

By: McCall

H.B. No. 1282

A BILL TO BE ENTITLED

AN ACT

relating to commercial electronic mail; providing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Title 4, Business & Commerce Code, is amended by adding Chapter 46 to read as follows:

CHAPTER 46. ELECTRONIC MAIL SOLICITATION

Sec. 46.001. DEFINITIONS. In this chapter:

(1) "Commercial electronic mail message" means an electronic mail message that advertises, offers for sale or lease, or promotes any goods, services, business opportunity, property, or any other article, commodity, or thing of value.

(2) "Electronic mail" means a message, file, or other information that is transmitted through a local, regional, or global computer network, regardless of whether the message, file, or other information is viewed, stored for retrieval at a later time, printed, or filtered by a computer program that is designed or intended to filter or screen those items.

(3) "Electronic mail service provider" means a person that:

(A) is qualified to do business in this state;

(B) is an intermediary in sending or receiving electronic mail; and

(C) provides an end user of an electronic mail service the ability to send or receive electronic mail.

1           (4) "Established business relationship" means a prior  
2 or existing relationship of a person formed by a voluntary two-way  
3 communication between a person and another person, regardless of  
4 whether consideration is exchanged, regarding products or services  
5 offered by one of the persons, that has not been terminated by  
6 either party.

7           (5) "Internet domain name" refers to a globally  
8 unique, hierarchical reference to an Internet host or service,  
9 assigned through a centralized Internet naming authority and  
10 composed of a series of character strings separated by periods with  
11 the right-most string specifying the top of the hierarchy.

12           (6) "Obscene" has the meaning assigned by Section  
13 43.21, Penal Code.

14           (7) "Sender" means a person who initiates an  
15 electronic mail message.

16           (8) "Sexual conduct" has the meaning assigned by  
17 Section 43.25, Penal Code.

18           (9) "Unsolicited commercial electronic mail message"  
19 means a commercial electronic mail message sent without the consent  
20 of the recipient by a person with whom the recipient does not have  
21 an established business relationship. The term does not include  
22 electronic mail sent by an organization using electronic mail for  
23 the purpose of communicating exclusively with members, employees,  
24 or contractors of the organization.

25           Sec. 46.002. CERTAIN ELECTRONIC MAIL MESSAGES PROHIBITED.

26           (a) A person may not transmit a commercial electronic mail message  
27 that:

1           (1) falsifies electronic mail transmission  
2 information or other routing information for an unsolicited  
3 commercial electronic mail message; or

4           (2) contains false, deceptive, or misleading  
5 information in the subject line.

6           (b) A person may not send a commercial electronic mail  
7 message that uses another person's Internet domain name without the  
8 other person's consent.

9           Sec. 46.003. UNSOLICITED ELECTRONIC MAIL MESSAGES. (a) A  
10 person may not take any action to send an unsolicited commercial  
11 electronic mail message unless:

12           (1) "ADV:" is used as the first four characters in the  
13 subject line of the message or, if the message contains any obscene  
14 material or material depicting sexual conduct,  
15 "ADULT-ADVERTISEMENT" is used as the first word in the subject line  
16 of the message; and

17           (2) the sender of the message or a person acting on  
18 behalf of the sender provides a functioning return electronic mail  
19 address to which a recipient may, at no cost to the recipient, send  
20 a reply requesting the removal of the recipient's electronic mail  
21 address from the sender's electronic mail list.

22           (b) A sender shall remove a person's electronic mail address  
23 from the sender's electronic mail list not later than the 90th day  
24 after the date on which the sender receives a request for removal of  
25 that address under Subsection (a)(2).

26           Sec. 46.004. SALE OR PROVISION OF ADDRESS ON ELECTRONIC  
27 MAIL LIST PROHIBITED. A sender or a person acting on behalf of the

1 sender may not sell or otherwise provide the electronic mail  
2 address of a person who requests the removal of that address from  
3 the sender's electronic mail list under Section 46.003(a)(2),  
4 except as required by other law.

5 Sec. 46.005. CRIMINAL PENALTY. A person commits an offense  
6 if the person takes any action to send a message containing obscene  
7 material or material depicting sexual conduct in violation of  
8 Section 46.003(1). An offense under this section is a Class B  
9 misdemeanor.

