

**HOUSE BILL NO. 1388**

Introduced by

Representatives Warner, Hawken, N. Johnson

Senators Andrist, Krauter

1 A BILL for an Act to create and enact chapters 51-26 and 51-27 of the North Dakota Century  
2 Code, relating to internet privacy and commercial electronic mail solicitation; and to provide an  
3 expiration date.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1.** Chapter 51-26 of the North Dakota Century Code is created and enacted  
6 as follows:

7 **51-26-01. Definitions.** In this chapter, unless context otherwise requires:

- 8 1. "Consumer" means a person who agrees to pay a fee to an internet service  
9 provider for access to the internet for personal, family, household, or commercial  
10 business purposes, and who does not resell access.
- 11 2. "Internet service provider" means a person who provides consumers in this state  
12 authenticated access to, or presence on, the internet by means of a switched or  
13 dedicated telecommunications channel upon which the provider provides transit  
14 routing of internet protocol packets for and on behalf of the consumer. Internet  
15 service provider does not include the offering, on a common carrier basis, of  
16 telecommunications facilities or of telecommunications by means of these facilities.
- 17 3. "Ordinary course of business" means debt collection activities, order fulfillment,  
18 request processing, or the transfer of ownership.
- 19 4. "Personally identifiable information" means information that identifies a consumer  
20 by physical or electronic address or telephone number; a consumer as having  
21 requested or obtained specific materials or services from an internet service  
22 provider; internet or on-line sites visited by a consumer; or any of the contents of a  
23 consumer's data storage devices.

24 **51-26-02. Disclosure of personal information.**

- 1           1. Except as provided in subsections 2 and 3, an internet service provider may not  
2           knowingly disclose personally identifiable information concerning a consumer of  
3           the internet service provider.
- 4           2. An internet service provider shall disclose personally identifiable information  
5           concerning a consumer:
  - 6           a. Pursuant to a grand jury subpoena;
  - 7           b. To a law enforcement officer while acting as authorized by law;
  - 8           c. Pursuant to a court order in a civil proceeding upon a showing of compelling  
9           need for the information that cannot be accommodated by other means;
  - 10          d. To a court in a civil action for conversion commenced by the internet service  
11          provider or in a civil action to enforce collection of unpaid subscription fees or  
12          purchase amounts, and then only to the extent necessary to establish the fact  
13          of the subscription delinquency or purchase agreement, and with appropriate  
14          safeguards against unauthorized disclosure;
  - 15          e. To the consumer who is the subject of the information, upon written or  
16          electronic request and upon payment of a fee not to exceed the actual cost of  
17          retrieving the information;
  - 18          f. Pursuant to subpoena, including an administrative subpoena, issued under  
19          authority of a law of this state or another state or the United States; or
  - 20          g. Pursuant to a warrant or court order.
- 21          3. An internet service provider may disclose personally identifiable information  
22          concerning a consumer to:
  - 23          a. Any person if the disclosure is incident to the ordinary course of business of  
24          the internet service provider;
  - 25          b. Another internet service provider for purposes of reporting or preventing  
26          violations of the published acceptable use policy or customer service  
27          agreement of the internet service provider, except that the recipient may  
28          further disclose the personally identifiable information only as provided by this  
29          chapter; or
  - 30          c. Any person with the authorization of the consumer.

1           4. The internet service provider may obtain the consumer's authorization of the  
2 disclosure of personally identifiable information in writing or by electronic means.  
3 The request for authorization must reasonably describe the types of persons to  
4 whom personally identifiable information may be disclosed and the anticipated  
5 uses of the information. In order for an authorization to be effective, a contract  
6 between an internet service provider and the consumer must state either that the  
7 authorization will be obtained by an affirmative act of the consumer or that failure of  
8 the consumer to object after the request has been made constitutes authorization  
9 of disclosure. The provision in the contract must be conspicuous. Authorization  
10 may be obtained in a manner consistent with self-regulating guidelines issued by  
11 representatives of the internet service provider or on-line industries, or in any other  
12 manner reasonably designed to comply with this subdivision.

13           **51-26-03. Security of information.** An internet service provider shall take reasonable  
14 steps to maintain the security and privacy of a consumer's personally identifiable information.

