

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

1388

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Deanna Halliwell
Operator's Signature

10/3/03
Date

2003 HOUSE JUDICIARY

HB 1388

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10/3/03
Date

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1388

House Judiciary Committee

☐ Conference Committee

Hearing Date 2-10-03

Tape Number	Side A	Side B	Meter #
1		xx	15.5-end
2	xx		0-5
Committee Clerk Signature <i>D. Penrose</i>			

Minutes: 13 members present.

Chairman DeKrey: We will open the hearing on HB 1388.

Rep. Warner: Introduced the bill (see attached testimony), support.

Chairman DeKrey: Thank you. Any questions.

Rep. Eckre: On pg. 5, talks about a toll free number - how would those companies know about North Dakota laws.

Rep. Warner: They have trade associations that they belong to, that gets the word. This legislation is being adopted by a majority of states.

Rep. Eckre: Say if a new company started up in New Mexico, they would be aware of these types of laws, a majority.

Rep. Warner: Yes.

Rep. Klemin: You've got some language in here relating to federal law and an expiration date, what is the status of the federal legislation.

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House Judiciary Committee
Bill/Resolution Number HB 1388
Hearing Date 2-10-03

Rep. Warner: I'm afraid I don't know. Senator Krauter is following my testimony and he has more information on that.

Chairman DeKrey: Thank you. Further testimony in support.

Sen. Krauter: (see attach testimony and amendments) Support. In regard to the question asked by Rep. Klemin, in 1999, legislation was proposed in the US House of Reps. and nothing was acted on. No legislation has been proposed yet this year.

Rep. Grande: How do you know if individual or business is spamming you.

Sen. Krauter: That is our biggest challenge. It is possible that an ISP can track it; especially the get rich quick schemes, all of these need to put an ADV and toll free # for the person to opt-out.

Rep. Grande: Need to address the problem - will it give educational component with this bill.

Sen. Krauter: No.

Rep. Eckre: If most of the companies are overseas, how is it working in other states to shut them down.

Sen. Krauter: There have been lawsuits filed in other states.

Rep. Klemin: This isn't going to stop spam, but stop misleading subject lines?

Sen. Krauter: Yes, can't stop spam, if it comes, you have to respond back by opting out by e-mail or with the toll free number.

Rep. Klemin: I have been told not to opt-out because it confirms your address for the spammer and lets them continue spamming you.

Sen. Krauter: We are trying to get a consistent pattern with the ADV, to let the person know it is an advertisement.

Rep. Klemin: What does ADV stand for.

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House Judiciary Committee
Bill/Resolution Number HB 1388
Hearing Date 2-10-03

Sen. Krauter: Advertisement.

Rep. Klemin: Some messages say ADULT OR ADLT? This bill is using ADULT, is it going to make a difference, be in violation?

Sen. Krauter: When we put the bill together, we went with what a majority of the states use, and they use ADULT.

Rep. Klemin: An injured person can recover damages caused by a violation, are we talking about a ND company spamming a ND person, or are we talking about a company located anywhere in the world.

Sen. Krauter: North Dakota e-mails received in North Dakota is what bill covers.

Rep. Klemin: If I'm injured, can I sue someone in Germany in North Dakota state district court, or only if someone in Bismarck is spamming me.

Sen. Krauter: You are limited to within the state of North Dakota.

Rep. Klemin: Most e-mail spam I get is from out-of-state.

Sen. Krauter: I'm going to have to doublecheck that for you.

Rep. Galvin: In the first paragraph of your testimony, you talk about federal law, and how the states have taken the lead, by enacting this legislation, will the federal government eventually enact law.

Sen. Krauter: In 2002, there were two pieces of legislation introduced at the federal level, and there hasn't been any legislation introduced yet, but will probably be.

Rep. Boehning: When you open up the e-mails, and it doesn't have the ADV in the subject line, so you are looking at something and pretty soon you have 40 or 50 other web sites come up and make it hard to close out of the program.

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House Judiciary Committee
Bill/Resolution Number HB 1388
Hearing Date 2-10-03

Sen. Krauter: E-mails don't open up web sites. You have to click on something in the e-mail message to activate the web sites to come up.

Rep. Klemin: So the idea here would be to use the internet e-mail software to automatically delete messages with ADV.

Sen. Krauter: Yes.

Rep. Delmore: Do other states have penalties for these laws.

Sen. Krauter: There is a penalty in these states.

Chairman DeKrey: Thank you.

Rep. Nancy Johnson: Support. We want to require them to label ADV. We had ITD take a look at this legislation and they supported it.

Chairman DeKrey: Thank you.

Wayne Stenehjem, Attorney General: We would have to look at certain first amendment issues. We haven't looked into this bill in detail yet.

Rep. Eckre: Do you like this bill.

Mr. Stenehjem: I haven't gone through it, section by section, so I can't answer that question. I just want to offer assistance to comb through and look at what might work.

Rep. Eckre: What do you do when the upset parent comes to you and brings the e-mails; what can your office do.

Mr. Stenehjem: We have a criminal section, a trained individual from DCI who looks through computer hard drives, for example, we concentrate on child pornographers. We work with the US state's attorney and FBI and in those cases, where it is child pornography, we have a pretty

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Page 5
House Judiciary Committee
Bill/Resolution Number HB 1388
Hearing Date 2-10-03

good chance of getting them prosecuted. But it would be helpful to have some kind of tool. We need to start somewhere and a bill like this could help.

Rep. Klemin: Who would I sue, I got the impression that the commercial spam would have to originate here in North Dakota for me to bring an action, vs. the spam coming from New York, would you use NY law.

Mr. Stenehjem: No, I don't know. I came here to listen to the testimony, and offer help if needed. I can't really testify about the specifics of the statute you have in front of you. Other statutes, when an ISP is used to deliver other people's spam to a ND resident, we can utilize the long arm statute and get jurisdiction over the people who usually are out-of-state in a North Dakota court.

Rep. Klemin: Do you have any recommendation as to whether we should put some type of long-arm statute-type provision in the bill. Because right now, the long arm statute isn't even a statute, it is part of the rules of civil procedure.

Mr. Stenehjem: Which means it properly would have to be a rule of procedure. I will be happy to go through the specifics and work with anybody on the committee to craft a statute.

Chairman DeKrey: Thank you.

Rep. Kretschmar: Under this bill - is it possible to tack this on under a commerce laws?

Mr. Stenehjem: I don't know about the specifics of this bill, but that is one issue you need to be very careful about when enacting a statute, to make sure you don't have a commerce clause problem. There was a case in Washington.

Rep. Kretschmar: Was that case in state or federal court.

Mr. Stenehjem: State court.

Deanna Hall Smith
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House Judiciary Committee
Bill/Resolution Number HB 1388
Hearing Date 2-10-03

Chairman DeKrey: Thank you. Any further testimony in support? Opposition? We will close the hearing.

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10/3/03
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2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1388

House Judiciary Committee

☐ Conference Committee

Hearing Date 2-11-03

Tape Number	Side A	Side B	Meter #
3	xx		43.7-49.5
Committee Clerk Signature <i>W. Penrose</i>			

Minutes: 13 members present.

Chairman DeKrey: What are the committee's wishes in regard to HB 1388.

Rep. Kingsbury: I move the Krauter amendments, .0201.

Rep. Maragos: Seconded.

Voice vote: Carried.

Rep. Delmore: I move a Do Pass as amended.

Rep. Maragos: Seconded.

11 YES 2 NO 0 ABSENT DO PASS AS AMENDED CARRIER: Rep. Maragos

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Dorinda Halliwell
Operator's Signature

10/3/03
Date

30267.0201
Title.0300

Prepared by the Legislative Council staff for
Senator Krauter
February 10, 2003

VR
2/12/03
1062

HOUSE AMENDMENTS TO HOUSE BILL NO. 1388 JUD 2-12-03

Page 1, line 1, remove "51-26 and" and after "51-27" insert "and 51-28"

Page 1, line 5, replace "51-26" with "51-27"

Page 1, line 7, replace "51-26-01" with "51-27-01"

Page 1, line 24, replace "51-26-02" with "51-27-02"

HOUSE AMENDMENTS TO HB 1388 JUD 2-12-03

Page 3, line 13, replace "51-26-03" with "51-27-03"

Page 3, line 15, replace "51-26-04" with "51-27-04"

Page 3, line 18, replace "51-26-05" with "51-27-05"

Page 3, line 26, replace "51-26-06" with "51-27-06"

HOUSE AMENDMENTS TO HB 1388 JUD 2-12-03

Page 4, line 1, replace "51-27" with "51-28"

Page 4, line 3, replace "51-27-01" with "51-28-01"

Page 4, line 22, replace "51-27-02" with "51-28-02"

Page 4, line 27, replace "51-27-03" with "51-28-03"

HOUSE AMENDMENTS TO HB 1388 JUD 2-12-03

Page 5, line 11, replace "51-27-04" with "51-28-04"

Page 5, line 30, replace "51-27-05" with "51-28-05" and after the second boldfaced period insert "This chapter does not prevent or limit an Internet service provider from adopting a policy regarding commercial or other electronic mail, including a policy of declining to transmit certain types of electronic mail messages, or from enforcing a policy through technical means, through contract, or by pursuing a remedy available under any other law."

HOUSE AMENDMENTS TO HB 1388 JUD 2-12-03

Page 6, line 4, replace "51-27-06" with "51-28-06"

Page 6, line 12, replace "51-27-07" with "51-28-07"

Page 6, line 17, replace "51-27-02" with "51-28-02"

Page 6, line 20, replace "51-27-03" with "51-28-03" and replace "51-27-04" with "51-28-04"

Page 6, line 25, replace "51-27-02" with "51-28-02"

Page 6, line 28, replace "51-27-03" with "51-28-03" and replace "51-27-04" with "51-28-04"

Page No. 1

30267.0201

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HOUSE AMENDMENTS TO HR 1388

2082

Page 7, line 9, replace "51-27-08" with "51-28-08"

Page 7, line 15, replace "51-26" with "51-27"

Page 7, line 17, replace "51-27" with "51-28"

Renumber accordingly

Page No. 2

30267.0201

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Date

Date: 2/11/03
Roll Call Vote #: 1

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1388

House Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 30267.0201 . 0300

Action Taken Do Pass As Amended

Motion Made By Rep. Delmore Seconded By Rep. Maragos

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Rep. Delmore	✓	
Vice Chairman Maragos	✓		Rep. Eckre	✓	
Rep. Bernstein	✓		Rep. Onstad	✓	
Rep. Boehning		✓			
Rep. Galvin	✓				
Rep. Grande	✓				
Rep. Kingsbury	✓				
Rep. Klemin	✓				
Rep. Kretschmar	✓				
Rep. Wrangham		✓			

Total (Yes) 11 No 2

Absent 0

Floor Assignment Rep. Maragos

If the vote is on an amendment, briefly indicate intent:

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10/3/03
Date

REPORT OF STANDING COMMITTEE (410)
February 13, 2003 7:51 a.m.

Module No: HR-28-2513
Carrier: Maragos
Insert LC: 30267.0201 Title: .0300

REPORT OF STANDING COMMITTEE

HB 1388: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (11 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). HB 1388 was placed on the Sixth order on the calendar.

