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HOUSE BILL 1258

48TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2007

INTRODUCED BY

Jane E. Powdrell-Culbert

AN ACT

RELATING TO TRADE PRACTICES; ENACTING THE ANTI-SPAM ACT;
PROHIBITING UNSOLICITED COMMERCIAL EMAIL; PROVIDING FOR
ENFORCEMENT; PROVIDING FOR PENALTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the
"Anti-Spam Act".

Section 2. DEFINITIONS.--As used in the Anti-Spam Act:

A. "domain name" means any alphanumeric designation
that is registered with or assigned by any domain name
registrar as part of an electronic address on the internet;

B. "electronic mail advertisement" or "email
advertisement" means any electronic mail message, the principal
purpose of which is to promote the sale or distribution of
goods or services to the recipients;

1 C. "electronic mail service provider" or "email
2 service provider" means any business or organization qualified
3 to do business in New Mexico that provides registered users the
4 ability to send or receive electronic mail through equipment
5 located in this state and that is an intermediary in sending or
6 receiving electronic mail or is hired to send electronic mail
7 for a company or organization or any person, including an
8 internet service provider, that is an intermediary in sending
9 or receiving electronic mail or that provides to end users of
10 the electronic mail service the ability to send or receive
11 electronic mail;

12 D. "electronic mail" or "email" means an electronic
13 message that is sent to an email address and transmitted
14 between two or more telecommunications devices, computers or
15 electronic devices capable of receiving electronic messages,
16 whether or not the message is converted to hard copy format
17 after receipt, viewed upon transmission or stored for later
18 retrieval. "Electronic mail" or "email" includes electronic
19 messages that are transmitted through a local, regional or
20 global computer network;

21 E. "electronic mail address" or "email address"
22 means a destination, commonly expressed as a string of
23 characters, to which electronic mail can be sent or delivered.
24 An "electronic mail address" or "email address" consists of a
25 user name or mailbox and a reference to an internet domain;

1 F. "explicit sexual material" means any of the
2 following:

3 (1) offers for pornographic material that is
4 for sale or free;

5 (2) offers for escort services that are for
6 sale;

7 (3) live web cameras designated for sexual
8 services;

9 (4) adult night clubs;

10 (5) pornographic images or videos; or

11 (6) sexual performance or sexual enhancing
12 devices, procedures, equipment, drugs, vitamins or supplements;

13 G. "initiate" means to transmit or cause to be
14 transmitted an email advertisement or to assist in the
15 transmission of an email advertisement by providing email
16 addresses where the advertisement may be sent, but does not
17 include the routine transmission of the advertisement through
18 the network or system of a telecommunications utility or an
19 email service provider through its network or system;

20 H. "initiation" of an unsolicited email
21 advertisement refers to the action by the initial sender of the
22 email advertisement. It does not refer to the actions of any
23 intervening email service provider that may handle or
24 retransmit the electronic message;

25 I. "incident" means a single transmission or

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1 delivery to a single recipient or to multiple recipients of an
2 unsolicited commercial email advertisement containing
3 substantially similar content;

4 J. "preexisting or current business relationship"
5 means that the recipient has made an inquiry, joined a
6 membership, nonprofit organization or club and has provided the
7 recipient's email address or has made an application, purchase
8 or transaction, with or without consideration, regarding
9 products or services offered by the advertiser;

10 K. "recipient" means the addressee of an
11 unsolicited electronic mail advertisement. If an addressee of
12 an unsolicited commercial email advertisement has one or more
13 email addresses to which an unsolicited commercial email
14 advertisement is sent, the addressee shall be deemed to be a
15 separate recipient for each email address to which the email
16 advertisement is sent;

17 L. "registered user" means an individual,
18 corporation or other entity that maintains an email address
19 with an electronic mail service provider;

20 M. "routine transmission" means the transmission,
21 routing, relaying, handling or storing of an email message
22 through an automatic technical process but does not include the
23 sending, or the knowing participation in the sending, of
24 unsolicited commercial email advertisements;

25 N. "unsolicited commercial email advertisement"

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1 means a commercial email advertisement sent to a recipient who
2 meets both of the following criteria:

3 (1) the recipient has not provided direct
4 consent to receive advertisements from the advertiser such as
5 from a sold mailing list; and

6 (2) the recipient does not have a preexisting
7 or current business relationship with the advertiser promoting
8 the lease, sale, rental, gift offer or other disposition of any
9 property, goods, services, money exchanges and transfers or
10 extension of credit.

