

HOUSE BILL REPORT

2SHB 1037

As Amended by the Senate

Title: An act relating to commercial electronic mail.

Brief Description: Creating a registry of Washington resident's electronic mail addresses to facilitate a program that allows private interactive computer service providers to limit unsolicited commercial electronic mail messages.

Sponsors: By House Committee on Technology, Telecommunications & Energy
(Originally sponsored by Representatives Bush, Morris and Ruderman).

Brief History:

Committee Activity:

Technology, Telecommunications & Energy: 1/26/99, 2/17/99 [DPS];

Appropriations: 3/1/99, 3/6/99 [DP2S(w/o sub TTE)].

Floor Activity:

Passed House: 3/11/99, 95-1.

Senate Amended.

Passed Senate: 4/16/99, 47-0.

House (House refused to concur)

Senate (Senate receded)

Senate Amended.

Passed Senate: 4/23/99, 44-2.

Brief Summary of Second Substitute Bill

- Commercial electronic messages select task force is extended an additional year.
- Attorney General's Office is to operate an electronic registry where citizens may register their e-mail addresses and indicate Washington residency.
- Persons cannot assist or conspire with others to send out commercial e-mail messages containing certain types of misleading information.
- Interactive computer service providers may publish and enforce policies prohibiting or restricting the transmission of unsolicited commercial e-mail over their systems.
- Unsolicited commercial e-mail messages must include legal name, physical and mailing addresses, and telephone number of sender or sender's registered agent.

HOUSE COMMITTEE ON TECHNOLOGY, TELECOMMUNICATIONS & ENERGY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 13 members: Representatives Crouse, Republican Co-Chair; Poulsen, Democratic Co-Chair; DeBolt, Republican Vice Chair; Ruderman, Democratic Vice Chair; Bush; Cooper; Kastama; McDonald; Mielke; Morris; Reardon; Thomas and Wolfe.

Staff: Linda Brooks (786-7153).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Technology, Telecommunications and Energy. Signed by 31 members: Representatives Huff, Republican Co-Chair; H. Simmers, Democratic Co-Chair; Alexander, Republican Vice Chair; Doumit, Democratic Vice Chair; D. Schmidt, Republican Vice Chair; Barlean; Benson; Boldt; Carlson; Clements; Cody; Crouse; Gombosky; Grant; Kagi; Keiser; Kenney; Lambert; Linville; Lisk; Mastin; McIntire;

McMorris; Mulliken; Parlette; Regala; Rockefeller; Ruderman; Sullivan; Tokuda and Wensman.

Staff: Mark Matteson (786-7145).

Background:

The Internet is an international network of computer networks, interconnecting computers ranging from simple personal computers to sophisticated mainframes. It is a dynamic, open-ended aggregation of computer networks, rather than a physical entity. Internet users can access or provide a wide variety of information, purchase goods and services, and communicate with other users electronically.

Last year the Legislature passed a law regulating commercial electronic mail messages. The law defines a commercial electronic mail message as one sent for the purpose of promoting real property, goods, or services for sale or lease. A person who initiates the transmission of a commercial electronic mail message from a computer located in Washington or to a Washington resident that contains untrue or misleading information may violate the Consumer Protection Act. Specifically, a violation of the Consumer Protection Act occurs when a sender:

- Uses a third party's Internet domain name without permission of the third party, or otherwise misrepresents any information in identifying the point of origin or transmission path of the message.
- Puts false or misleading information in the subject line of the message.

Only the person who actually clicks or pushes a "send" button on a computer screen or keyboard to transmit a message is liable under the Consumer Protection Act. An interactive computer service provider that routes or re-transmits the message is not liable.

When a sender violates the Consumer Protection Act, the recipient of the commercial electronic mail message may bring a civil action against the sender for the greater of \$500 or actual damages. An interactive computer service provider may also bring an action against the sender for the greater of \$1,000 or actual damages.

A sender is responsible for knowing that a message recipient is a Washington resident if that information is available, upon request, from the registrant of the Internet domain name contained in the recipient's electronic mail address. To facilitate access to residency information, the Washington Association of Internet Service Providers (WAISP) has voluntarily created an electronic registry in cooperation with the Attorney General's Office. This WAISP registry serves as a place where a citizen may indicate Washington residency by recording his or her electronic mail address.

