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BILL ANALYSIS

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Senate Bill 1025 (as enrolled)
House Bill 5979 (as enrolled)
Sponsor: Senator Michael D. Bishop (S.B. 1025)
Representative David Palsrok (H.B. 5979)
Senate Committee: Technology and Energy
House Committee: Energy and Technology

PUBLIC ACT 241 of 2004
PUBLIC ACT 242 of 2004

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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 believed 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

Senate Bill 1025 created 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 may register contact points (e.g., e-mail addresses) to which a minor may have access.**
- **Prohibit a person from sending to a registered contact point a message that advertises or links to a product**

or service that a minor is prohibited by law from purchasing, viewing, possessing, participating in, or otherwise receiving.

- **Require a person who wants 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.**
- **Allow a recipient, a person through whose facilities the illegal messages are transmitted, or the Attorney General to bring a civil action against a violator.**

House Bill 5979 amended Public Act 53 of 1979, which prohibits fraudulent access to computers, computer systems, and computer networks, to provide that a violation of the Michigan Children's Protection Registry Act also is a violation of Public Act 53, and prescribe penalties.

The bills were tie-barred and took effect on July 21, 2004, although the criminal penalties will not take effect until July 1, 2005. The bills are described below in further detail.

Senate Bill 1025

Child Protection Registry

The bill requires DLEG to establish and operate the Child Protection Registry, or contract with a qualified third party to do so. (If DLEG elects to contract with a third party, it must give due consideration to any

party located in Michigan.) A parent, guardian, or entity who is responsible for a contact point to which a minor has access, may register that contact point with DLEG under rules it promulgates under the Administrative Procedures Act. Schools and other institutions or entities primarily serving minors also may register, and make one registration for all of their contact points. The school's or other entity's registration may include the entity's internet domain name under rules promulgated by DLEG.

(The bill defines "contact point" as any electronic identification to which messages may be sent, including an electronic mail (e-mail) address; an instant message identity; a wireless telephone number, a personal digital assistant, or any other similar wireless communication device; a facsimile number; or other electronic addresses subject to rules promulgated under the Act by DLEG. The bill defines "internet domain name" as a globally unique, hierarchical reference to an internet host or service, assigned through centralized internet authorities, comprising a series of character strings separated by periods, with the right-most string specifying the top of the hierarchy.)

The Department must establish procedures to ensure that a registrant meets the Act's requirements. A registration may be for up to three years. If the contact point is established for a specific minor, the registration will expire the year the minor turns 18. A registrant may renew or revoke the registration by notifying DLEG. A registrant may not be assessed or incur a fee or charge.

The Registry must be fully operational by July 1, 2005. It will not be subject to the Freedom of Information Act. A person may not release to another person information concerning persons or provide access to addresses contained on the Registry except as provided in the Act. A person may not sell or use the Registry for any reason other than to meet the Act's requirements, or gain access to or attempt to gain access to the Registry except as provided in the Act.

Communications; Fee

A person may not send, cause to be sent, or conspire with a third party to send a message to a contact point that has been

registered for more than 30 calendar days if the message's primary purpose is, directly or indirectly, to advertise or otherwise link to a product or service that a minor is prohibited by law from purchasing, viewing, possessing, participating in, or otherwise receiving. The sending of such a message is prohibited only if it otherwise is a crime for the minor to purchase, view, possess, participate in, or otherwise receive the product or service. The consent of a minor or third party to receive the message is not a defense to a violation.

A person who desires to send such a message must use a mechanism as established by DLEG to verify compliance with the Registry. The Department or third-party administrator must establish procedures, to the extent possible, to prevent the use or disclosure of protected contact points. The sender must pay DLEG a fee for access to the verification mechanism. The Department must set the fee, which may not exceed 0.03 cents and must be based on the number of contact points checked against the Registry for each time a contact point is checked. The mechanism and fee must be established by the rules promulgated by DLEG.

Eighty-five percent of the fees must be credited to the Children's Protection Registry Fund, described below. At least 15% must be credited to the Attorney General to cover the costs of investigating, enforcing, and defending the Act and Section 5a of Public Act 53 of 1979 (which House Bill 5979 added). The Department may reimburse the Attorney General from the Fund for costs that exceed the fees credited to the Attorney General.

