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House Bill 4519 (Substitute H-2 as passed by the House)
Sponsor: Representative Bill Huizenga
House Committee: Energy and Technology
Senate Committee: Technology and Energy

Date Completed: 6-3-03

CONTENT

The bill would create the "Unsolicited Commercial E-mail Protection Act" to do all of the following:

- Require senders of unsolicited commercial e-mail to include a valid method for recipients to opt out of receiving future e-mails.**
- Require certain information to be included in an unsolicited commercial e-mail.**
- Prohibit a sender of unsolicited commercial e-mail from using a third party's internet domain name or e-mail address without consent; or misrepresenting or failing to include information in identifying the point of origin or the transmission path of the e-mail.**
- Prohibit a person from knowingly selling, giving, or otherwise distributing or possessing with the intent to sell, give, or distribute software designed to facilitate or enable the falsification of e-mail transmission information or other routing information; or providing such software directly or indirectly to another person.**
- Require a sender of unsolicited commercial e-mail to establish and maintain the necessary policies and records to ensure that a recipient who notified the sender that he or she did not wish to receive future e-mails did not receive any e-mail from the date of notice.**
- Allow an e-mail service provider to design its software so that a sender of unsolicited commercial e-mail was notified of the bill's requirements each time the sender requested delivery of e-mail.**
- Prescribe criminal penalties for violating the proposed Act, and allow a recipient, an e-mail service provider, or the Attorney General to bring a civil action against a violator.**

The bill would take effect on September 1, 2003.

Under the bill, "unsolicited" would mean without the recipient's express permission. An e-mail would not be unsolicited if the sender had a preexisting business or personal relationship with the recipient, or if the e-mail were received because the recipient opted into a system in order to receive promotional material. ("Preexisting business relationship" would mean a relationship that existed before the receipt of an e-mail formed voluntarily by the recipient with another person by means of an inquiry, application, purchase, or use of a product or service of the sender.) "Commercial e-mail" would mean an electronic message, file, data, or other information promoting the sale, lease, or exchange of goods, services, real property, or any other thing of value that was transmitted between two or more computers, computer networks, or electronic terminals or within a computer network.

Required Information

A person who intentionally sent or caused to be sent an unsolicited commercial e-mail through an e-mail service provider that the sender knew or should have known was located in this State, or to an e-mail address that the sender knew or should have known was held by a resident of this State, would have to do all of the following:

- Include in the e-mail subject line "ADV:" as the first four characters.
- Conspicuously state in the e-mail the sender's legal name, correct street address, valid internet domain name, and valid return e-mail address.
- Conspicuously provide in the text of the e-mail, in print as large as the print used for the majority of the e-mail, a notice that the recipient could conveniently and at no cost be excluded from future e-mail from the sender.

The sender also would have to establish a toll-free telephone number, a valid sender-operated return e-mail address, or another easy-to-use electronic method that the recipient could call or gain access to by e-mail or other electronic means, to notify the sender not to transmit any further unsolicited commercial e-mail messages. The notification process could include the ability for the recipient to direct the sender to transmit or not transmit particular e-mails based upon products, services, divisions, organizations, companies, or other selections of the recipient's choice. An unsolicited commercial e-mail would have to include, in print as large as the print used for the majority of the e-mail, a statement informing the recipient of a toll-free telephone number or valid return address the recipient could use to notify the sender not to transmit any further commercial e-mail messages.

Misrepresenting Information

A person who sent or caused to be sent an unsolicited commercial e-mail through an e-mail service provider located in Michigan or to an e-mail address held by a resident of Michigan would be prohibited from doing any of the following:

- Using a third party's internet domain name or e-mail address in identifying the point of origin or in stating the transmission path of the e-mail without the third party's consent.
- Misrepresenting any information in identifying the point of origin or the transmission path of the e-mail.
- Failing to include in the e-mail the information necessary to identify the point of origin of the e-mail.

Additionally, a person could not knowingly sell, give, or otherwise distribute or possess with the intent to sell, give, or distribute software that was primarily designed or produced for the purpose of facilitating or enabling the falsification of e-mail transmission or routing information; had only limited commercially significant purpose or use other than to facilitate or enable the falsification of e-mail transmission information or other routing information; or was marketed by the person or another acting in concert with the person, with that person's knowledge, for use in facilitating or enabling the falsification of e-mail transmission information or other routing information. A person who sent unsolicited commercial e-mail could not provide such software directly or indirectly to another person.

Sender Notification

A sender could not send unsolicited commercial e-mail, either directly or through a third party, to a recipient who notified the sender that he or she did not want to receive future e-mails. A sender would have to establish and maintain the necessary policies and records to ensure that a recipient who notified the sender did not receive any e-mail from the date of the notice. The sender also would have to update its records at least every 14 business days.

The bill would allow an e-mail service provider to design its software so that a sender of unsolicited commercial e-mail would be notified of the requirements of the proposed Act each time the sender requested delivery of e-mail. The existence of the software would constitute actual notice to the sender of the Act's requirements.

Penalties & Damages

A person who violated the proposed Act would be guilty of a misdemeanor punishable by imprisonment for up to one year or a fine of up to \$10,000, or both. A person who misrepresented or failed to include information regarding the point of origin or transmission path of an e-mail, provided software used to falsify transmission or routing information, or violated the proposed Act in the furtherance of another crime would be guilty of a felony punishable by up to four years in prison or a maximum fine of \$25,000, or both. Each e-mail sent in violation of the Act would be a separate violation.

The bill states that an e-mail service provider would not be in violation of the Act solely by being an intermediary between the sender and recipient, or by providing transmission of unsolicited commercial e-mail over its network or facilities.

It would be prima facie evidence that a sender had committed a violation if the recipient were unable to contact the sender through the return e-mail address provided in an unsolicited commercial e-mail.

A civil action could be brought by the recipient of an unsolicited commercial e-mail, an e-mail service provider through whose facilities an e-mail was transmitted in violation of the Act, or by the Attorney General. In each action, a recipient, an e-mail service provider, or the Attorney General could recover either actual damages, or the lesser of the following: \$10 per unsolicited commercial e-mail received by the recipient or transmitted by the e-mail service provider, or \$25,000 for each day the violation occurred. Additionally, a prevailing recipient or e-mail service provider would have to be awarded actual costs and reasonable attorney fees.

It would be a defense to any criminal or civil action brought against a sender that the unsolicited e-mail was transmitted accidentally or as a result of a preexisting business relationship. The burden of proof would be on the sender.

Legislative Analyst: Julie Koval

FISCAL IMPACT

There are no data to indicate how many offenders would be convicted of violating the proposed Act. Local units of government would incur the costs of misdemeanor probation and incarceration in a local facility, which varies by county. The State would incur the cost of felony probation at an average cost of \$4.80 per day and incarceration in a State facility at an average cost of \$25,000 per year. For each person who was convicted of violating the Act in the furtherance of another crime and sentenced to prison for the longest allowable minimum sentence, it would cost the State approximately \$67,000. Public libraries would benefit from any additional penal fine revenue collected.

Fiscal Analyst: Bethany Wicksall

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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.