

Department of Legislative Services
Maryland General Assembly
2004 Session

FISCAL AND POLICY NOTE

Senate Bill 278
Finance

(Senator Brochin)

**Commercial Law - Unsolicited Sexually Explicit Commercial Electronic Mail
and Pop-Up Advertisements**

This bill prohibits a person from sending sexually explicit commercial electronic mail (e-mail) messages or causing any pop-up advertisements to appear on an individual's computer unless specified actions are taken.

Fiscal Summary

State Effect: Assuming that few cases are brought under the bill, any additional workload could be handled with the existing resources of the Judiciary.

Local Effect: None.

Small Business Effect: Minimal.

Analysis

Bill Summary: The bill prohibits a person from initiating, conspiring with another person to initiate, or assisting in the transmission of a sexually explicit e-mail message from a computer in the State or to an e-mail address that the sender knows or should have known is held by a resident of the State, unless the message includes in the subject line "ADV: ADULT" as the first nine characters. Violators are subject to the penalties applicable to deceptive commercial e-mail.

The bill also prohibits a person that is an administrator or host of a web site from manipulating an individual's computer to display a pop-up advertisement if the person

knows or should have known that the computer is held by a resident of the State, unless there is a means to disable pop-up advertisements on the web site. Violators are liable to an individual whose computer displays a pop-up advertisement for attorney's fees and the greater of \$500 or actual damages.

Current Law: A person may not initiate, conspire with another person to initiate, or assist in the transmission of an e-mail message that: (1) misrepresents or obscures any information relating to the point of origin or transmission path of the message; or (2) contains false or misleading information in the subject line. The prohibition applies to commercial e-mail messages that are sent from a computer located in Maryland or to an e-mail address that the sender knows or has reason to know is held by a resident of the State. Violators are liable to a recipient of the e-mail or a third party without whose permission the third party's domain name or e-mail address was used for attorney's fees and the greater of \$500 or actual damages. Violators are liable to an interactive service provider for attorney's fees and the greater of \$1,000 or actual damages.

Background: Under the federal CAN-SPAM Act of 2003, a sender of commercial e-mail must include clear and conspicuous information that the message is an advertisement or solicitation. The sender must also notify the recipient of the opportunity to decline to receive further e-mail from the sender. This is commonly known as "opting out." The Act prohibits a commercial e-mail message that is false or misleading or contains materially false or misleading information in the subject line.

The CAN-SPAM Act preempts any State or local statute, regulation, or rule that expressly regulates the use of commercial e-mail, except to the extent that the statute, regulation, or rule prohibits false or deceptive information in the commercial e-mail message or information attached to it. The Act does not preempt other state laws to the extent that those laws relate to acts of fraud or computer crime.

The CAN-SPAM Act requires the Federal Trade Commission (FTC), within 120 days after the date of enactment of the Act, to prescribe clearly identifiable marks or notices to be included in or associated with commercial e-mail that contains sexually oriented material, in order to inform the recipient and facilitate filtering. FTC is required to publish in the *Federal Register* and provide notice to the public of the prescribed marks or notices.

Additional Information

Prior Introductions: A similar bill, SB 503, was introduced during the 2003 session and received an unfavorable report from the Senate Finance Committee. Among its

provisions, SB 503 would have required sexually explicit e-mail to contain ADV: ADULT in its subject line; however, SB 503 did not address pop-up advertisements.

Cross File: HB 196 (Delegate Aumann, *et al.*) – Economic Matters.

Information Source(s): Office of the Attorney General (Consumer Protection Division), Department of Legislative Services

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