gambling, or pornographic material, while using computers for appropriate purposes, such as doing homework, playing games, and chatting online with friends. The bill would help reduce the number of harmful images sent electronically, which can make young children feel uncomfortable, and provide parents with a tool to protect their children in a technological world.

Legislative Analyst: Julie Koval

### **FISCAL IMPACT**

The bill would have an indeterminate fiscal impact on the State and local government. There are no data available to indicate how many offenders would be convicted of violating the proposed Act. Department of Attorney General enforcement costs would depend on the number of violations. Local units of government incur the costs of misdemeanor probation and incarceration in a local facility, both of which vary by county. Public libraries would benefit from any additional revenue raised from the proposed penal fines.

Administrative costs incurred by the Department of Labor and Economic Growth would depend on the cost of operating the Registry. The bill provides that the

Registry's operation would be funded completely from the fees, fines, and civil penalties collected by the DLEG under the proposed Act.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.