15           **51-26-04. Exclusion from evidence.** Except for purposes of establishing a violation of  
16 this chapter, personally identifiable information obtained in any manner other than as provided  
17 in this chapter may not be received in evidence in a civil action.

18           **51-26-05. Enforcement - Civil liability - Defense.**

19           1. A consumer who prevails or substantially prevails in a civil action brought under  
20 this chapter is entitled to the greater of five hundred dollars or actual damages.  
21 Costs, disbursements, and reasonable attorney fees may be awarded to a party  
22 awarded damages for a violation of this chapter.

23           2. In a civil action under this chapter, it is a defense that the defendant has  
24 established and implemented reasonable practices and procedures to prevent a  
25 violation of this chapter.

26           **51-26-06. Other law.** This chapter does not limit any greater protection of the privacy  
27 of information under other law. This chapter does not limit the authority under other state or  
28 federal law of law enforcement or prosecuting authorities to obtain information. If federal law is  
29 enacted that regulates the release of personally identifiable information by internet service  
30 providers but does not preempt state law on the subject, the federal law supersedes any  
31 conflicting provision of this chapter.

1           **SECTION 2.** Chapter 51-27 of the North Dakota Century Code is created and enacted  
2 as follows:

3           **51-27-01. Definitions.**

- 4           1. "Commercial electronic mail message" means an electronic mail message sent  
5 through an internet service provider's facilities located in this state to a resident of  
6 this state for promoting real property, goods, or services for sale or lease.
- 7           2. "Electronic mail address" means a destination, commonly expressed as a string of  
8 characters, to which electronic mail may be sent or delivered.
- 9           3. "Electronic mail service provider" means a person that provides a set of users the  
10 ability to send or receive electronic mail messages via the internet.
- 11           4. "Initiate the transmission" refers to the action by the original sender of an electronic  
12 mail message and not to the action by an intervening internet service provider or  
13 electronic mail service provider that may handle or retransmit the message.
- 14           5. "Internet service provider" means a person who provides users authenticated  
15 access to, or presence on, the internet by means of a switched or dedicated  
16 telecommunications channel upon which the provider provides transit routing of  
17 internet protocol packets for and on behalf of the user.
- 18           6. "Internet domain name" refers to a globally unique, hierarchical reference to an  
19 internet host or service, assigned through centralized internet naming authorities,  
20 comprising a series of character strings separated by periods, with the rightmost  
21 string specifying the top of the hierarchy.

22           **51-27-02. False or misleading messages prohibited.** A person may not initiate the  
23 transmission of a commercial electronic mail message that contains false or misleading  
24 information in the subject line or uses a third-party's internet domain name without permission  
25 of the third party, or otherwise misrepresents any information in identifying the point of origin or  
26 the transmission path of a commercial electronic mail message.

27           **51-27-03. Subject disclosure.** The subject line of a commercial electronic mail  
28 message must include "ADV" as the first characters. If the message contains information that  
29 consists of material of a sexual nature that may only be viewed by an individual eighteen years  
30 of age and older, the subject line of the message must include "ADV-ADULT" as the first  
31 characters. For purposes of this section, "commercial electronic mail message" does not

1 include a message if the recipient has consented to receive or has solicited electronic mail  
2 messages from the initiator; from an organization using electronic mail to communicate  
3 exclusively with its members; from an entity which uses electronic mail to communicate  
4 exclusively with its employees or contractors; or if there is a business or personal relationship  
5 between the initiator and the recipient. For purposes of this section, "business relationship"  
6 means a prior or existing relationship formed between the initiator and the recipient, with or  
7 without an exchange of consideration, on the basis of an inquiry, application, purchase, or  
8 services offered by the initiator or an affiliate or agent of the initiator. "Affiliate" means a person  
9 that directly or indirectly controls, is controlled by, or is under common control with a specified  
10 person.