11 Section 3. OBSCENE AND OTHER SEXUAL MATERIALS AND
12 PERFORMANCES.--

13 A. No person knowing the content of the
14 advertisement to be explicit sexual materials shall transmit or
15 cause to be transmitted an unsolicited advertisement in an
16 electronic communication to one or more persons within this
17 state that contains explicit sexual materials without including
18 in the advertisement the term "ADV-ADULT" at the beginning of
19 the subject line of the advertisement.

20 B. Any person who violates Subsection A of this
21 section and attempts to avoid prosecution by knowingly
22 including false or misleading information in the return address
23 portion of the electronic communication such that the recipient
24 would be unable to send a reply message to the original,
25 authentic sender shall, in addition to any other penalty

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1 imposed, upon conviction, be sentenced to pay a fine of not
2 less than one hundred dollars (\$100) nor more than five hundred
3 dollars (\$500) per message or imprisonment for not more than
4 ninety days, or both, for a first offense and a fine of not
5 less than five hundred dollars (\$500) nor more than one
6 thousand dollars (\$1,000) or imprisonment for not more than one
7 year, or both, for a second or subsequent offense.

8 Section 4. PROVISIONS.--

9 A. Notwithstanding any other provision of law, a
10 person or entity may not do any of the following:

11 (1) initiate or advertise in an unsolicited
12 commercial email advertisement from New Mexico or advertise in
13 an unsolicited commercial email advertisement sent from New
14 Mexico; or

15 (2) initiate or advertise in an unsolicited
16 commercial email advertisement to a New Mexico email address,
17 or advertise in an unsolicited commercial email advertisement
18 sent to a New Mexico email address.

19 B. Commercial email advertisements sent in the
20 context of preexisting or current business relationships shall
21 provide the recipient of the commercial email advertisement
22 with the ability to "opt-out" from receiving further commercial
23 email advertisements. This opt-out provision does not apply to
24 recipients who are receiving free email service with regard to
25 commercial email advertisements sent by the provider of the

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1 email service.

2 Section 5. LIMITS AND RESTRICTIONS.--Nothing in the Anti-
3 Spam Act shall be construed to limit or restrict the adoption,
4 implementation or enforcement by a provider of internet access
5 service of a policy of declining to transmit, receive, route,
6 relay, handle or store certain types of email messages.

7 Section 6. DATA MINING.--

8 A. It is unlawful for any person or entity to
9 collect email addresses posted on the internet if the purpose
10 of the collection is for the email addresses to be used for the
11 following:

12 (1) initiate or advertise in an unsolicited
13 commercial email advertisement from New Mexico or advertise in
14 an unsolicited commercial email advertisement sent from New
15 Mexico; or

16 (2) initiate or advertise in an unsolicited
17 commercial email advertisement to a New Mexico email address or
18 advertise in an unsolicited commercial email advertisement sent
19 to New Mexico email address.

20 B. It is unlawful for any person or entity to use
21 an email address obtained by using automated means based on a
22 combination of names, letters or numbers for the following:

23 (1) initiate or advertise in an unsolicited
24 commercial email advertisement from New Mexico or to advertise
25 in an unsolicited commercial email advertisement sent from New

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1 Mexico; or

2 (2) initiate or advertise in an unsolicited
3 commercial email advertisement to a New Mexico email address or
4 advertise in an unsolicited commercial email advertisement sent
5 to a New Mexico email address.

6 C. It is unlawful for any person to use scripts or
7 other automated means to register for multiple email accounts
8 from which to do, or to enable another person to do, the
9 following:

10 (1) initiate or advertise in an unsolicited
11 commercial email advertisement from New Mexico or advertise in
12 an unsolicited commercial email advertisement sent from New
13 Mexico; or

14 (2) initiate or advertise in an unsolicited
15 commercial email advertisement to a New Mexico email address or
16 advertise in an unsolicited commercial email advertisement sent
17 to a New Mexico email address.