Page 1, line 1, remove "51-26 and" and after "51-27" insert "and 51-28"

Page 1, line 5, replace "51-26" with "51-27"

Page 1, line 7, replace "51-26-01" with "51-27-01"

Page 1, line 24, replace "51-26-02" with "51-27-02"

Page 3, line 13, replace "51-26-03" with "51-27-03"

Page 3, line 15, replace "51-26-04" with "51-27-04"

Page 3, line 18, replace "51-26-05" with "51-27-05"

Page 3, line 26, replace "51-26-06" with "51-27-06"

Page 4, line 1, replace "51-27" with "51-28"

Page 4, line 3, replace "51-27-01" with "51-28-01"

Page 4, line 22, replace "51-27-02" with "51-28-02"

Page 4, line 27, replace "51-27-03" with "51-28-03"

Page 5, line 11, replace "51-27-04" with "51-28-04"

Page 5, line 30, replace "51-27-05" with "51-28-05" and after the second boldfaced period insert "This chapter does not prevent or limit an Internet service provider from adopting a policy regarding commercial or other electronic mail, including a policy of declining to transmit certain types of electronic mail messages, or from enforcing a policy through technical means, through contract, or by pursuing a remedy available under any other law."

Page 6, line 4, replace "51-27-06" with "51-28-06"

Page 6, line 12, replace "51-27-07" with "51-28-07"

Page 6, line 17, replace "51-27-02" with "51-28-02"

Page 6, line 20, replace "51-27-03" with "51-28-03" and replace "51-27-04" with "51-28-04"

Page 6, line 25, replace "51-27-02" with "51-28-02"

Page 6, line 28, replace "51-27-03" with "51-28-03" and replace "51-27-04" with "51-28-04"

Page 7, line 9, replace "51-27-08" with "51-28-08"

Page 7, line 15, replace "51-26" with "51-27"

Page 7, line 17, replace "51-27" with "51-28"

(2) DESK, (3) COMM

Page No. 1

HR-28-2513

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Dennis Hall
Operator's Signature

10/3/03
Date

REPORT OF STANDING COMMITTEE (410)
February 13, 2003 7:51 a.m.

Module No: HR-28-2513
Carrier: Maragos
Insert LC: 30267.0201 Title: .0300

Renumber accordingly

(2) DESK, (3) COMM

Page No. 2

HR-28-2513

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Demetrius Hall
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2003 SENATE JUDICIARY

HB 1388

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2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1388

Senate Judiciary Committee

☐ Conference Committee

Hearing Date 03/11/03

Tape Number	Side A	Side B	Meter #
1	X		0.0 - 41
Committee Clerk Signature <i>Maria L. Salberg</i>			

Minutes: **Senator John T. Traynor, Chairman**, called the meeting to order. Roll call was taken and not all committee members present. Sen. Traynor requested meeting starts with testimony on the bill:

Testimony in Support of HB 1388

Rep John Warner - Representative of District 4 (meter .4) Introduced Bill and Read Testimony -

Attachment #1. Discussed proposed Amendments.

Senator Carolyn Nelson discussed how AOL used a filter to delete "spam" messages and it maxed out at over 1 Mil.

Rep. Nancy Johnson - District 37 In support of Bill Read Testimony - Did not submitted. (meter 4) Discussed frequency of "spam" How in a magazine or TV we can ignore them If not labeled as so we are forced to open. Discussed pornographic ads freely received via the Internet. Discussed spam messages at own business and time wasted with them.

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10/3/03
Date

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Senate Judiciary Committee

Bill/Resolution Number HB 1388

Hearing Date 03/11/03

Sen. Aaron Krauter - Dist 31 Read "Legisbrief" (Attachment 3a) and handed out (Attachment 3b)

what each state is doing. Six months ago my children convinced me to open up a "hot-mail" account- we checked into it and I set my daughter, seventh grader and son, a fifth grader. Within 12 hours they were "spammed" with pornographic material! I was floored. It is hard enough to mold kids with good thoughts but to sit and try to explain some of these things to them. Not just the pornographic material but why anyone would e-mail it to them, really creates some challenges for them to understand. We have sat down since then and done all of the blocks and they still come through.

Wayne Stenehjem - ND Attorney General (meter 11.6) Thank you for the opportunity to visit with you. This is a not only a Nation Wide problem but a ND problem also. I have worked with the sponsors of the bill to try and work out a partial solution for the "spam" problem. This is more than an annoyance but people have be scammed out of their resources from some of these misleading, deceptive and sometimes illegal messages. The most prominent is the Nigerian Internet Scam - Attachment #2, Discussed. (meter 12). Discussed A.O.L. viewpoints. One provision of act that causes "heartburn" is the portion that deals with Internet privacy. I propose that they delete that provision from the bill and instead deal with a statute that talks only about spam. I suggested they use as a model is the statute from the state of Washington, the reason being is that one has been litigated. It was determined by the lower court to be a violation of commerce clause and the case was appealed to the Supreme Court of Washington who held and said not this is not a violation of the commerce clause but a consumer protection issue. Discussed law. (meter 13.5) Discussed a case of an Oregon man who was brought to court by the state of Washington for e-mail's to Oregon. The case upheld.

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Senate Judiciary Committee
Bill/Resolution Number HB 1388
Hearing Date 03/11/03

While no Bill we will enact will completely solve this problem, perhaps the largest part of the problem will be solved by Federal Congress may eventually do. Discussion (meter 14.9)

Amendments. My department can only afford to take one or two cases on. I am reluctant to talk about it because we do not have the staff or money to do more then this.

Perrell Grossman - Director of Attorney Generals Consumer Protection Division and at the request of the A.G. we have submitted the following Amendments (meter 16.2) Discussed his Hog House Amendment - Attachment #4

Sen. Traynor discussed the Washington State Statute and the Supreme Courts upholding it and the US Supreme Court denied hearing of it.

Sen. Dever asked if all sponsors have read attachments. Yes and they are O.K.

The Attorney General discussed how responding to a "delete" this me off of this mailing list confirms you as a live target.

Sen. Warner stated that we can not ask a serving company to go through our e-mail's no more than we would like them to screen our calls on the phone.

Emily Hackett - Internet Alliance Read Testimony (meter 24) Attachment #5 Discussed the difference between Header Information the stuff on top of an e-mail and Routing information..

This is what is falsified The Subject line is the line you first read "I have become your new neighbor" This line should be clear.

Discussion of different e-mail situation; i.e. viruses..

Morgan Hayley Long - American Legislative Exchange Council Wash DC (meter 30.9) At first I was against this bill but with this amendment am now in support of this bill - Attachment #6.

We indorse the Virginia Model of Legislation.

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Senate Judiciary Committee
Bill/Resolution Number HB 1388
Hearing Date 03/11/03

Sen. Traynor discussed with the Attorney the houses activity on this bill. After much discussion in regards to some of the issues these changed did not change the intent of the bill. (meter 32)

Additional Testimony Submitted:

Stewart Baker - General Counsel US Internet Service Providers (AOL) - Attachment #7

Anthony T. Wilson - Microsoft Corporation, Central region Government Affairs Manager - Attachment #8.

Testimony in opposition of HB 1388

None

Testimony Neutral to HB 1388

None

Senator John T. Traynor, Chairman closed the hearing

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2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1388

Senate Judiciary Committee

☐ Conference Committee

Hearing Date 03/12/03

Tape Number	Side A	Side B	Meter #
3	X		0.0 - 2.0
Committee Clerk Signature <i>Maria L. Solberg</i>			

Minutes: **Senator John T. Traynor, Chairman**, called the meeting to order. Roll call was taken and all committee members present. Sen. Traynor requested meeting starts with committee work on the bill: Discussion of Attorney Generals Amendment

Motion Made to DO PASS Amendment 30267.0301 HB 1388 Senator Stanley W. Lyson,

Vice Chairman and seconded by Senator Thomas L. Trenbeath

Roll Call Vote: 5 Yes. 0 No. 1 Absent

Motion Passed

Motion Made to DO PASS HB 1388 As Amended Sen. Trenbeath and seconded by Sen.

Dever

Roll Call Vote: 6 Yes. 0 No. 0 Absent

Motion Passed

Floor Assignment: Senator Thomas L. Trenbeath

Senator John T. Traynor, Chairman closed the hearing

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10/3/03
Date

QC3
3-13-03
1 of 4

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1388

Page 1, line 1, replace "chapters" with "chapter" and remove "and 51-28"

Page 1, line 2, remove "Internet privacy and" and after the semicolon insert "to provide a penalty;"

Page 1, replace lines 8 through 24 with:

- "1. "Assist the transmission" means actions taken by a person to provide substantial assistance or support that enables any person to formulate, compose, send, originate, initiate, or transmit a commercial electronic mail message when the person providing the assistance knows or consciously avoids knowing that the initiator of the commercial electronic mail message is engaged, or intends to engage, in any practice that violates chapter 51-15.
2. "Commercial electronic mail message" means an electronic mail message sent to promote real property, goods, or services for sale or lease. The term does not mean an electronic mail message to which an interactive computer service provider has attached an advertisement in exchange for free use of an electronic mail account if the sender has agreed to such an arrangement.
3. "Electronic mail address" means a destination, commonly expressed as a string of characters, to which electronic mail may be sent or delivered.
4. "Initiate the transmission" refers to the action by the original sender of an electronic mail message, not to the action by any intervening interactive computer service that may handle or retransmit the message, unless the intervening interactive computer service assists in the transmission of an electronic mail message when the interactive computer service knows, or consciously avoids knowing, that the person initiating the transmission is engaged, or intends to engage, in any act or practice that violates chapter 51-15.
5. "Interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including a service or system that provides access to the Internet and systems operated or services offered by libraries and educational institutions.
6. "Internet domain name" refers to a globally unique, hierarchical reference to an Internet host or service, assigned through centralized Internet naming authorities, comprising a series of character strings separated by periods, with the right-most string specifying the top of the hierarchy.

51-27-02. False or misleading messages prohibited.

1. A person may not initiate the transmission, conspire with another to initiate the transmission, or assist the transmission of a commercial electronic mail message from a computer located in this state or to an electronic mail address that the sender knows, or has reason to know, is held by a resident of this state that:

- 2 of 4
- a. Uses a third-party's Internet domain name without permission of the third party or otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or
 - b. Contains false or misleading information in the subject line.
2. For purposes of this section, a person knows that the intended recipient of a commercial electronic mail message is a resident of this state if that information is available, upon request, from the registrant of the Internet domain name contained in the recipient's electronic mail address.

51.27-03. Unpermitted or misleading electronic mail - Violation of consumer protection law.

1. It is a violation of chapter 51-15 to conspire with another person to initiate the transmission or to initiate the transmission of a commercial electronic mail message that:
 - a. Uses a third-party's Internet domain name without permission of the third party or otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or
 - b. Contains false or misleading information in the subject line.
2. It is a violation of chapter 51-15 to assist in the transmission of a commercial electronic mail message if the person providing the assistance knows, or consciously avoids knowing, that the initiator of the commercial electronic mail message is engaged, or intends to engage, in any act or practice that violates chapter 51-15.

51-27-04. Subject disclosure - Violation of consumer protection law.

1. The subject line of a commercial electronic mail message must include "ADV" as the first characters. If the message contains information that consists of material of a sexual nature that may only be viewed by an individual eighteen years of age or older, the subject line of the message must include "ADV-ADULT" as the first characters.
2. For purposes of this section, a commercial electronic mail message does not include a message if the recipient has consented to receive or has solicited electronic mail messages from the initiator, from an organization using electronic mail to communicate exclusively with its members, from an entity which uses electronic mail to communicate exclusively with its employees or contractors, or if there is a business or personal relationship between the initiator and the recipient.
3. For purposes of this section, a business relationship means a prior or existing relationship formed between the initiator and the recipient, with or without an exchange of consideration, on the basis of an inquiry, application, purchase, or services offered by the initiator or an affiliate or agent of the initiator. "Affiliate" means a person that directly or indirectly controls, is controlled by, or is under common control with a specified person.
4. It is a violation of chapter 51-15 to conspire with another person to initiate the transmission or to initiate the transmission of a commercial electronic mail message that violates this section.