Last year the Legislature also created a select task force on commercial electronic mail messages to further study technical, legal, and cost issues related to the transmission and receipt of commercial electronic mail messages over the Internet. The select task force completed its work and issued a report with policy recommendations on November 16, 1998.

Washington is one of three states that have enacted laws regulating commercial electronic mail messages; Nevada and California are the other two states. One of California's new laws takes a property rights approach towards regulating commercial electronic mail messages. The California law permits each interactive computer service provider to publish a policy prohibiting or restricting the use of its service or equipment for the initiation or delivery of unsolicited commercial electronic mail messages. If a person violates an interactive computer service provider's published policy, then the interactive computer service provider may bring a civil action against the person for \$50 per message sent in violation, up to a maximum of \$25,000 per day.

Summary of Bill:

Select Task Force

The Commercial Electronic Messages Select Task Force is extended an additional year. The task force is to continue studying technical, legal, and cost issues surrounding the usage of commercial electronic messages. The task force is to recommend any potential legislation needed for regulating commercial electronic mail messages by November 1999.

Definitions

The definition of a commercial electronic mail message is clarified as excluding advertisements that are attached to messages sent through a free electronic mail account, when the message sender has consented to the advertising as a condition for free use of the account. An unsolicited commercial electronic message is defined as one sent without a recipient's prior consent, sent to a recipient with whom the sender does not have a pre-existing or ongoing personal or business relationship, and is sent for a purpose other than collecting an existing obligation.

Electronic Registry

The electronic registry created by the Washington Association of Internet Service Providers is made a formal, state-operated database. The Attorney General's Office is responsible for maintaining and operating the electronic registry. Citizens may indicate their Washington residency by registering their electronic mail addresses in this database. An interactive computer service provider may also register its Internet domain

name as a single registration covering all electronic mail addresses that belong to its customers, when the interactive computer service provider's clientele is exclusively located in Washington. Registrations in the database are declarations of Washington residency made under penalty of perjury. All records in the database are exempted from public disclosure requirements so that electronic mail addresses cannot be harvested from the database by persons seeking to compile lists of electronic mail addresses.

Conspirators and Assistors May Be Liable

A person who conspires with another person to initiate the transmission of a commercial electronic mail message containing certain types of misleading information violates the Consumer Protection Act. A person who substantially assists an initiator also violates the Consumer Protection Act, but only if an assistor knows, or consciously avoids knowing, that the initiator of the message is violating or intends to violate the Consumer Protection Act.

Interactive computer service providers continue to be exempt from liability for unknowingly handling or re-transmitting a message sent in violation of the Consumer Protection Act. However, an interactive computer service provider may be liable for violating or conspiring to violate the Consumer Protection Act, if the interactive computer service provider knows, or consciously avoids knowing, that it is assisting a person who is sending messages in violation of the Consumer Protection Act.

Identifying Information Required

When a person sends an unsolicited commercial electronic mail message, the body of the message must include the legal name, mailing address, physical address, and telephone number for either the sender or the sender's registered agent in Washington.

Interactive Computer Service Providers May Publish & Enforce Policies

Each interactive computer service provider may publish a policy prohibiting or restricting the use of its service and equipment located in this state for the initiation or delivery of unsolicited commercial electronic mail messages. An interactive computer service provider may bring a civil suit against a person who initiates, conspires, or assists in the transmission of a message sent in violation of its published policy. The interactive computer service provider may sue for damages of \$50 per message sent in violation of its published policy, up to a maximum of \$25,000 per day.

Additionally, a customer may sue a person who initiates, conspires, or assists in the transmission of a message sent in violation of the published policy of the customer's interactive computer service provider. A customer may sue for damages of \$500 per each unsolicited commercial electronic message received by the customer in violation of

an interactive computer service provider's published policy, up to a maximum of \$25,000 in damages per day.

