

Department of Legislative Services
Maryland General Assembly
2005 Session

FISCAL AND POLICY NOTE

House Bill 337
Economic Matters

(Delegate Smigiel, *et al.*)

Adult Sexual Matter - Transmission via Electronic Mail - Use of .sex Suffix

This bill prohibits a person, including an electronic mail service provider, from knowingly sending a commercial electronic mail (e-mail) containing sexually graphic material within Maryland unless the originating mail address has the suffix “.sex.” The bill establishes a criminal penalty and creates a civil cause of action.

Fiscal Summary

State Effect: Minimal increase in general fund revenues due to the bill’s penalty provision. No effect on expenditures.

Local Effect: Potential minimal increase in revenues due to the bill’s penalty provision. No effect on expenditures.

Small Business Effect: None.

Analysis

Bill Summary: The transmission of sexually graphic material regulated by this bill includes pictures, photographs, drawings, other visual representations, verbal descriptions, or narrative accounts of sadomasochistic abuse, sexual conduct or sexual excitement, or links to a commercial web site that contains these depictions.

A violator is guilty of a misdemeanor and subject to a maximum fine of \$1,000 per violation.

A person who receives a commercial e-mail message that violates the bill's provisions is authorized to bring a civil action in a court of competent jurisdiction. Each prohibited copy of a commercial e-mail message that is addressed to more than one recipient and that is sent or received in the State is considered a separate violation. The court is authorized to impose a preliminary and/or permanent injunction to prevent or restrain a violation. The District Court is not authorized to grant this injunctive relief.

While the civil action is pending, the court may order that any computer and related equipment be impounded that the court reasonably believes was involved in the alleged violation and under the custody or control of the violator. In a civil action, the court may award the greater of actual damages and nominal damages up to \$1,000 per violation, court costs, and reasonable attorney's fees. As part of a final judgment or decree that finds the bill's provisions were violated, the court may order the remedial modification or destruction of any computer or related equipment involved in the violation that was impounded or that is under control of the violator.

Current Law: A person is prohibited from using e-mail with the intent to harass one or more persons, or with the intent to harass by sending lewd, lascivious, or obscene material. The provisions do not pertain to specified persons who provide information, facilities, or technical assistance to another person authorized to intercept, conduct surveillance of, or provide e-mail pursuant to a court order. The prohibition does not apply to peaceable activity that may express a political view or provide information to others.

A violator is guilty of a misdemeanor and subject to maximum penalties of one year's imprisonment and/or a \$500 fine.

A person is prohibited from initiating an electronic transmission, conspiring with another to initiate a transmission or assisting another with the transmission of commercial e-mail that:

- is from a computer in Maryland or is sent to an e-mail address that the sender knows or should have known is held by a State resident;
- uses a third party's Internet domain name or e-mail address without the third party's permission;
- contains false or misleading information about the origin of the transmission; or
- contains false or misleading information in the message subject line.

An interactive computer service provider may block the transmission or receipt of commercial e-mail that the provider reasonably believes violates these provisions. An

interactive computer service provider who acts in good faith is immune from civil liability.

A violator is liable to the e-mail recipient for reasonable attorney's fees and damages equal to the greater of \$500 or the e-mail recipient's actual damages. To the third party whose e-mail address or domain name was used without permission, a violator is liable for the greater of \$500 or the third party's actual damages. To the interactive computer service provider, a violator is also liable for the greater of \$1,000 or the provider's actual damages.

Background: Effective January 1, 2004, the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM) requires commercial e-mail senders to clearly identify unsolicited e-mail as a solicitation or advertisement. Commercial e-mail marketers must offer an opt-out option that is an easy and legitimate way for recipients to avoid future e-mails. Also, unsolicited e-mails must contain a legitimate return e-mail address and the sender's postal address. According to the National Conference of State Legislatures, 36 states had enacted laws to address fraudulent, misleading, and adult-oriented unsolicited e-mail as of 2003. However, CAN-SPAM preempts state laws that expressly regulate the use of e-mail for commercial messages except to the extent that the laws prohibit falsity or deception.

The Federal Trade Commission (FTC) is required to issue regulations regarding the purpose of unsolicited e-mail to determine which types of messages may be regulated without contravening free speech concerns. FTC has also sought public comment on a national "Do Not E-Mail" registry, intended to function like the national "Do Not Call" list. The Federal Communications Commission is working on regulations to reduce or eliminate unwanted e-mails from wireless devices.

In February 2005, Sobonito Investments, an adult web site operation located in the country of Cyprus, settled with FTC regarding charges that its unsolicited e-mails were deceptive, constituted unfair trade practices, and violated CAN-SPAM. The operation was accused of sending tens of thousands of e-mails to U.S. citizens with deceptive headers and subject lines intended to disguise the spam contents. Consumers who opened the e-mails were subjected to sexually explicit solicitations and driven to the firm's adult-oriented web sites. The deceptive headers blamed innocent third parties for the transmission of the sexually explicit e-mails. Among other things, the settlement requires Sobonito Investments and its affiliates to use the words "Sexually Explicit" in any unsolicited e-mail that contains adult content, and enjoins the use of deceptive headers and subject lines to disguise their e-mail content.

According to a 2003 nationwide survey from the Pew Internet and American Life Project, "...spam is beginning to undermine the integrity of e-mail and to degrade the online experience." This survey found that 70% of respondents said that spam has made being online unpleasant or annoying and 76% of respondents said they were bothered by the offensive or obscene content of spam. While the Pew survey also noted somewhat conflicting feelings from respondents on just how to define spam, when it came to adult content, 92% of survey respondents believed that unsolicited e-mail containing this material was definitely spam.

State Revenues: General fund revenues could increase minimally under the bill's monetary penalty provision for those cases heard in the District Court.

Local Revenues: Potential minimal increase in revenues under the bill's monetary penalty provision for those cases heard in the circuit courts.

State and Local Expenditures: The District Court and circuit courts should be able to handle any increased caseload resulting from this bill within existing resources.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts), Department of Public Safety and Correctional Services, Federal Trade Commission, Federal Communications Commission, National Conference of State Legislatures, Pew Internet and American Life Project, Center for Democracy and Technology, Department of Legislative Services

Fiscal Note History: First Reader - March 14, 2005
ncs/jr

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