3 of 4

51-27-05. Toll-free number.

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

51-27-06. Violations - Damages.

1. Damages to the recipient of a commercial electronic mail message sent in violation of this chapter are five hundred dollars, or actual damages, whichever is greater.
2. Damages to an interactive computer service resulting from a violation of this chapter are one thousand dollars, or actual damages, whichever is greater.

51-27-07. Blocking of commercial electronic mail by interactive computer service - Immunity from liability.

1. An interactive computer service may block the receipt or transmission through its service of any commercial electronic mail that it reasonably believes is, or will be, sent in violation of this chapter.
2. An interactive computer service may not be held liable for any action voluntarily taken in good faith to block the receipt or transmission through its service of any commercial electronic mail which it reasonably believes is, or will be, sent in violation of this chapter.

51-27-08. Nonexclusive causes of action, remedies, and penalties. The remedies, duties, prohibitions, and penalties of this chapter are not exclusive and are in addition to all other causes of action, remedies, and penalties in chapter 51-15 or otherwise provided by law.

51-27-09. Relationship to federal law. If any federal law is enacted that regulates false, misleading, or unsolicited commercial electronic mail messages, but does not preempt state law on the subject, the federal law supersedes any conflicting provision of this chapter.

SECTION 2. EXPIRATION DATE. The governor shall certify to the legislative council the effective date of any federal legislation that preempts state regulation of false, misleading, or unsolicited commercial electronic mail messages. This Act becomes ineffective upon the effective date contained in the certification of federal

4 of 4
legislation that preempts state regulation of false, misleading, or unsolicited commercial electronic mail messages."

Page 2, remove lines 1 through 30

Page 3, remove lines 1 through 30

Page 4, remove lines 1 through 31

Page 5, remove lines 1 through 31

Page 6, remove lines 1 through 31

Page 7, remove lines 1 through 24

Renumber accordingly

Page No. 4

30267.0301

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Deanna Halliwell
Operator's Signature

10/3/03
Date

Date: March 12, 2003
Roll Call Vote #: 1

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1388

Senate JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 30267.0301

Action Taken DO PASS Amendment submitted by Attorney General's Office

Motion Made By Sen. Lyson Seconded By Senator Thomas L. Trenbeath

Senators	Yes	No	Senators	Yes	No
Sen. John T. Traynor - Chairman	X		Sen. Dennis Bercier	X	
Sen. Stanley. Lyson - Vice Chair	X		Sen. Carolyn Nelson	X	
Sen. Dick L'ever	X				
Sen. Thomas L. Trenbeath	X				

Total (Yes) FIVE (5) No ZERO (0)

Absent ONE (1)

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

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Dennis Bercier
Operator's Signature

10/3/03
Date

Date: March 12, 2003
Roll Call Vote #: 2

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1388

Senate JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 30267.0301

Action Taken DO PASS As Amended

Motion Made By Sen. Trenbeath Seconded By Sen. Dever

Senators	Yes	No	Senators	Yes	No
Sen. John T. Traynor - Chairman	X		Sen. Dennis Bercier	X	
Sen. Stanley Lyson - Vice Chair	X		Sen. Carolyn Nelson	X	
Sen. Dick Dever	X				
Sen. Thomas L. Trenbeath	X				

Total (Yes) SIX (6) No ZERO (0)

Absent ZERO (0)

Floor Assignment Sen. Trenbeath

If the vote is on an amendment, briefly indicate intent:

The micrographic images on this film are accurate reproductions of records delivered to Modern Information Systems for microfilming and were filmed in the regular course of business. The photographic process meets standards of the American National Standards Institute (ANSI) for archival microfilm. NOTICE: If the filmed image above is less legible than this Notice, it is due to the quality of the document being filmed.

Dennis Bercier
Operator's Signature

10/3/03
Date

REPORT OF STANDING COMMITTEE (410)
March 14, 2003 9:23 a.m.

Module No: SR-46-4767
Carrier: Trenbeath
Insert LC: 30267.0301 Title: .0400

REPORT OF STANDING COMMITTEE

HB 1388, as engrossed: Judiciary Committee (Sen. Traynor, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1388 was placed on the Sixth order on the calendar.

Page 1, line 1, replace "chapters" with "chapter" and remove "and 51-28"

Page 1, line 2, remove "internet privacy and" and after the semicolon insert "to provide a penalty;"

Page 1, replace lines 8 through 24 with:

- "1. "Assist the transmission" means actions taken by a person to provide substantial assistance or support that enables any person to formulate, compose, send, originate, initiate, or transmit a commercial electronic mail message when the person providing the assistance knows or consciously avoids knowing that the initiator of the commercial electronic mail message is engaged, or intends to engage, in any practice that violates chapter 51-15.
2. "Commercial electronic mail message" means an electronic mail message sent to promote real property, goods, or services for sale or lease. The term does not mean an electronic mail message to which an interactive computer service provider has attached an advertisement in exchange for free use of an electronic mail account if the sender has agreed to such an arrangement.
3. "Electronic mail address" means a destination, commonly expressed as a string of characters, to which electronic mail may be sent or delivered.
4. "Initiate the transmission" refers to the action by the original sender of an electronic mail message, not to the action by any intervening interactive computer service that may handle or retransmit the message, unless the intervening interactive computer service assists in the transmission of an electronic mail message when the interactive computer service knows, or consciously avoids knowing, that the person initiating the transmission is engaged, or intends to engage, in any act or practice that violates chapter 51-15.
5. "Interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including a service or system that provides access to the Internet and systems operated or services offered by libraries and educational institutions.
6. "Internet domain name" refers to a globally unique, hierarchical reference to an Internet host or service, assigned through centralized Internet naming authorities, comprising a series of character strings separated by periods, with the right-most string specifying the top of the hierarchy.

51-27-02. False or misleading messages prohibited.

1. A person may not initiate the transmission, conspire with another to initiate the transmission, or assist the transmission of a commercial electronic mail message from a computer located in this state or to an electronic mail

Dennis Halliwell
Operator's Signature

10/3/03
Date

address that the sender knows, or has reason to know, is held by a resident of this state that:

- a. Uses a third-party's internet domain name without permission of the third party or otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or
 - b. Contains false or misleading information in the subject line.
2. For purposes of this section, a person knows that the intended recipient of a commercial electronic mail message is a resident of this state if that information is available, upon request, from the registrant of the internet domain name contained in the recipient's electronic mail address.

51.27-03. Unpermitted or misleading electronic mail - Violation of consumer protection law.

1. It is a violation of chapter 51-15 to conspire with another person to initiate the transmission or to initiate the transmission of a commercial electronic mail message that:
 - a. Uses a third-party's internet domain name without permission of the third party or otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or
 - b. Contains false or misleading information in the subject line.
2. It is a violation of chapter 51-15 to assist in the transmission of a commercial electronic mail message if the person providing the assistance knows, or consciously avoids knowing, that the initiator of the commercial electronic mail message is engaged, or intends to engage, in any act or practice that violates chapter 51-15.

51-27-04. Subject disclosure - Violation of consumer protection law.

1. The subject line of a commercial electronic mail message must include "ADV" as the first characters. If the message contains information that consists of material of a sexual nature that may only be viewed by an individual eighteen years of age or older, the subject line of the message must include "ADV-ADULT" as the first characters.
2. For purposes of this section, a commercial electronic mail message does not include a message if the recipient has consented to receive or has solicited electronic mail messages from the initiator, from an organization using electronic mail to communicate exclusively with its members, from an entity which uses electronic mail to communicate exclusively with its employees or contractors, or if there is a business or personal relationship between the initiator and the recipient.
3. For purposes of this section, a business relationship means a prior or existing relationship formed between the initiator and the recipient, with or without an exchange of consideration, on the basis of an inquiry, application, purchase, or services offered by the initiator or an affiliate or agent of the initiator. "Affiliate" means a person that directly or indirectly

controls, is controlled by, or is under common control with a specified person.

4. It is a violation of chapter 51-15 to conspire with another person to initiate the transmission or to initiate the transmission of a commercial electronic mail message that violates this section.

51-27-05. Toll-free number.

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

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1. Damages to the recipient of a commercial electronic mail message sent in violation of this chapter are five hundred dollars, or actual damages, whichever is greater.
2. Damages to an interactive computer service resulting from a violation of this chapter are one thousand dollars, or actual damages, whichever is greater.

51-27-07. Blocking of commercial electronic mail by interactive computer service - Immunity from liability.

1. An interactive computer service may block the receipt or transmission through its service of any commercial electronic mail that it reasonably believes is, or will be, sent in violation of this chapter.
2. An interactive computer service may not be held liable for any action voluntarily taken in good faith to block the receipt or transmission through its service of any commercial electronic mail which it reasonably believes is, or will be, sent in violation of this chapter.

51-27-08. Nonexclusive causes of action, remedies, and penalties. The remedies, duties, prohibitions, and penalties of this chapter are not exclusive and are in addition to all other causes of action, remedies, and penalties in chapter 51-15 or otherwise provided by law.

REPORT OF STANDING COMMITTEE (410)
March 14, 2003 9:23 a.m.

Module No: SR-46-4767
Carrier: Trenbeath
Insert LC: 30267.0301 Title: .0400

51-27-09. Relationship to federal law. If any federal law is enacted that regulates false, misleading, or unsolicited commercial electronic mail messages, but does not preempt state law on the subject, the federal law supersedes any conflicting provision of this chapter.

SECTION 2. EXPIRATION DATE. The governor shall certify to the legislative council the effective date of any federal legislation that preempts state regulation of false, misleading, or unsolicited commercial electronic mail messages. This Act becomes ineffective upon the effective date contained in the certification of federal legislation that preempts state regulation of false, misleading, or unsolicited commercial electronic mail messages."

Page 2, remove lines 1 through 30

Page 3, remove lines 1 through 30

Page 4, remove lines 1 through 31

Page 5, remove lines 1 through 31

Page 6, remove lines 1 through 31

Page 7, remove lines 1 through 24

Renumber accordingly

Deanna Halliwell
Operator's Signature

10/3/03
Date

2003 TESTIMONY

HB 1388

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10/3/03
Date

HOUSE BILL 1388
REP. JOHN WARNER BEFORE THE
HOUSE JUDICIARY COMMITTEE
10 FEBRUARY 2003

Mr. Chairman, Members of the Committee

House Bill 1388 has become known as the DO NOT SPAM bill. It is a companion piece to Senate Bill 2255 which has become known as DO NOT CALL. Both of these bills are a response to a growing public concern that certain aggressive commercial speech has begun to intrude upon private life and the home. HB 1388 attempts to do four things:

1. It forbids the disclosure of personally identifiable information concerning a consumer of Internet service without the consumers permission. This means information that identifies a consumer by physical or electronic address or telephone number; a consumer as having requested or obtained specific materials or services from an Internet service provider; Internet or on-line sites visited by a consumer; or any of the contents of a consumer's data storage devices. This refers only to the disclosure of information obtained by the application process or through the use of "worm" programs which secretly read the consumers computer. It does not forbid the disclosure of information given with the consumer's consent such as method of payment and delivery address given in the ordinary course of business. It also allows the release of information to law enforcement and civil proceedings if requested by due process.
2. It forbids false or misleading messages designed to disguise the point of origin of a message or its routing path. Some SPAM programs are designed to read the address book of consumers who receive them and then forward the commercial message under a familiar name. This practice is strictly forbidden.
3. It requires that commercial messages be identified by the letters "ADV" as the first characters of the subject line or the letters "ADV-ADULT" if the material is of a sexual nature that may only be viewed by an individual eighteen years of age or older. This section of the bill also allows some exceptions for requested information and communications between an organization and its members or in the case of a previous business relationship.
4. It requires the establishment of a toll free number, a valid sender operated return electronic mail address or any other easy electronic method for a consumer to notify the sender that no further messages are desired. (Unsubscribe)

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The bill allows that if Internet providers have established and implemented reasonable practices and procedures and can show by a preponderance of the evidence that they have done so they are immune from prosecution.