EFFECT OF SENATE AMENDMENT(S): The Senate amendment deletes the following provisions:

- Extension of the commercial electronic messages select task force for an additional year;
- The operation of an electronic registry by the Attorney General's Office as a place where citizens may register their e-mail addresses and indicate Washington residency;
- The ability of interactive computer service providers to publish and enforce policies prohibiting or restricting the transmission of unsolicited commercial e-mail messages over their systems; and
- Requirement that unsolicited commercial e-mail messages include legal name, physical and mailing addresses, and telephone number of sender or sender's registered agent.

Appropriation: None.

Fiscal Note: Available.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: (Technology, Telecommunications & Energy) (Original bill): This legislation is the product of a select task force that studied commercial e-mail issues. The task force included members from both parties and a person from the Governor's Office. This bill is a nonpartisan, technologically neutral proposal. The task force heard from several stakeholders. This bill is a solid, consumer protection piece of legislation that will allow the Internet to continue to grow while addressing some of the abuses. The law passed last year has been effective, and it is serving as a model for other states that are considering their own legislation. This bill would make some additional refinements to the law passed last year. For one, we mistakenly assumed that all Internet service providers (ISP) would disclose residency information for their subscribers. What we did not anticipate is that some of the larger out-of-state Internet service providers such as America Online may not want to disclose residency information out of a concern for their subscribers' privacy. Setting up an electronic registry operated by the Attorney General's Office will make residency information more available. The provision in the bill that allows Internet service providers (ISP) to publish policies restricting or prohibiting the use of their networks for spam will

also enable the ISPs to control their networks and to go after persons who abuse the networks. Additionally, the bill includes requirements for persons who send unsolicited commercial e-mail messages to include their names, phone numbers, physical addresses, and mailing addresses in their messages. These requirements for identifying information are important, as it is difficult to enforce the law without a physical address. In order to sue someone under the existing law, you need to know where the person is located so that legal papers may be served.

(Appropriations) The legislation is the result of the efforts of the task force. The legislation is agreed to among all stakeholders. There has been overwhelming public response to the original legislation passed in 1998 to do something about scammers. The electronic registry of state e-mail addresses needs to be an ongoing activity. As a result of tightening up the law, there is expected to be an increase in complaints. Therefore, additional enforcement is needed. For Internet Service Providers (ISPs), spam is the biggest problem behind bandwidth. The efficacy of the Internet is being endangered by the proliferation of spam.

Testimony Against: (Technology, Telecommunications & Energy) (Original bill) Requiring a person to include his or her name, telephone number, physical address, and mailing address in every unsolicited commercial email message sent goes too far. Government should not compel persons to disclose this information. If a person operates a home business and sends out unsolicited commercial email messages as part of that home business, then this requirement essentially mandates that the person disclose his or her home phone number and home address. The provisions in the bill that pertain to assistors also should be clarified more. A person should only be liable for assisting another person who sends out misleading commercial e-mail messages, if the person providing assistance knows that he or she was helping someone to violate the Consumer Protection Act. Replacing language that an assistor, "knows, or consciously avoids knowing," with new language that an assistor "knows or has reason to know" would improve the bill. Direct marketers support some provisions in the bill but object to other parts. Direct marketers would prefer to see an "opt-out" bill. There are problems with states enacting separate laws. Commercial e-mail crosses states' borders and would be better addressed through federal legislation.

(Appropriations) The spam concern is a national and international issue and is being reviewed at the federal level. The problem could be better addressed by working with industry and waiting to see what action the feds will take. With 50 states and potentially 50 different state laws, Internet business could become prohibitive.

Testified: (Technology, Telecommunications & Energy) (In support) Representative Roger Bush; Paula Selis, Attorney General's Office; Gary Gardener and Jim Kendall, Washington Association of Internet Service Providers; and Brady Johnson, Law Office of Brady R. Johnson.

(Technology, Telecommunications & Energy) (Opposed): Gerry Sheehan and Doug Klunder, American Civil Liberties Union; and Joe Daniels, Direct Marketers.

(Appropriations) (In support) Rep. Bush, prime sponsor; Gary Gardner and Jim Kendall, Washington Association of Internet Service Providers; and Paula Selis, Office of the Attorney General.

(Appropriations) (Opposed): Ian McGowan, American Electronics Association.