18 Section 7. MISLEADING RETURN EMAILS.--

19 A. It is unlawful for any person or entity to:

20 (1) advertise in a commercial email
21 advertisement either sent from New Mexico or sent to a New
22 Mexico email address under any of the following circumstances:

23 (a) the email advertisement contains or
24 is accompanied by a third-party's domain name without the
25 permission of the third party;

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1 (b) the email advertisement contains or
2 is accompanied by falsified, misrepresented or forged header
3 information, but does not apply to truthful information used by
4 a third party who has been lawfully authorized by the
5 advertiser to use that information; or

6 (c) the email advertisement has a
7 subject line that a person knows would be likely to mislead a
8 recipient, acting reasonably under the circumstances, about a
9 material fact regarding the contents or subject matter of the
10 message;

11 (2) use a computer or computer network with
12 the intent to falsify or forge email transmission information
13 or other routing information in any manner in connection with
14 the transmission of unsolicited bulk email through or into the
15 computer network of an email service provider or its
16 subscribers; or

17 (3) knowingly sell, give or otherwise
18 distribute or possess with the intent to sell, give or
19 distribute software that:

20 (a) is primarily designed or produced
21 for the purpose of facilitating or enabling the falsification
22 of email transmission information or other routing information;

23 (b) has only limited commercially
24 significant purpose or use other than to facilitate or enable
25 the falsification of email transmission information or other

1 routing information; or

2 (c) is marketed by that person acting
3 alone or with another for use in facilitating or enabling the
4 falsification of email transmission information or other
5 routing information.

6 B. In addition to any other remedies provided by
7 any other provision of law, an action may be brought against a
8 person or entity that violates any provision of Subsection A of
9 this section by the following:

- 10 (1) the attorney general;
11 (2) an email service provider; or
12 (3) a recipient of an unsolicited commercial
13 email advertisement.

14 C. A person or entity bringing an action against a
15 person or entity that violates any provision of Subsection A of
16 this section may recover the following:

- 17 (1) actual damages; or
18 (2) liquidated damages of one thousand dollars
19 (\$1,000) for each unsolicited commercial email advertisement
20 transmitted in violation of Subsection A of this section, not
21 to exceed one million dollars (\$1,000,000) per incident.

22 D. The recipient, an email service provider or the
23 attorney general, if the prevailing plaintiff, may also recover
24 reasonable attorney fees and costs.

25 E. There shall not be a cause of action under this

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1 section against an email service provider that is only involved
2 in the routine transmission of the email advertisement over its
3 computer network.

4 F. If the court finds that the defendant
5 established and implemented with due care practices and
6 procedures reasonably designed effectively to prevent
7 unsolicited commercial email advertisements that are in
8 violation of this section, the court shall reduce the
9 liquidated damages recoverable under Paragraph (2) of
10 Subsection C of this section to a maximum of one hundred
11 dollars (\$100) for each unsolicited commercial email
12 advertisement or a maximum of one hundred thousand dollars
13 (\$100,000) per incident.

14 G. A person who has brought an action against a
15 person or entity under Subsection A of this section shall not
16 bring an action against that party under Section 8 of the Anti-
17 Spam Act for the same commercial email advertisement.

18 H. A person who has brought an action against a
19 party under Section 8 of the Anti-Spam Act shall not bring an
20 action against that party under this section for the same
21 commercial email advertisement.

22 I. A person is guilty of a fourth degree felony if
23 that person commits a violation of Paragraphs (2) and (3) of
24 Subsection A of this section and:

25 (1) the volume of unsolicited commercial email

1 transmitted exceeded ten thousand attempted recipients in any
2 twenty-four-hour period, one hundred thousand attempted
3 recipients in any thirty-day time period or one million
4 attempted recipients in any one-year time period; or

5 (2) the revenue generated from a specific
6 unsolicited commercial email transmission exceeded one thousand
7 dollars (\$1,000) or the total revenue generated from all
8 unsolicited commercial email transmitted to any email service
9 provider exceeded fifty thousand dollars (\$50,000).

10 J. A person is guilty of a fourth degree felony if
11 that person knowingly hires, employs, uses or permits any minor
12 to assist in the transmission of unsolicited commercial email
13 in violation of Paragraphs (2) and (3) of Subsection A of this
14 section.

15 K. No registered user of an email service provider
16 shall use or cause to be used that email service provider's
17 equipment located in this state in violation of that email
18 service provider's policy prohibiting or restricting the use of
19 its service or equipment for the initiation of unsolicited
20 email advertisements.