Children's Protection Registry Fund

The bill creates the "Children's Protection Registry Fund" as a separate fund within the Department of Treasury to be administered by DLEG. The Department must spend money from the Fund only for the purposes of administering the Act and for the investigation, enforcement, and defense of the Act and Section 5a of Public Act 53 of 1979. All money in the Fund at the end of the fiscal year, including interest and earnings, must remain in the Fund and not revert to the General Fund.

Penalties & Damages

The bill states that a violation of the Act is a computer crime and a violation of Section 5a of Public Act 53 of 1979 subject to the penalties under that Act. 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, are subject to lawful seizure and forfeiture in the same manner as provided under the Revised Judicature Act.

A civil action may be brought by an authorized individual or registrant on behalf of a minor who received a message in violation of the Act, a person through whose facilities the message was transmitted, or the Attorney General. In each action, the prevailing party may be awarded reasonable attorney fees, if the court finds the action to be frivolous. A person bringing an action may recover either actual damages, including reasonable attorney fees, or the lesser of the following: \$5,000 per communication received by a recipient or transmitted, or \$250,000 for each day that the violation occurs.

If the Attorney General has reason to believe that a person has violated the Act, the Attorney General may investigate that

person's business transactions. The Attorney General may require the person to appear, at a reasonable time and place, to give information under oath and produce such documents and evidence necessary to determine whether the person is in compliance with the Act's requirements.

Any civil penalties collected by the Attorney General must be credited to the Attorney General for the costs of investigating, enforcing, and defending the Act and Section 5a of Public Act 53 of 1979.

The bill specifies that a person does not violate the Act by being an intermediary between the sender and recipient in the transmission of an electronic message that violates the Act, or by unknowingly providing transmission of the messages over the person's computer network or facilities. It is a defense to an action that the message was transmitted accidentally. The burden of proving that the message was sent accidentally is on the sender.

House Bill 5979

The bill added Section 5a to Public Act 53 of 1979, to state that a violation of the Michigan Children's Protection Registry Act also is a violation of Public Act 53. The penalties for a violation of Section 5a are shown in Table 1.

Table 1

Violation	Type	Maximum Imprisonment	Maximum Fine
First	Misdemeanor	1 year	\$10,000
Second	Felony	2 years	\$20,000
Third or Subsequent	Felony	3 years	\$30,000

Like Senate Bill 1025, the House bill provides that an intermediary between a sender and recipient is not a violator; accidental transmission is a defense; and money, income, and property knowingly used in a violation are subject to seizure and forfeiture.

MCL 752.1601-752.1608 (S.B. 1025)
752.795a-752.796b (H.B. 5979)

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 permission. 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. Similar to the State legislation, the CAN-SPAM Act 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 Federal Trade Commission (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 FTC 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.

The law also requires the FTC to report on the feasibility of creating a "Do Not E-Mail" registry and develop a plan for such a list. In June 2004, however, the FTC announced that it will not create a "Do Not E-Mail" registry, stating that spammers likely would use the registry as a source of e-mail addresses to which they could continue sending unsolicited messages.

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, however, the Registry will make it clear which contact points are 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. By providing for the Registry, as well as criminal penalties and civil actions, the bills will 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.

FISCAL IMPACT

The bills will have an indeterminate fiscal impact on State and local government. Administrative costs incurred by the Department of Labor and Economic Growth will depend on the cost of operating the Registry. The Registry's operation will be funded completely from the fees collected by DLEG under the new Act. The Department will receive 85% of the fee revenue, less amounts paid to reimburse the Attorney General for expenses that exceed the 15% of fee revenue credited to the Attorney General.

Department of Attorney General enforcement costs will depend on the number of violations. In addition to receiving at least 15% of the fees, the Attorney General may be awarded fines in civil actions.

There are no data available to indicate how many offenders will be convicted of violating the Act. Local units of government incur the costs of misdemeanor probation and incarceration in a local facility, both of which vary by county. The State incurs the cost of felony probation at an average annual cost of \$1,800, as well as the cost of incarceration in a State facility at an average annual cost of \$28,000. Public libraries will benefit from any additional revenue raised from the new penal fines.

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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.