Finally, the bill sets forth the damages by which a person injured by a violation of this law can obtain by private action through a civil proceeding.

Mr. Chairman, Members of the Committee, House Bill 1388 is not a perfect solution to the problem of unwanted SPAM but it does give North Dakota's standing in lawsuits aimed at ending the most egregious examples. It gives North Dakota's recourse to damages through private action and it joins North Dakota's name to the growing list of states which are addressing this public concern.

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Deanna Hall
Operator's Signature

10/3/03
Date



Senator Aaron Krauter
District 31
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Regent, ND 58850-9721
akrauter@state.nd.us

NORTH DAKOTA SENATE

STATE CAPITOL
600 EAST BOULEVARD
BISMARCK, ND 58505-0360



COMMITTEES:
Appropriations

Testimony for HB 1388

Chairman DeKrey and members of the House Judiciary Committee, for the record my name is Aaron Krauter, State Senator from District 31. I am here today as a cosponsor of HB 1388.

HB 1388 is anti-spamming legislation. Spamming is the action whereby a consumer receives an unsolicited commercial or bulk e mail advertisement. These types of e mails are usually get-rich-quick schemes and adult orientated or pornographic material, which together amounts to almost two-thirds of all spam. As of December 2002 over 30 states have enacted laws regulating unsolicited commercial or bulk electronic mail advertising and many more are considering legislation this year. Enforcement of anti-spam laws should be done at the federal level but states have taken the lead.

The purpose of HB 1388 is set into state law a process whereby consumers have a course of action to stop unsolicited e mail.

HB 1388 prohibits - identity "spoofing"- whereby it is illegal to mislead or falsely state information regarding sender or routing information.

HB 1388 prohibits false or misleading information in subject line; ADV or ADV-ADULT.

HB 1388 requires opt-out information (toll- free number or other contact information)

HB 1388 hold Internet service providers (ISP's) harmless relating to actions under state laws brought in response to blocking spam on behalf of consumers. These provisions are consistent with and encompass much or all of what other states have done in similar legislative initiatives.

Now on a personal note I knew we had problems with spamming e mail when I look at the types and quantity of e mails I get on my state owned computer. I have blocks on certain words and groups of words but still the senders are figuring ways around them. But I came to the real impact of unsolicited spam when I allowed my children to have e mail address. Within days they were getting spammed, so we set up different blocks and filters, but still some came through. Yes, the pornographic spammers came through. That wasn't bad enough, the kiddy porn and luring chat room e mails came also.

On the next couple of pages is a review of laws enacted in many other states.

Also, I have prepared an amendment to HB 1388 to clarify language regarding policies that the Internet service provider may adopt.

Thank you and I will answer any questions.

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Operator's Signature

10/3/03
Date

Arkansas

A law enacted in April of 2001 makes it illegal to send unsolicited e-mail messages that use a third party's domain name without permission, misrepresent the sender or point of origin, or contain falsified routing information. It is also illegal to distribute software designed to falsify routing information.

California

Under legislation approved in September 1998, unsolicited commercial e-mail messages must include opt-out instructions and contact information, and opt-out requests must be honored. Certain messages must contain a label ("ADV:" or "ADV:ADLT") at the beginning of the subject line. A provider may sue a sender of unsolicited commercial e-mail for violating the provider's policies if the sender has actual notice of such policies. The law applies to e-mail that is delivered to a California resident via a provider's facilities located in California.

Colorado

The Colorado Junk Email Law, enacted in June 2000, prohibits the sending of unsolicited commercial e-mail that uses a third party's Internet address or domain name without permission, or contains false or missing routing information. Unsolicited commercial e-mail messages must contain a label ("ADV:") at the beginning of the subject line, and must include the sender's e-mail address and opt-out instructions; opt-out requests must be honored. The law applies to e-mail that is sent to Colorado residents via a provider's service or equipment located in Colorado.

Connecticut

A Connecticut law enacted in June 1999 makes it illegal to send unsolicited bulk e-mail containing falsified routing information in violation of a provider's policies, or to distribute software designed to falsify routing information. A court may exercise personal jurisdiction over a nonresident who uses a computer or computer network located in Connecticut.

Delaware

Under legislation approved in July 1999, it is illegal to send unsolicited bulk commercial e-mail, to send unsolicited bulk e-mail containing falsified routing information, or to distribute software designed to falsify routing information. The law applies to messages originating outside the state if the recipient is located in Delaware and the sender is aware of facts making the recipient's presence in Delaware a reasonable possibility.

Florida

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Donna H. Smith
Operator's Signature

10/3/03
Date

Florida has not enacted spam legislation, although a Florida bar rule (Fla. R.P.C. 4-7.6(c)(3)) requires attorneys who advertise via unsolicited e-mail to put "legal advertisement" in the subject line.

Idaho

A law approved in April 2000 requires that unsolicited bulk commercial e-mail messages must include an e-mail address for opt-out requests and requires senders to honor opt-out requests. Such messages may not use a third party's name for the return address without permission, and must contain accurate routing information.

Illinois

Legislation approved in July 1999 makes it illegal to send an unsolicited commercial e-mail message using a third party's domain name without permission; containing falsified routing information; or with a false or misleading subject line. The law applies to e-mail that is delivered to an Illinois resident via a provider's facilities located in Illinois. A separate provision makes it illegal to send unsolicited bulk e-mail with falsified routing information or to distribute software designed to falsify routing information.

Iowa

An Iowa law approved in May 1999 prohibits the sending of unsolicited bulk e-mail that uses a third party's name for the return address without permission, or contains false or missing routing information. Unsolicited bulk commercial e-mail messages must include opt-out instructions and contact information, and opt-out requests must be honored. The law applies to e-mail that is sent to or through a computer network located in Iowa.

Kansas

Under a Kansas law enacted in May 2002, commercial e-mail messages may not contain falsified routing information, use a third party's domain name without permission, or have a false or misleading subject line. Senders of commercial e-mail messages must include opt-out instructions and honor opt-out requests. Unsolicited bulk commercial e-mail messages (500 or more recipients) and advertisements for sexually explicit content must contain a label ("ADV:" or "ADV:ADLT") at the beginning of the subject line. The law applies if a message is sent from within Kansas, or if the sender knows that the recipient is a Kansas resident. The law also prohibits the distribution of software designed to falsify routing information.

Kentucky

Kentucky has not enacted spam legislation. A Kentucky Supreme Court rule (Ky. Sup. Ct. R. 3.130(7.09)(3)), as amended effective January 2002) requires attorneys who advertise via written, recorded, or electronic communication targeted at potential clients to include the words "THIS IS AN ADVERTISEMENT" prominently in each communication.

Deanna Hall
Operator's Signature

10/3/03
Date

Louisiana

A Louisiana law approved in July 1999 makes it illegal to send unsolicited bulk commercial e-mail to more than 1,000 recipients if the e-mail messages contain falsified routing information or the sender uses a provider's facilities to transmit the messages in violation of the provider's policies. The law also prohibits the distribution of software designed to falsify routing information.

A Louisiana bar rule (Rules of Professional Conduct, Rule 7.2(b)(iii)(B)) was amended in November 2001 to require attorneys who advertise via unsolicited e-mail targeted at potential clients to use a subject line that states "This is an advertisement for legal services."

Maryland

Under a Maryland law enacted in May 2002, it is illegal to send a commercial e-mail message that uses a third party's domain name without permission; that contains false or missing routing information; or with a false or misleading subject line. The law applies if a message is sent from within Maryland; if the sender knows that the recipient is a Maryland resident; or if the registrant of the domain name contained in the recipient's address will confirm upon request that the recipient is a Maryland resident.

Minnesota

A Minnesota law enacted in May 2002 prohibits commercial e-mail that uses a third party's domain name without permission, contains false routing information; or has a false or misleading subject line. Such messages must contain opt-out instructions and contact information. Unsolicited commercial e-mail messages must contain a label ("ADV:" or "ADV-ADULT") at the beginning of the subject line. The law takes effect in March 2003 and applies to messages sent to Minnesota residents through facilities located in Minnesota.

Missouri

A Missouri law enacted in June 2000 requires unsolicited commercial e-mail messages to contain opt-out instructions and contact information.

Nevada

In July 1997 Nevada became the first state to enact spam legislation. A second spam statute was enacted by the state in 1999 and amended in 2001. Under current Nevada law, it is illegal to send unsolicited commercial e-mail unless it is labeled or otherwise readily identifiable as an advertisement and includes the sender's name, street address, and e-mail address, along with opt-out instructions. The law prohibits all unsolicited e-mail that contains falsified routing information; that is sent with the intent to disrupt the normal operation or use of a computer, internet site, or e-mail address; or that is reasonably likely

to cause such disruption. The state also prohibits the distribution of software that is designed to falsify routing information.

North Carolina

Legislation approved in June 1999 makes it illegal to send unsolicited bulk commercial e-mail containing falsified routing information, if the sender thereby violates a provider's policies. The law applies to e-mail sent into or within the state.

Ohio

An Ohio law approved in August 2002 (effective November 2002) requires unsolicited commercial e-mail messages to contain the sender's name, address, and e-mail address, along with opt-out instructions, and requires senders to honor out-out requests; these requirements do not apply to messages sent based upon a "direct referral" from another person. It is illegal to forge the sender's address or other routing information in commercial e-mail messages. The law also enables a provider to sue a sender of commercial e-mail for violating the provider's policies if (1) the sender had actual notice of such policies, or (2) the policies were posted on the provider's web site and were communicated electronically to the sender's computer.

Oklahoma

An Oklahoma law approved in June 1999 makes it illegal to send an e-mail message that contains false or missing routing information, or to distribute software designed to falsify routing information. A court may exercise personal jurisdiction over a nonresident who sends a message to or through the network of a provider located in Oklahoma.

Oregon

Oregon has not enacted spam legislation, although an Oregon bar rule (Ore. Code Prof. Resp. DR 2-101(H)) requires attorneys who advertise via unsolicited e-mail targeted at potential clients to include the word "Advertisement" prominently in the message body.

Pennsylvania

A Pennsylvania law approved in June 2000 requires unsolicited commercial e-mail messages containing "explicit sexual materials" to contain a label ("ADV-ADULT") at the beginning of the subject line.

Rhode Island

Under legislation approved in July 1999, it is illegal to send unsolicited bulk e-mail with falsified routing information using a Rhode Island provider in violation of the provider's policies, or to distribute software designed to falsify routing information. A separate law requires unsolicited commercial e-mail messages to include opt-out instructions and contact information, and opt-out requests must be honored; it is illegal to send unsolicited commercial e-mail using a third party's domain name without permission or containing

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false routing information. This law applies to messages sent from a computer located in Rhode Island and to messages sent into the state, if the sender had reason to know that the recipient was a Rhode Island resident or the recipient had previously submitted an opt-out request to the sender.

South Dakota

Legislation approved in February 2002 prohibits sending commercial e-mail that misrepresents or obscures its point of origin or routing information, or contains a false or misleading subject line. The law applies if a message is sent from within South Dakota; if the sender knows that the recipient is a South Dakota resident; or if the registrant of the domain name contained in the recipient's address will confirm upon request that the recipient is a South Dakota resident. Unsolicited commercial e-mail messages must contain a label ("ADV:" or "ADV:ADLT") at the beginning of the subject line.