11 **51-27-04. Toll-free number.**

- 12 1. A sender initiating the transmission of a commercial electronic mail message must  
13 establish a toll-free telephone number, a valid sender-operated return electronic  
14 mail address, or another easy-to-use electronic method that the recipient of the  
15 commercial electronic mail message may call or access by electronic mail or other  
16 electronic means to notify the sender not to transmit by electronic mail any further  
17 unsolicited commercial electronic mail messages. The notification process may  
18 include the ability for the commercial electronic mail messages recipient to direct  
19 the initiator to transmit or not transmit particular commercial electronic mail  
20 messages based upon products, services, divisions, organizations, companies, or  
21 other selections of the recipient's choice.
- 22 2. A commercial electronic mail message must include a statement informing the  
23 recipient of a toll-free telephone number that the recipient may call, or a valid return  
24 address to which the recipient may write or access by electronic mail or another  
25 electronic method established by the initiator, notifying the sender not to transmit to  
26 the recipient any further unsolicited commercial electronic mail messages to the  
27 electronic mail address, or addresses, specified by the recipient, and explaining the  
28 manner in which the recipient may specify what commercial electronic mail  
29 messages the recipient does and does not want to receive.

30 **51-27-05. Blocking receipt or transmission.** An electronic mail service provider may  
31 not be held liable in an action by a recipient for any act voluntarily taken in good faith to block

1 the receipt or transmission through its service of any commercial electronic mail message that  
2 the electronic mail service provider reasonably believes is, or will be, sent in violation of this  
3 chapter.

4 **51-27-06. Defenses.**

- 5 1. A person is not liable for a commercial electronic mail message sent in violation of  
6 this chapter if the person can show by a preponderance of the evidence that the  
7 commercial electronic mail message was not initiated by the person or was  
8 initiated in a manner and form not subject to the control of the person.
- 9 2. In an action under this chapter, it is a defense that the defendant has established  
10 and implemented reasonable practices and procedures to prevent violations of this  
11 chapter.

12 **51-27-07. Damages.**

- 13 1. A person injured by a violation of this chapter may recover damages caused by the  
14 violation as specified in this section.
- 15 2. An injured person, other than an electronic mail service provider, may recover:
- 16 a. The lesser of two thousand dollars for each commercial electronic mail  
17 message received that violates section 51-27-02, or thirty-five thousand  
18 dollars per day; or
- 19 b. The lesser of two thousand dollars for each commercial electronic mail  
20 message received that violates section 51-27-03 or 51-27-04, or twenty-five  
21 thousand dollars per day.
- 22 3. An injured electronic mail service provider may recover actual damages or elect, in  
23 lieu of actual damages, to recover:
- 24 a. The lesser of twenty-five dollars for each commercial electronic mail message  
25 received that violates section 51-27-02, or thirty-five thousand dollars per day;  
26 or
- 27 b. The lesser of ten dollars for each commercial electronic mail message  
28 received that violates section 51-27-03 or 51-27-04, or twenty-five thousand  
29 dollars per day.
- 30 4. At the request of any party to a civil action brought under this chapter, the court  
31 may conduct all legal proceedings in a manner so as to protect the secrecy and

1 security of the computer, computer network, computer data, computer program,  
2 and computer software involved in order to prevent possible recurrence of the  
3 same or a similar act by another person and to protect any trade secrets of any  
4 party.

5 5. Costs, disbursements, and reasonable attorney fees may be awarded to a party  
6 awarded damages for a violation of this chapter.

7 6. Except as otherwise provided in this section, the remedies in this section are in  
8 addition to remedies available under other law.

9 **51-27-08. Relationship to federal law.** If federal law is enacted that regulates false,  
10 misleading, or unsolicited commercial electronic mail messages but does not preempt state law  
11 on the subject, the federal law supersedes any conflicting provision of this chapter.

12 **SECTION 3. EXPIRATION DATE.** The governor shall certify to the legislative council  
13 the effective date of federal legislation that preempts state regulation of the release of  
14 personally identifiable information by an internet service provider or of false, misleading, or  
15 unsolicited commercial electronic mail messages. Chapter 51-26 expires upon the effective  
16 date contained in the certification of federal legislation that preempts state regulation of the  
17 release of personally identifiable information by an internet service provider. Chapter 51-27  
18 expires upon the effective date contained in the certification of federal legislation that preempts  
19 state regulation on false, misleading, or unsolicited commercial electronic mail messages.