10 Sec. 46.006. CIVIL PENALTY. (a) A person who violates this  
11 chapter other than Section 46.009 is liable to the state for a civil  
12 penalty in an amount not to exceed the lesser of:

13 (1) \$10 for each unlawful message or action; or

14 (2) \$25,000 for each day an unlawful message is  
15 received or an action is taken.

16 (b) The attorney general or the prosecuting attorney in the  
17 county in which the violation occurs may:

18 (1) bring suit to recover the civil penalty imposed  
19 under Subsection (a); and

20 (2) seek an injunction to prevent or restrain a  
21 violation of this chapter.

22 (c) The attorney general or the prosecuting attorney may  
23 recover reasonable expenses incurred in obtaining a civil penalty  
24 under this section, including court costs, reasonable attorney's  
25 fees, investigative costs, witness fees, and deposition expenses.

26 Sec. 46.007. DECEPTIVE TRADE PRACTICES. A violation of  
27 this chapter is a false, misleading, or deceptive act or practice

1 under Subchapter E, Chapter 17, and any public or private right or  
2 remedy prescribed by that subchapter may be used to enforce this  
3 chapter.

4 Sec. 46.008. CIVIL LIABILITY. (a) A person injured by a  
5 violation of this chapter may bring an action to recover actual  
6 damages, including lost profits. A person who prevails in the  
7 action is entitled to reasonable attorney's fees and court costs.

8 (b) In lieu of actual damages, a person injured by a  
9 violation of this chapter arising from the transmission of an  
10 unsolicited or commercial electronic mail message, other than an  
11 electronic mail service provider, may recover the lesser of:

12 (1) \$10 for each unlawful message; or

13 (2) \$25,000 for each day the unlawful message is  
14 received.

15 (c) In lieu of actual damages, an electronic mail service  
16 provider injured by a violation of this chapter arising from the  
17 transmission of an unsolicited or commercial electronic mail  
18 message may recover the greater of:

19 (1) \$10 for each unlawful message; or

20 (2) \$25,000 for each day the unlawful message is  
21 received.

22 (d) At the request of a party to any action brought under  
23 this chapter, the court, in its discretion, may conduct a legal  
24 proceeding in such a manner as to protect the secrecy and security  
25 of the computer, computer network, computer data, computer program,  
26 and computer software involved to prevent a possible recurrence of  
27 the same or a similar act by another person and to protect any trade

1 secrets of a party to the action.

2 Sec. 46.009. NOTICE TO ATTORNEY GENERAL. (a) A person who  
3 brings an action under Section 46.008 shall give notice of the  
4 action to the attorney general by sending a copy of the petition by  
5 registered or certified mail not later than the 30th day after the  
6 date the petition was filed and at least 10 days before the date set  
7 for a hearing on the action.

8 (b) The attorney general may intervene in the action by:

9 (1) filing a notice of intervention with the court in  
10 which the action is pending; and

11 (2) serving each party to the action with a copy of the  
12 notice of intervention.

13 (c) A person who violates Subsection (a) is liable to the  
14 state for a civil penalty in an amount not to exceed \$200 for each  
15 violation. The attorney general may bring suit to recover the civil  
16 penalty imposed under this subsection in the court in which the  
17 action is instituted.

18 Sec. 46.010. BLOCKING OF COMMERCIAL ELECTRONIC MAIL  
19 MESSAGE. An electronic mail service provider may on its own  
20 initiative block the receipt or transmission through its service of  
21 any commercial electronic mail message that the provider reasonably  
22 believes is or will be sent in violation of this chapter.

23 Sec. 46.011. IMMUNITY FROM LIABILITY. (a) An electronic  
24 mail service provider does not violate Section 46.002 or 46.003,  
25 and a person injured by a violation of this chapter does not have a  
26 cause of action against an electronic mail service provider under  
27 this chapter, solely because the provider:

1           (1) is an intermediary between the sender, or any  
2 person acting on behalf of the sender, and recipient in the  
3 transmission of electronic mail that violates this chapter; or

4           (2) provides transmission of an unsolicited  
5 commercial electronic mail message through the provider's computer  
6 network or facilities.

7           (b) An electronic mail service provider may not be held  
8 liable for an action taken in good faith under Section 46.010.

9           SECTION 2. This Act takes effect September 1, 2003, and  
10 applies only to an electronic mail message that is sent on or after  
11 that date.