Tennessee

Under legislation approved in June 1999, unsolicited bulk commercial e-mail messages must include opt-out instructions and contact information, and opt-out requests must be honored. Certain messages must contain a label ("ADV:" or "ADV:ADLT") at the beginning of the subject line. The law applies to e-mail that is delivered to a Tennessee resident via a provider's facilities located in Tennessee. The distribution of software designed to falsify routing information is also prohibited. (Use "without authority" is defined to include sending unsolicited bulk e-mail in violation of a provider's policies, although the statute does not provide any consequences for such use.)

Utah

Legislation enacted in March 2002 applies to unsolicited commercial e-mail and unsolicited sexually explicit e-mail that is sent through a provider in Utah or to a resident of Utah. Such messages must disclose the sender's name and physical address, and the point of origin of the message; and must include a label ("ADV:" or "ADV:ADULT") at the beginning of the subject line, along with opt-out instructions. The law also prohibits the falsification of routing information in such messages.

Virginia

Legislation approved in March 1999 makes it illegal to send unsolicited bulk e-mail containing falsified routing information, if the sender thereby violates a provider's policies, or to distribute software designed to falsify routing information. A court may exercise personal jurisdiction over a nonresident who uses a computer or computer network located in Virginia.

Washington

Under a Washington state law enacted in March 1998 and amended in May 1999, it is illegal to send a commercial e-mail message that uses a third party's domain name

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without permission; that contains false or missing routing information; or with a false or misleading subject line. The law applies if a message is sent from within Washington; if the sender knows that the recipient is a Washington resident; or if the registrant of the domain name contained in the recipient's address will confirm upon request that the recipient is a Washington resident.

West Virginia

A law enacted in March of 1999 makes it illegal to send unsolicited bulk e-mail messages in violation of a provider's policies that use a third party's domain name without permission, misrepresent the point of origin or other routing information, have a false or misleading subject line, or contain sexually explicit materials. Each message must include the sender's name and return e-mail address, along with the date and time it was sent. It is also illegal to distribute software designed to falsify routing information. The law applies if a message is sent from a computer located in West Virginia, or if the sender knows or has reason to know that the recipient is a resident of West Virginia.

Wisconsin

In June 2001 Wisconsin enacted a statute that requires unsolicited commercial e-mail messages that contain obscene material or depict sexually explicit conduct to include the words "ADULT ADVERTISEMENT" in the subject line. A separate Wisconsin statute prohibits e-mail harassment (Wis. Stat. 947.0125), but does not appear to apply to most unsolicited bulk or commercial e-mail.

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Att #1

Testimony of Representative John Warner
House Bill 1388
Senate Judiciary Committee
11 March 2003

Mr. Chairman, Members of the Committee

House Bill 1388, also known as DO NOT SPAM is a companion to SB 2255, DO NOT CALL which received favorable consideration by this committee some weeks ago.

They are a response to a growing public concern about the development of technologies which allow the commercial marketplace to intrude upon the sanctuary of the home. They are also about allowing individual consumers to reclaim ownership of technological devices and services that they have purchased for their own use and convenience.

The bill that you have before you is based on the law adopted by South Dakota. It is in two parts. Section one regulates the privacy policies of Internet Service Providers or ISPs. Section two deals with the nature of commercial speech which is to be used in e-mail.

In a few minutes the Attorney General's office will propose a hog house amendment that removes section 1 dealing with the regulation of the ISPs and substitutes the language adopted by the State of Washington which has withstood legal challenge in the Washington Supreme Court for section 2.

Both Engrossed 1388 and the AG's amendment prohibit misleading electronic mail, prohibit the use of a third party's internet domain name without permission and prohibit false or misleading information in the subject line.

The Attorney General's amendment also includes language requiring the subject line of commercial messages to contain the letters ADV for commercial advertising or the letters ADV-ADULT in the case of material which does not appear in the Washington statute but does appear in HB 1388 that you have before you. The language used in the amendment is taken from California law which has withstood legal challenge at the Appeals Court level.

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AA #2



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47°

The Olympian, Olympia Washington
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Northwest

Oregon man receives first fine under Washington anti-spam e-mail law

THE ASSOCIATED PRESS

SEATTLE -- An Oregon man was ordered Friday to pay nearly \$100,000 in fines and court costs in the first case brought under Washington's tough law against "spam" e-mails.

Attorney General Christine Gregoire's office estimates that Jason Heckel, 28, of Salem, Ore., doing business as Natural Instincts, sent as many as 20,000 unsolicited e-mails to Washington residents in 1998. He was trying to sell a \$39.95 booklet called "How to Profit from the Internet."

The case was the first brought after the Legislature's 1998 move to ban commercial e-mail with misleading information in the subject line, invalid reply addresses or with disguised paths of transmission.

The state had sought fines of \$20,000 and payment of court and legal fees of more than \$140,000.

But King County Superior Court Judge Douglass North ruled that the state could only prove one violation of the law and cut the fine to \$2,000 and the legal fees by a third. Altogether Heckel now owes more than \$96,000.

"The point of the case is to uphold the statute, and we've done that," said Owen Clarke Jr., a senior assistant attorney general. "This case is not really about money."

Heckel didn't appear in court but sent a written statement.

"I did not knowingly attempt to send commercial e-mail to e-mail recipients who did not want them," Heckel wrote, describing a part-time operation run out of his parents' home. "I sold 17 copies of the booklet to Washington residents and made approximately \$680 from those sales. I have never had a desire to break any valid law in the state of Washington or any other jurisdiction."

Heckel's lawyer Dale Crandall said he plans to appeal. He argued that individual state laws against Internet spam would violate the U.S. Constitution's protection of interstate commerce.

"It would create a patchwork of laws that would be impossible to keep up with," Crandall said. Crandall also condemned the state for making an example of Heckel,

On the Web

Attorney General
- **Christine Gregoire:**
www.wa.gov/ago/
Washington
Association of
Internet Service
Providers:
www.waisp.org

<http://www.theolympian.com/home/news/20021019/northwest/22671.shtml>

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who he said cooperated with state officials and couldn't easily defend himself from hundreds of miles away.

"Why did they go after Jason Heckel?" Crandall asked. "Why not a pornographer? Why not someone in Washington? They thought it was an easy slam-dunk."

State officials received 20 complaints from 17 different people about Heckel's e-mails, Clarke said.

The fine was levied for a single violation of the state's Consumer Protection Act, which is linked to the anti-spam law. That violation involved someone who received Heckel's solicitations twice -- once before state officials warned him about the law and once afterward.

The state didn't try to use a separate fining authority in the anti-spam law that could have cost Heckel \$500 for each e-mail he sent. Clarke said that law requires the state to prove that the spammer knew he was sending e-mails to Washington users.

"We only had proof of that before the court with respect to one consumer," Clarke said.

Enforcement of the law was put on hold when Heckel appealed its constitutionality. He won at the trial court level in 2000, but was overturned by the Washington Supreme Court last year. The U.S. Supreme Court declined to hear the case, which isn't uncommon when there hasn't been a final judgment.

Spam e-mails, while irksome for individual users, are particularly troublesome for Internet service providers, corporations and others who maintain large e-mail systems.

Gary Gardner, executive director of the Washington Association of Internet Service Providers, one of the anti-spam law's backers, said he hoped the fine is the beginning of a new push to enforce the law.

"Our goal was never to make any money on this stuff," Gardner said. "It's to put these people out of business."

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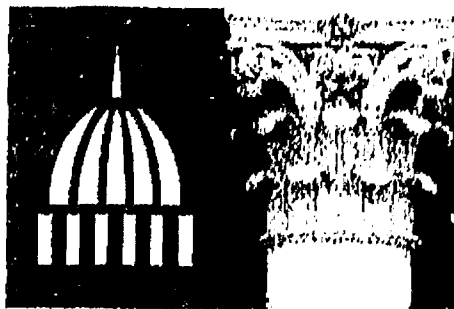
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National Conference of State Legislatures

LEGISBRIEF

BRIEFING PAPERS ON THE IMPORTANT ISSUES OF THE DAY

OCTOBER 2002

Vol. 10, No. 40

The Problem of Spam: Unsolicited Commercial E-Mail

By Pam Greenberg

Unsolicited commercial or bulk e-mail advertisements are called "spam."

Unsolicited commercial or bulk e-mail advertisements—spam—are an easy way to reach huge numbers of consumers at very little cost to the sender. Messages can be sent to thousands with only a computer and an Internet connection. Recipients of spam overwhelmingly dislike it—a GartnerGroup study found that 83 percent of those surveyed find it time-consuming, an invasion of privacy or offensive. The two most prevalent types are get-rich-quick schemes and adult-oriented or pornographic materials, which together amount to almost two-thirds of all spam.

Spam costs Internet service providers, businesses and recipients.

While spam costs little for the sender, it has significant costs for Internet service providers (ISPs), businesses and recipients. ISPs pay for extra bandwidth to make up for what is eaten up by junk e-mail, the processing and storage space it occupies, and for lost customers who change providers to avoid spam. Businesses pay for software to filter out spam and in time spent by employees to sort through e-mail. Recipients pay through costs passed along by ISPs and time spent dealing with spam.

More and more questionable marketing practices are being used.

While legitimate businesses can responsibly use e-mail to advertise their products and services, an increasing number of operations use questionable marketing practices, such as:

- Using misleading subject lines—language that is unrelated to the content of the message.
- Routing e-mail messages through third party computers or forging message headers so that they appear to be coming from another organization or business.
- Using invalid return addresses or contact information in the text of messages, so that clicking on the link to unsubscribe simply verifies that the spammer has found a valid e-mail address.
- "Harvesting" e-mail addresses—collecting masses of addresses from users' posts to on-line chat rooms, Usenet newsgroups, other on-line discussion groups or listservs, or searching Web sites that post e-mail addresses.

Twenty-six states have enacted laws regulating spam.

State Actions

Twenty-six states have enacted laws regulating spam. These laws generally:

- Prohibit misrepresenting or falsifying an e-mail's origin or routing information, using a third party's Internet address without permission, or including misleading information in the subject line of a message. Some states also prohibit the sale or distribution of software designed solely to falsify or forge an e-mail's point of origin or routing information.
- Require that certain information, such as a toll-free telephone number or valid e-mail address, be included in the message so that recipients can opt out of receiving any future posts.
- Require labeling in the subject line of a message to indicate whether it contains an advertisement (e.g., ADV:) or materials that may be viewed, purchased or possessed only by adults (e.g., ADV:ADLT).

Court Challenges. Court challenges to state spam laws argue that they violate the Commerce Clause of the U.S. Constitution because they involve interstate commerce and seek to regulate conduct

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outside of state borders. Some states, however, have included provisions limiting the reach of their law. Some limit it to those who initiate it from a computer located in the state or to an e-mail address that the sender knows is held by a state resident. In addition to Commerce Clause concerns, laws that require labeling of e-mail have also raised questions about violations of free speech.

Two recent court decisions have bolstered state efforts to regulate spam. California's First District Court of Appeals in San Francisco in January upheld the state's anti-spam law. The state Supreme Court in April declined to hear an appeal to the decision. The California law requires unsolicited advertising e-mail messages to be labeled if they contain advertising (ADV:) or adult materials (ADV:ADLT). The U.S. Supreme Court in October 2001 declined to hear an appeal of a Washington Supreme Court decision that upheld that state's anti-spam law. The Washington law was designed to protect Internet users from deceptive commercial e-mail, such as those with a false header, a misleading subject line or a third party's address used without permission. Even if state laws withstand court challenges, enforcement remains difficult. Criminal prosecutions under existing laws are rare—the anonymity of the Internet makes it time-consuming and expensive for law enforcement officials to track down those who violate spam laws.