21 L. No individual, corporation or other entity shall
22 use or cause to be used by initiating an unsolicited email
23 advertisement an email service provider's equipment located in
24 this state in violation of that email service provider's policy
25 prohibiting or restricting the use of its equipment to deliver

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1 unsolicited email advertisements to its registered users.

2 M. An email service provider shall not be required
3 to create a policy prohibiting or restricting the use of its
4 equipment for the initiation or delivery of unsolicited email
5 advertisements.

6 N. Nothing in this section shall be construed to
7 limit or restrict the rights of an email service provider under
8 Section 330(c)(1) of Title 47 of the United States Code, any
9 decision of an email service provider to permit or to restrict
10 access to or use of its system or any exercise of its editorial
11 function.

12 O. In addition to any other action available under
13 law, any email service provider whose policy on unsolicited
14 email advertisements is violated as provided in this section
15 may bring a civil action to recover the actual monetary loss
16 suffered by that provider by reason of that violation or
17 liquidated damages of fifty dollars (\$50.00) for each email
18 message initiated or delivered in violation of this section, up
19 to a maximum of twenty-five thousand dollars (\$25,000) per day,
20 whichever amount is greater. In any action brought pursuant to
21 this subsection:

22 (1) the court may award reasonable attorney
23 fees to a prevailing party; and

24 (2) the electronic mail service provider shall
25 be required to establish as an element of its cause of action

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1 that prior to the alleged violation, the defendant had actual
2 notice of the following:

3 (a) the email service provider's policy
4 on unsolicited email advertising; and

5 (b) the fact that the defendant's
6 unsolicited email advertisements would use or cause to be used
7 the email service provider's equipment located in this state.

8 P. An email service provider who has brought an
9 action against a party for a violation under Section 8 of the
10 Anti-Spam Act shall not bring an action against that party
11 under this section for the same unsolicited commercial email
12 advertisement.

13 Q. An email service provider who has brought an
14 action against a party for a violation of this section shall
15 not bring an action against that party under Section 8 of the
16 Anti-Spam Act for the same unsolicited commercial email
17 advertisement.

18 Section 8. ENFORCEMENT.--

19 A. In addition to any other remedies provided by
20 the Anti-Spam Act or by any other provisions of law, a
21 recipient of an unsolicited commercial email advertisement
22 transmitted in violation of that act, an email service provider
23 or the attorney general may bring an action against an entity
24 that violates any provisions of that act to recover either or
25 both of the following:

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- 1 (1) actual damages; or
- 2 (2) liquidated damages of one thousand dollars
- 3 (\$1,000) for each unsolicited commercial email advertisement
- 4 transmitted in violation of Section 4 of the Anti-Spam Act up
- 5 to one million dollars (\$1,000,000) per incident.

6 B. The recipient, an email service provider or the
7 attorney general, if the prevailing plaintiff, may also recover
8 reasonable attorney fees and costs.

9 C. There shall not be a cause of action against an
10 email service provider that is only involved in the routine
11 transmission of the unsolicited commercial email advertisement
12 over its computer network.

13 D. If the court finds that the defendant
14 established and implemented, with due care, practices and
15 procedures reasonably designed effectively to prevent
16 unsolicited commercial email advertisements that are in
17 violation of the Anti-Spam Act, the court shall reduce the
18 liquidated damages recoverable under Paragraph (2) of
19 Subsection A of this section to a maximum of one hundred
20 dollars (\$100) for each unsolicited commercial email
21 advertisement or a maximum of one hundred thousand dollars
22 (\$100,000) per incident.

23 Section 9. EMAIL LIST REMOVAL.--

24 A. An "opt-out" option must be included in all
25 unsolicited commercial emails. This option can include the

1 following:

2 (1) a link placed in a conspicuous place
3 before or after the main body of the email that meets any of
4 these criteria;

5 (2) a link to a web site on the internet that
6 allows for a person to unsubscribe from the email;

7 (3) a link to an email address that allows for
8 a person to unsubscribe from the email and that should include:

9 (a) the recipient's full name;

10 (b) the email address that the email was
11 sent to; and

12 (c) a toll-free number in a conspicuous
13 place before or after the body of the email.

14 B. The font size used shall not be less than seven
15 points and shall be in the same language as the main body of
16 the email.

17 Section 10. SEVERABILITY.--If any part or application of
18 the Anti-Spam Act is held invalid, the remainder or its
19 application to other situations or persons shall not be
20 affected.

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