There are technological approaches to fighting spam. E-mail software provides ways to block or filter out messages from specified senders. Individuals can use an anonymous or alias e-mail address when posting messages to Usenet or other discussion groups. Most large ISPs have established policies prohibiting sending spam on their networks and also help their customers fight the problem.

Self-regulation efforts also are under way. The Direct Marketing Association sets guidelines for its members' on-line commercial solicitations. The association also sponsors a free e-mail preference service that allows consumers to indicate that they do not want to receive unsolicited commercial e-mail. TRUSTe, a nonprofit organization known for its privacy certification and seal program for Web sites, and ePrivacy Group, a consulting company, have developed a certification and seal program for e-mail. Messages sent by a "trusted sender-certified company" will display a unique seal to identify it as coming from a sender that abides by legitimate practices, as outlined by TRUSTe.

Federal Action

At least eight bills in the 107th Congress target spam, including legislation to prohibit false headers or deceptive subject lines or require labeling or opt-out information in commercial or bulk e-mail messages. The Federal Trade Commission (FTC) has used existing consumer protection laws to crack down on fraudulent spammers. The FTC joined forces with Canadian and law enforcement agencies in eight states in April to issue complaints against spammers who sent illegal chain letter schemes or used other fraudulent practices. This "Netforce" partnership also sent warning letters to spammers who purported to allow recipients to remove their name from spam lists, but, when tested, did not.

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Sorkin, David E. *Spam Laws*. <http://www.spamlaws.com/>

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www.ncsl.org/programs/lis/clp/spam-home.htm

Two recent court decisions have bolstered state efforts.

Self-regulation efforts also are under way.

At least eight bills in the 107th Congress target spam.

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HH # 4

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1388
SENATE JUDICIARY COMMITTEE
JOHN T. TRAYNOR, CHAIRMAN
MARCH 11, 2003

Page 1, line 1, replace "chapters" with "chapter"

Page 1, line 1, remove "and 51-28"

Page 1, line 2, remove "Internet privacy and"

Page 1, line 7, after the semi-colon replace the remainder of the bill with:

1. "Assist the transmission" means actions taken by a person to provide substantial assistance or support which enables any person to formulate, compose, send, originate, initiate, or transmit a commercial electronic mail message when the person providing the assistance knows or consciously avoids knowing that the initiator of the commercial electronic mail message is engaged, or intends to engage, in any practice that violates chapter 51-15.
2. "Commercial electronic mail message" means an electronic mail message sent for the purpose of promoting real property, goods, or services for sale or lease. It does not mean an electronic mail message to which an interactive computer service provider has attached an advertisement in exchange for free use of an electronic mail account, when the sender has agreed to such an arrangement.
3. "Electronic mail address" means a destination, commonly expressed as a string of characters, to which electronic mail may be sent or delivered.
4. "Initiate the transmission" refers to the action by the original sender of an electronic mail message, not to the action by any intervening interactive computer service that may handle or retransmit the message, unless such intervening interactive computer service assists in the transmission of an electronic mail message when it knows, or consciously avoids knowing, that the person initiating the transmission is engaged, or intends to engage, in any act or practice that violates chapter 51-15.
5. "Interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.
6. "Internet domain name" refers to a globally unique, hierarchical reference to an Internet host or service, assigned through centralized Internet naming authorities, comprising a series of character strings separated by periods, with the right-most string specifying the top of the hierarchy.
7. "Person" means a person, corporation, partnership, or association.

51-27-02. False or misleading messages prohibited.

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1. A person may not initiate the transmission, conspire with another to initiate the transmission, or assist the transmission, of a commercial electronic mail message from a computer located in North Dakota or to an electronic mail address that the sender knows, or has reason to know, is held by a North Dakota resident that:
 - a. Uses a third party's internet domain name without permission of the third party, or otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or
 - b. Contains false or misleading information in the subject line.
2. For purposes of this section, a person knows that the intended recipient of a commercial electronic mail message is a North Dakota resident if that information is available, upon request, from the registrant of the internet domain name contained in the recipient's electronic mail address.

51-27-03. Unpermitted or misleading electronic mail -- Violation of consumer protection law.

1. It is a violation of chapter 51-15 to conspire with another person to initiate the transmission or to initiate the transmission of a commercial electronic mail message that:
 - a. Uses a third party's internet domain name without permission of the third party, or otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or
 - b. Contains false or misleading information in the subject line.
2. It is a violation of chapter 51-15 to assist in the transmission of a commercial electronic mail message, when the person providing the assistance knows, or consciously avoids knowing, that the initiator of the commercial electronic mail message is engaged, or intends to engage, in any act or practice that violates chapter 51-15.

51-27-04. Subject Disclosure -- Violation of consumer protection law.

1. The subject line of a commercial electronic mail message must include "ADV" as the first characters. If the message contains information that consists of material of a sexual nature that may only be viewed by an individual eighteen years of age and older, the subject line of the message must include "ADV-ADULT" as the first characters.
2. For purposes of this section, "commercial electronic mail message" does not include a message if the recipient has consented to receive or has solicited electronic mail messages from the initiator; from an organization using electronic mail to communicate exclusively with its members; from an entity which uses electronic mail to communicate exclusively with its employees or contractors; or if

there is a business or personal relationship between the initiator and the recipient.

3. For purposes of this section, "business relationship" means a prior or existing relationship formed between the initiator and the recipient, with or without an exchange of consideration, on the basis of an inquiry, application, purchase, or services offered by the initiator or an affiliate or agent of the initiator. "Affiliate" means a person that directly or indirectly controls, is controlled by, or is under common control with a specified person.
4. It is a violation of chapter 51-15 to conspire with another person to initiate the transmission or to initiate the transmission of a commercial electronic mail message that violates this section.

51-27-05. Toll-free number.

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

51-27-06. Violations -- Damages.

1. Damages to the recipient of a commercial electronic mail message sent in violation of this chapter are five hundred dollars, or actual damages, whichever is greater.
2. Damages to an interactive computer service resulting from a violation of this chapter are one thousand dollars, or actual damages, whichever is greater.

51-27-07. Blocking of commercial electronic mail by interactive computer service -- Immunity from liability.

1. An interactive computer service may, upon its own initiative, block the receipt or transmission through its service of any commercial electronic mail that it reasonably believes is, or will be, sent in violation of this chapter.
2. An interactive computer service may not be held liable for any action voluntarily taken in good faith to block the receipt or transmission through its service of any commercial electronic mail which it reasonably believes is, or will be, sent in violation of this chapter.

51-27-08. Nonexclusive causes of action, remedies and penalties. The remedies, duties, prohibitions and penalties of this chapter are not exclusive and are in addition to all other causes of action, remedies and penalties in chapter 51-15, or otherwise provided by law.

51-27-09. Relationship to federal law. If federal law is enacted that regulates false, misleading, or unsolicited commercial electronic mail messages but does not preempt state law on the subject, the federal law supersedes any conflicting provision of this chapter.

SECTION 2. EXPIRATION DATE. The governor shall certify to the legislative council the effective date of federal legislation that preempts state regulation of false, misleading, or unsolicited commercial electronic mail messages. Chapter 51-27 expires upon the effective date contained in the certification of federal legislation that preempts state regulation of false, misleading, or unsolicited commercial electronic mail messages.

Renumber accordingly

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March 7, 2003

Honorable John T. Traynor, Chair
Senate Judiciary Committee
State Capitol, 600 E Boulevard Ave
Bismark, ND 58505-0360

Dear Senator Traynor:

My name is Emily Hackett and I am the state director of the Internet Alliance. I hope to attend next Tuesday's hearing regarding HB 1388, being considered by your committee. Here I offer you my thoughts on the bill in advance. My members appreciate your committee's interest in this important issue and would like to use this letter to ask that you reject the bill as drafted and instead advance email legislation that targets the most egregious, fraudulent spammers.

By way of introduction, the Internet Alliance (IA) is the leading Internet trade association operating in the states. Leading members of the IA include: AOL Time Warner, FISPA, IBM, eBay, TRUSTe, VeriSign and others.

The IA also suggests that you consider working with industry and supporting the alternative programs and policies discussed below. Together we must teach consumers how to use technology and common sense to protect their own personal privacy online.

The IA shares the legitimate concerns many consumers have about their privacy online and the annoying spam they find in their email inbox. We believe that state regulation of Internet privacy and email will not work, be impossible and costly to enforce, and ultimately, confuse consumers.

Internet Privacy

The IA is concerned because HB 1388 would create a North Dakota privacy law that targets Internet service providers (ISPs). We believe state laws regulating Internet privacy will not work and, in fact, may undermine consumer trust and confidence in the Internet. A state law regulating ISPs does little to protect a consumer's privacy online. ISPs with customers in North Dakota are not the threat. The Internet is vast and the real online outlaws are often out of state, even out of the country, and beyond the reach of state regulators. A privacy law targeting ISPs suggests to consumers that somehow they are more safe online. This is not true, as the real outlaws would remain untouched.

However, the IA agrees that online consumers need online privacy protection. They should be able to set the level of privacy they want when surfing the Web. Only technology can make that

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possible. Only an educated consumer, armed with technology can establish real online privacy protection. The tools exist today to protect your privacy online.

Consumers can install software that makes it impossible to see where you surf. Software can block cookies, Java, JavaScript, and other tracking methods. It will encrypt cookies allowing you to safely access and use the Websites that require cookies. It will even encrypt your page requests so your ISP cannot log them. Microsoft offers a product called P3P that allows consumers to build privacy parameters into its browser that will keep consumers away from Websites that do not conform to the privacy information practices they seek. This is just one of many software packages available to help consumers protect their privacy.

The Internet industry has developed best practices and set up privacy seal of approval programs that consumers can look for when they visit a site. Today there are several major privacy seal organizations including: TRUSTe, an Internet Alliance member.

The IA believes industry self-regulation is a sound way to assure that consumer privacy and personally identifiable information are protected online. In a rapidly changing, technologically driven, and highly innovative online commercial environment, consumers are best served by a voluntary regulatory scheme that is nimble and can adapt as the industry and its products change.

There are many advantages to self-regulation:

- Self-regulatory regimes can react almost immediately to newly discovered problems. Within weeks of the discovery of a new kind of problem, seal programs can be modified and industry organizations can quickly alter their standards to meet new challenges. State legislative and regulatory solutions are cumbersome in comparison.
- Enforcement is swift. Violations of self-regulatory regimes are often voluntarily resolved nearly overnight. Compare that to the time-consuming process of undertaking enforcement by litigation. Litigation encourages multi-year, protracted denials of wrongdoing.
- Self-regulatory regimes are industry-wide in scope and uniform across geographical boundaries. Legislated solutions vary from state to state.

Unsolicited Commercial Email

We applaud efforts elsewhere in this bill to go after the real cyber criminals. We support the prohibition against false email headers and footers, which cite the origin of an email, and also prohibitions on placing false or misleading information in the subject line. Additionally, it should be illegal to sell or distribute software that is designed to falsify electronic mail transmissions or other routing information.

Technology can help consumers keep spam from ever reaching their inbox. Much of it is blocked before consumers ever see it. For example, AOL recently reported it blocks 780 million spam emails each day, which are 100 million more emails than it delivers.

Donna Hall
Operator's Signature

10/3/03
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For the spam that gets by the ISP, consumers have several ways they can divert or block it. Email services like Yahoo Mail and Hotmail offer free institutional screens that automatically divert spam and bulk mail away from your inbox and place it in a bulk mailbox. You never need to see or open this unwanted email. If you ignore it, it remains in your bulk email box and is automatically deleted.

Other email services like Microsoft Outlook will automatically highlight spam and bulk mail in a different color so you can delete it without even looking at the subject line. Additionally, all services, including AOL, allow you to install personal screens built into your email browser that let you automatically delete spam and bulk mail by keywords, by sender or by address. These systems give consumers a foolproof way to banish spam and bulk mail from their inbox with NO cost to the state or any consumer.

Thank you for taking the time to review this letter. Again, I ask that you reject the ISP privacy provisions contained in HB 1388. Please let me know if I can be of any further assistance.

Sincerely,

Emily Hackett

Att #6

Testimony of Morgan Hayley Long

**On behalf of the American Legislative Exchange Council
1129 20th St., NW,
Washington, DC 20036
202/466-3800 ~ www.alec.org**

Before the North Dakota State Judiciary Committee

March 11, 2003

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today before your distinguished Committee about House Bill 1388, regarding internet privacy and commercial electronic mail solicitation.

Background

I am testifying today on the behalf of the American Legislative Exchange Council, the nation's largest bipartisan, individual membership association of state legislators, numbering over 2,400.¹ ALEC's National Task Forces provide a forum for legislators and the private sector to discuss issues, develop policies, and draft model legislation.

By way of background, I am the Telecommunications & Information Technology Task Force Director at the American Legislative Exchange Council. At ALEC, I am charged with the role of helping our members develop model legislation that protects individual liberty, secures free-markets, and seeks limited government. I also frequently write on subjects involving the field of technology. Before joining ALEC, I worked in the Arizona State Senate and served as an economic research analyst at the Federal Trade Commission. I received a Bachelor of Arts from the University of Arizona, Summa Cum Laude.

Online Privacy: Is Legislation Warranted?

One of the primary roles of ALEC is to provide a forum where legislators can identify policy problems and formulate the appropriate resolution, either through education, legislation, or restraint. Let me provide you the considerations our members took into account when examining online privacy legislation similar to HB 1388. After reviewing online privacy legislation through national workshops forums, and task force

¹ For more information, please visit ALEC's Internet website, www.alec.org.

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Dennis Hallworth
Operator's Signature

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discussions, our members expressed several concerns about the unintended consequences that may arise from such legislation, primarily its ability to appropriately protect personal privacy and its electronic commerce ramifications.

Our members determined that legislation, similar HB 1388, leaves industry and consumers in precarious positions, opening internet service providers to massive class action lawsuits and inhibiting consumer choice from enriched goods and services. They have identified a more constructive approach that has already taken root in commercial practices through market-based initiatives to ensure the safety of private information. Leave the market alone and e-commerce will prosper in direct relation to consumers' demands.

Responding to these market pressures, industry has already taken self-led regulatory measures to protect consumer privacy. The Progress and Freedom Foundation has recently studied the privacy practices of commercial sites on the Internet. Its findings: The online market has responded favorably and swiftly to consumer concerns regarding the collection and use of personal information.² Among other privacy improvements, the study found that Web sites are collecting less information and privacy notices are more prevalent, prominent and complete.³ Market forces have encouraged commercial Web sites to reduce the use of third party cookies, to track Internet surfing behavior, and third party sharing of information.⁴ What this study demonstrates is that the market is responding to consumer concerns—without burdensome government regulation.

During national ALEC's discussions on online privacy legislation similar to that which is before you, Federal Trade Commissioner Swindle stated that, "the market place is working" and that "industry is responding to consumer and public demands, and progress is being made through better policies, practices and privacy enhancing technology."

Unintended Consequences

ALEC's primary concerns regarding HB 1388 are its exceptionally burdensome privacy requirements and its failure to correctly identify and address the problem of internet privacy. The way the bill is currently drafted, there are no protections against fraudulent or frivolous lawsuits, because the bill enforcement would be through private class action lawsuits with statutory damages of \$500 per violation—regardless of whether the consumer suffers any harm, if privacy concerns were actually raised, or even if the personal information did not come from an internet service provider. How many could resist the temptation to sue their internet provider, absent of any requirement to provide proof of a privacy violation, under this legislation?

² Adkinson, William, et al. *Privacy Online: A Report on the Information Practices and Policies of Commercial Web Sites*. Progress & Freedom Foundation. Special Report March 2002.

³ Ibid.

⁴ Ibid.

Deanna Hall Smith
Operator's Signature

10/3/03
Date

Under the bill's current language, even a computer hacker or pedophile could sue an internet service provider. Sections 5 and 6 would undermine the federal requirement for internet service providers to report evidence of child pornography crimes to the National Center for Missing and Exploited Children (sections 5 and 6).⁵ Meanwhile, computer hackers could sue if they claim that the internet service provider disclosed more information than "necessary to report a violation" of its anti-hacking rules (section 6(b)(ii)).

The impact on the North Dakota electronic marketplace should be weighed against the merits of this legislation. It opens a floodgate of lawsuits to those who wish to provide internet service to your constituents, it exponentially increases the cost to serve those constituents through its regulation of disclosures, consumer access and security. In addition, this bill could very well cripple business-to-business services in your state.

ALEC's Approach to Spam

While HB 1388 has severe implications, its intent is genuine. This legislation was drafted with the intent to protect North Dakotans from the rising flood of unsolicited bulk electronic mail, spam. Spam continues to inundate our email boxes, too often with fraudulent and unsightly messages. Researchers estimate that spam has grown from 8 percent of all Internet mail to about 40 percent. Not only is the amount of spam increasing, but the deceptive skills of spammers are also on a sharp rise. From placing illegally obtained logos of reputable business in fraudulent financial service email messages, to forging e-mail headers, illicit junk email is claiming victims.

Addressing both the rise in fraudulent spam and theft of computer services, ALEC has drafted legislation that provides prosecutors with the necessary tools to stop deceptive spammers—taking perpetrators off-line. With millions of people falling victim to spam, ALEC's model Computer Protection ACT provides legal penalties for illicit spam while protecting legitimate businesses.

If the attempt of HB 1388 is to curb spam, I urge to consider ALEC's model legislation—keeping the doors to electronic commerce open and protecting both consumers and business.

Conclusion

When you consider online privacy legislation, please remember Commissioner Swindle's heed, "the marketplace is working" due to the creativity of self-led industry regulation. However, "legislation, especially broad and burdensome regulation, will likely diminish the creativity and investment in finding best solutions." Thank you for your time this morning. I would be happy to take any questions you may have.

⁵ Section 3 of HB 1388 states that the bill does not limit law enforcement authority to obtain information, but does not relieve internet service providers from liability if they provide the information.

Model Legislation

ALEC Model Legislation

Personal and Commercial Computer Protection Act

An Act to amend and reenact [insert appropriate sections]

Be it enacted by state of [insert state]:

1. That [insert appropriate sections] are amended and reenacted as follows:

SECTION [insert appropriate section]. When personal jurisdiction over person may be exercised.

SECTION [insert appropriate section] Definitions.

For purposes of this article:

A. "Computer" means an electronic, magnetic, optical, hydraulic or organic device or group of devices which, pursuant to a computer program, to human instruction, or to permanent instructions contained in the device or group of devices, can automatically perform computer operations with or on computer data and can communicate the results to another computer or to a person. The term "computer" includes any connected or directly related device, equipment, or facility which enables the computer to store, retrieve or communicate computer programs, computer data or the results of computer operations to or from a person, another computer or another device.

B. "Computer data" means any representation of information, knowledge, facts, concepts, or instructions which is being prepared or has been prepared and is intended to be processed, is being processed, or has been processed in a computer or computer network. "Computer data" may be in any form, whether readable only by a computer or only by a human or by either. Including, but not limited to, computer printouts, magnetic storage media, punched cards, or stored internally in the memory of the computer.

C. "Computer network" means a set of related, remotely connected devices and any communications facilities including more than one computer with the capability to transmit data among them through the communications facilities.

D. "Computer operation" means arithmetic, logical, monitoring, storage or retrieval functions and any combination thereof, and includes, but is not limited to, communication with, storage of data to, or retrieval of data from any device or human hand manipulation of electronic or magnetic impulses. A "computer operation" for a particular computer may also be any function for which that computer was generally designed.

E. "Computer program" means an ordered set of data representing coded instructions or statements that, when executed by a computer, causes the computer to perform one or more computer operations.

AMERICAN LEGISLATIVE EXCHANGE COUNCIL

ALEC

1129 20th Street N.W. ■ Suite 500 ■ Washington, D.C. 20036 ■ Tel. (202) 466-3000 ■ Fax (202) 466-3001 ■ www.ALEC.org

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F. "Computer services" means computer time or services, including data processing services, Internet services, electronic mail services, electronic message services, or information or data stored in connection therewith.

G. "Computer software" means a set of computer programs, procedures and associated documentation concerned with computer data or with the operation of a computer, computer program, or computer network.

H. "Electronic mail service provider" means any person who (i) is an intermediary in sending or receiving electronic mail and (ii) provides to end-users of electronic mail services the ability to send or receive electronic mail.

I. "Financial Instrument" includes, but is not limited to, any check, draft, warrant, money order, note, certificate of deposit, letter of credit, bill of exchange, credit or debit card, transaction authorization mechanism, marketable security, or any computerized representation thereof.

J. "Owner" means an owner or lessee of a computer or a computer network or an owner, lessee, or licensee of computer data, computer programs, or computer software.

K. "Person" shall include any individual, partnership, association, corporation or joint venture.

L. "Property" shall include:

1. Real property;
2. Computers and computer networks;
3. Financial instruments, computer data, computer programs, computer software and all other personal property regardless of whether they are:
 - a. Tangible or intangible;
 - b. In a format readable by humans or by a computer;
 - c. In transit between computers or within a computer network or between any devices which comprise a computer; or
 - d. Located on any paper or in any device on which it is stored by a computer or by a human; and
4. Computer services.

M. A person "uses" a computer or computer network when he:

1. Attempts to cause or causes a computer or computer network to perform or to stop performing computer operations;
2. Attempts to cause or causes the withholding or denial of the use of a computer, computer network, computer program, computer data or computer software to another user; or
3. Attempts to cause or causes another person to put false information into a computer.

N. A person is "without authority" when (i) he has no right or permission of the owner to use a computer or he uses a computer in a manner exceeding such right or permission or (ii) he uses a computer, a computer network, or the computer services of an electronic mail service provider to transmit unsolicited bulk electronic mail in contravention of the authority granted by or in violation of the policies set by the electronic mail service provider. Transmission of electronic mail from an organization to its members shall not be deemed to be unsolicited bulk electronic mail.

[Insert appropriate section] Computer trespass; penalty.

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A. It shall be unlawful for any person to use a computer or computer network without authority and with the intent to:

1. Temporarily or permanently remove, halt, or otherwise disable any computer data, computer programs, or computer software from a computer or computer network;
2. Cause a computer to malfunction, regardless of how long the malfunction persists;
3. Alter or erase any computer data, computer programs, or computer software;
4. Effect the creation or alteration of a financial instrument or of an electronic transfer of funds;
5. Cause physical injury to the property of another;
6. Make or cause to be made an unauthorized copy, in any form, including, but not limited to, any printed or electronic form of computer data, computer programs, or computer software residing in, communicated by, or produced by a computer or computer network; or
7. Falsify or forge electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited bulk electronic mail through or into the computer network of an electronic mail service provider or its subscribers.

B. It shall be unlawful for any person knowingly to sell, give or otherwise distribute or possess with the intent to sell, give or distribute software which (i) is primarily designed or produced for the purpose of facilitating or enabling the falsification of electronic mail transmission information or other routing information; (ii) has only limited commercially significant purpose or use other than to facilitate or enable the falsification of electronic mail transmission information or other routing information; or (iii) is marketed by that person or another acting in concert with that person with that person's knowledge for use in facilitating or enabling the falsification of electronic mail transmission information or other routing information.

C. Any person who violates this section shall be guilty of computer trespass, which offense shall be punishable as a Class [Insert appropriate class] misdemeanor. If there is damage to the property of another valued at [Insert appropriate value] or more caused by such person's reckless disregard for the consequences of his act in violation of this section, the offense shall be punished as a Class [Insert appropriate class] misdemeanor. If there is damage to the property of another valued at [Insert appropriate value] or more caused by such person's malicious act in violation of this section, the offense shall be punishable as a Class [Insert appropriate class] felony.

D. Nothing in this section shall be construed to interfere with or prohibit terms or conditions in a contract or license related to computers, computer data, computer networks, computer operations, computer programs, computer services, or computer software or to create any liability by reason of terms or conditions adopted by, or technical measures implemented by, a [Insert state] based electronic mail service provider to prevent the transmission of unsolicited electronic mail in violation of this article.

SECTION [Insert appropriate Section] Civil relief; damages.

A. Any person whose property or person is injured by reason of a violation of any provision of this article may sue therefor and recover for any damages sustained and the costs of suit. Without limiting the generality of the term, "damages" shall include loss of profits.

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B. If the injury arises from the transmission of unsolicited bulk electronic mail, the injured person, other than an electronic mail service provider, may also recover attorneys' fees and costs, and may elect, in lieu of actual damages, to recover the lesser of ten dollars for each and every unsolicited bulk electronic mail message transmitted in violation of this article, or [insert appropriate level] per day. The injured person shall not have a cause of action against the electronic mail service provider which merely transmits the unsolicited bulk electronic mail over its computer network.

C. If the injury arises from the transmission of unsolicited bulk electronic mail, an injured electronic mail service provider may also recover attorneys' fees and costs, and may elect, in lieu of actual damages, to recover the greater of ten dollars for each and every unsolicited bulk electronic mail message transmitted in violation of this article, or [insert appropriate level] per day.

D. At the request of any party to an action brought pursuant to this section, the court may, in its discretion, conduct all legal proceedings in such a way as to protect the secrecy and security of the computer, computer network, computer data, computer program and computer software involved in order to prevent possible recurrence of the same or a similar act by another person and to protect any trade secrets of any party.

E. The provisions of this article shall not be construed to limit any person's right to pursue any additional civil remedy otherwise allowed by law.

The Telecommunications & Information Technology Task Force Approved this legislation on July 28, 2000 at the 27th Annual Meeting.

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Operator's Signature

10/3/03
Date



US Internet Service Provider Association

1330 Connecticut Avenue, N.W. ♦ Washington, DC 20036 ♦ 202.662.3616 (v) ♦ 202.251.0604 (f)

March 11, 2003

The Honorable John T. Traynor
President Pro Tempore
North Dakota Senate
P.O. Box 838
Devils Lake, ND 58301

Dear Senator Traynor:

As a trade association representing major US Internet Service Providers (AOL Inc., Cable & Wireless, EarthLink, eBay, SBC Communications, Tele globe, Verizon Online, and WorldCom), we are writing to urge you to remove Section 1, the Internet Service Providers privacy provisions, from H.B. 1388. This proposed legislation, if passed, would impose significant burdens on North Dakota's Internet Service Provider industry, resulting in many unintended consequences.

We believe that H.B. 1388 discriminates against ISPs by singling them out for burdensome strict-liability consumer opt-in and access requirements. These same burdens do not apply to businesses operating offline, to ecommerce websites, or to governmental agencies. These latter industries, in fact, gather and share far more personally identifiable information than Internet Service Providers. Instead of addressing consumers' privacy expectations in a fair and even-handed way, H.B. 1388 targets ISPs with regulation that will have little to no effect on privacy.

If enacted, H.B. 1388 would create a number of unintended consequences that may erode an ISP's ability to fully cooperate with law enforcement and government agencies on a variety of criminal investigations and may actually decrease the level of security surrounding customer information. The following are three examples of law enforcement cooperation and security issues raised by the legislation:

- H.B. 1388's prohibition against ISPs disclosing information without a subpoena or court order or to anyone other than a law enforcement official will interfere with an ISP's ability to report child pornography to the proper authorities. Under current federal law, ISPs are required to disclose evidence of child pornography violations to the National Center for Missing and Exploited Children (NCMEC). Although the bill contains an exception regarding the authority of law enforcement to obtain information, it does not apply to NCMEC (an important national coordination group for crimes

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against children). If enacted, H.B. 1388 could expose ISPs who comply with this federal statute to lawsuits by child pornographers.

- It is important that ISPs have the ability to disclose information quickly to law enforcement and government agencies to help respond to criminal and terrorist threats. Congress felt so strongly about this that it has enacted a provision allowing ISPs to voluntarily disclose customer information to a government agency in emergency situations. H.B. 1388 does not contain clear authority to release customer information in such circumstances and thus could threaten Congress's intent in authorizing such disclosures. Instead, it holds ISPs liable for such disclosures, and could discourage the sending of key information on possible terrorist threats. ISPs should not be penalized for sharing critical information related to criminal activity to appropriate government agencies.
- H.B. 1388 requires ISPs to provide customers with all information in their possession about that customer. This access requirement could undermine the privacy of consumers because it is vulnerable to abuse by fraudsters and spammers who can use the provision to obtain information about ISP customers that the ISP would otherwise refuse to disclose. For example, a fraudster could pose as a consumer and threaten ISPs with litigation unless they revealed consumers' account information, including credit card and other transactional records. Minnesota, the only state to enact a statute of this sort, has had to begin consideration of amendments to cure these flaws, even though its law only took effect two weeks ago.

Protecting consumer privacy is a major priority for US ISPA members. Members continually develop and implement self-regulatory approaches to protect consumer privacy, as well as spend millions of dollars to combat privacy-invading spam through technical and legal means. No other industry has taken a more proactive approach to protecting consumers' privacy on-line.

We strongly urge you to remove Section 1, the Internet Service Providers privacy provision from H.B. 1388. We thank you for considering our views and would be glad to discuss our concerns with you in further detail.

Very truly yours,

Stewart Baker
General Counsel

Cc: Senate Judiciary Committee

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Deanna Hall Smith
Operator's Signature

10/3/03
Date

April 5, 2002

The Honorable Senator Steve Kelley
321 Capitol, 75 Constitution Ave
St. Paul, MN 55155-1606

Dear Senator Kelly:

As leading companies and associations, spanning not only the e-commerce realm, but from across the business spectrum, both from Minnesota and around the country, we are writing to urge you to remove Article 1, the on-line privacy provisions, from S.F. 2908 in conference. This proposed legislation, if passed, would represent the first legislative regulation of Internet privacy by any state in the nation, and would impose significant burdens on Minnesota businesses and consumers in the on-line world.

As you know, this legislation moved through the Minnesota House very quickly, and our companies and associations did not have the opportunity to raise our concerns in a timely fashion. We believe that the broad, unintended consequences of the "privacy" provisions of the legislation would have very serious consequences for businesses and consumers both in Minnesota and nation-wide, and we appreciate your consideration of our views after House and Senate floor consideration.

In particular, S.F. 2908 would:

- Create massive exposure to class action lawsuits for online service providers ("OSPs") and e-commerce companies. For example, if an e-commerce company is victimized by a hacker attack, the plaintiffs' bar would be able to sue the e-commerce site for statutory damages that far exceed what would be available against the hacker.
- Increase liability on OSPs and e-commerce sites, interfering with the clear intent of the anti-spam provisions by hindering the OSP's ability to respond to hacker and spam attacks. It would also stop OSPs from voluntarily reporting serious threats to health or safety through the imposition of liability on those sites; and
- Discriminate against e-commerce by singling out online companies for burdensome strict liability consumer opt-in and access requirements, as well as for strict liability for inadvertent violations. These burdens do not apply to companies that operate offline.

We believe that privacy is fundamental to the continued growth of the Internet, and that consumer trust is essential. That is why the business community has taken the lead in crafting ideas and solutions to enhance our customers' on-line experience, such as self-regulatory efforts and privacy technologies that supplement over 30 federal privacy laws and state privacy torts. We are concerned that S.F. 2908 would inadvertently thwart those developments, and would cause significant harm to the Minnesota e-commerce and high tech communities.

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10/3/03

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Thank you very much for your leadership and understanding on this important issue.

American Advertising Federation
American Insurance Association
AOL Time Warner
Apple Computer, Inc.
Association for Competitive Technology
Best Buy
Consumer Electronics Association
EarthLink, Inc.
eBay Inc.
Electronic Financial Services Council
Experian
Information Technology Association of America
Internet Alliance
Mobile Marketing Association
National Business Coalition on E-Commerce and Privacy
NCR Corp.
RealNetworks, Inc
Software & Information Industry Association
U.S. Chamber of Commerce
VeriSign, Inc.
Verizon Communications
WorldCom

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Dennis Halliwell
Operator's Signature

10/3/03
Date

Att # 8

March 10, 2003

Via-Fax

Honorable John T. Traynor, Chair
Senate Judiciary Committee
State Capitol, 600 E Boulevard Ave

Bismark, ND 58505-0360

Dear Senator Traynor:

Thank you for the opportunity to comment on HB. 1388, relating to Internet privacy and commercial electronic mail solicitation practices. We appreciate your leadership and thoughtfulness on these issues, as Microsoft believes that developing user trust on the Internet is essential to the promotion of online commerce. We are concerned however that your legislation unfairly targets ISPs and the online industry, thereby imposing disparate regulatory requirements on the online industry.

As a threshold issue, it is important to recognize that privacy protection should follow consumers in both the online and offline environments. Indeed, the vast majority of information collection takes place in the offline setting, and any regulatory requirements should not unduly burden electronic commerce. This is especially important in the current economic climate, which has detrimentally impacted the technology and "dot.com" sectors.

Further, the vast majority of online web sites already post privacy policies, despite the absence of regulatory mandates. Since 1999 the Federal Trade Commission (FTC) has conducted or supported a "web sweep" to assess the progress made by industry to adopt and provide notice of their online privacy policies. While each web sweep has been slightly different, in general the FTC has examined (1) a random sample of sites to get a sense of the overall adoption rate of privacy policies and (2) the most 100 most-visited commercial sites that account for roughly 95% of all web traffic. The most recent statistics from the FTC show that the overwhelming majority of the most-visited sites offer notice of their information practices. This means that roughly 95% or more of all commercial Internet traffic is conducted over sites that disclose their information practices and are therefore subject to the deceptive trade practice authority of the FTC and state attorneys general.

In addition, while Microsoft has subscribed to the Safe Harbor provisions of the EU Data Directive, thereby insuring the uninterrupted flow of data between our EU and US operations, this should not be interpreted as endorsing a similar legislative model in the United States. Rather, we believe that the use of self-regulatory solutions and technology tools, which allow for innovative responses to consumer privacy concerns by avoiding the stricture and costs that a "one-size-fits-all" regulatory approach would impose on the IT industry.

Finally, we would be happy to work with you to address other concerns that we have regarding the portion of your legislation concerning commercial electronic mail solicitation. Specifically, spam legislation needs to come down hardest on the spammers – the small percentage of entities on the Internet who are generating overwhelming amounts of offensive, deceptive and scheming email solicitations. Our proposals are aimed at driving a wedge between those bad actors and those who use email to conduct legitimate business. If the dividing line between the two is clear, then our filters can do a better job of protecting consumers while not impeding e-commerce. At the end of the day, effective filters are going to be a critical part, if not the most critical part, of mitigating the spam problem. Legislation targeted at creating a brighter line between the spammers and others will help drive that result.

I am sorry I was not personally able to attend your hearing to register my concerns with this legislation. If I can be helpful or answer additional questions, I hope you will not hesitate to call.

Sincerely,

Anthony T. Wilson
Microsoft Corporation
Central Region Government Affairs Manager.