

SUBJECT: Restricting unsolicited commercial e-mail or “spam”

COMMITTEE: Economic Development — favorable, without amendment

VOTE: 5 ayes — J. Keffer, Homer, Hughes, Rodriguez, Wong
0 nays
2 absent — Isett, Thompson

WITNESSES: For — William Ashworth, Microsoft Corporation; Steve Kester, American Electronics Association
Against — None

DIGEST: HB 1282 would add Chapter 46 to the Business and Commerce Code, restrict the sending of unsolicited electronic mail (e-mail) messages for commercial purposes.

Unsolicited commercial e-mail. HB 1282 defines unsolicited commercial electronic mail as e-mail “sent without the consent of the recipient by a person with whom the recipient does not have an established business relationship.” It would require the inclusion of the words “ADULT-ADVERTISEMENT” at the beginning of the subject line for any unsolicited commercial electronic mail message that included obscene or sexual content. For unsolicited commercial e-mails that did not include sexual content, the abbreviation “ADV:” would have to appear as the first four characters in the subject line.

The sender of an unsolicited commercial e-mail would have to provide a return address to which the recipient could, at no cost, request removal from the sender’s e-mail list. The sender would have 90 days to remove the recipient from its list. A sender also would be prohibited from selling or otherwise providing the recipient’s e-mail information to another entity after that person had requested removal from the sender’s e-mail list, except as required by other law.

In addition, HB 1282 would prohibit the transmission of commercial e-mail that falsified or obscured the routing information of the message, contained deceptive or misleading information in the subject line, or deceptively used the domain name of another person without that person's consent.

Civil liability. A person injured by practices prohibited under this bill could sue for damages, including lost profits or, in lieu of actual damages, the lesser of either \$10 for each prohibited message or \$25,000 for each day a prohibited message was received. Similarly, an e-mail service provider could sue for damages, including lost profits or, in lieu of actual damages, the greater of either \$10 for each prohibited message or \$25,000 for each day a prohibited message was received. A prevailing plaintiff would be entitled to reasonable reimbursement for court and attorney costs, and the attorney general or prosecuting attorney could recover any reasonable costs and fees incurred in securing a civil judgment.

The attorney general would be able intervene in any suit brought under HB 1282. If civil action were brought under this legislation, the litigant would be required to send a copy of the petition to the attorney general.

In a civil case brought under this legislation, a court could protect the secrecy of the computer, computer network, computer data, computer program, and computer software involved in the case in order to protect trade secrets or prevent recurrence of a similar prohibited act in the future.

The bill would assert the right of an e-mail service provider to block the receipt or transmission through its service of any e-mail prohibited under this statute. An e-mail service provider would not be liable for any action taken in good faith to block the transmission of prohibited messages. Further, an e-mail service provider would not be in violation of this act if a prohibited message were sent through the provider's computer network or because the service provider served solely as an intermediary between a sender and a receiver.

Deceptive trade practices. HB 1282 also would establish that a message sent in violation of the bill would constitute a deceptive trade practice as defined under subchapter E, Chapter 17 of the Business and Commerce Code. As

such, any “right or remedy” under that chapter could be employed to enforce this bill.

Penalties. Failure to properly identify a sexually explicit or obscene e-mail would constitute a class B misdemeanor (up to 180 days in jail and/or a maximum fine of \$2,000). All other violations under the bill would be subject to a civil penalty — the lesser of \$10 for each unlawful message sent or \$25,000 for each day an unlawful message was sent or received, except that failure of a plaintiff to serve notice of impending litigation to the attorney general would carry a fine not to exceed \$200.

The bill would take effect September 1, 2003, and would apply only to e-mails sent on or after that date.

**SUPPORTERS
SAY:**

HB 1282 would combat the growing problem of unsolicited and unwanted commercial e-mail messages, commonly referred to as “spam.” Industry sources estimate that spam accounts for 30 to 40 percent of all e-mail traffic, costing Texas businesses several million dollars per year because of time spent reading, deleting, and sifting through unwanted e-mail advertisements. Businesses also must spend millions of dollars to upgrade computer servers to deal with high levels of e-mail traffic. HB 1282 would provide a reasonable way of reducing unsolicited email that is supported by many leaders in the computer industry who also recognize the problem that spam represents.

HB 1282 would protect consumers by requiring senders of unsolicited commercial e-mails to identify these e-mails clearly in the subject line. Such a label would allow recipients who did not want to view advertisements to identify and delete them quickly without the inconvenience of having to open and read the message. This would save a great deal of time and minimize the cost of lost productivity to Texas businesses. More important, by requiring that the words “ADULT-ADVERTISEMENT” be included in the subject line of any sexually explicit or obscene unsolicited commercial email, HB 1282 would help protect children, families, and others with no interest in pornographic messages from unwittingly opening offensive e-mails.

By prohibiting messages that deceptively conceal their origin, content, or purpose, HB 1282 would eliminate several dubious practices. Some spam messages include misleading subject lines that conceal the commercial

purpose of the e-mail (e.g., “Hi, I got your message” or “Jennifer asked me to contact you”). Alternately, some senders harvest the domain or e-mail name of a reputable third party without that party’s consent and include it in an unrelated commercial message. HB 1282 appropriately would ban practices that mask the commercial purpose of some e-mail.

By requiring that a solicitor include a return e-mail address to which a receiver can reply in order to request removal from the solicitor’s e-mail list, HB 1282 would help protect individuals who consistently receive unwanted messages from the same source.

In addition to these restrictions, HB 1282 recognizes that the most promising opportunity for curbing unwanted spam likely lies in new filtering technology used by e-mail service providers. Given this finding, HB 1282 would encourage and protect e-mail service providers who made reasonable attempts to block the transmission of unwanted commercial e-mail to their customers.

By establishing clear formulas to calculate harm caused by spam, HB 1282 would encourage prosecution against those who violated the law. Prosecution and enforcement would help reduce the amount of unwanted spam in Texas.

Several court decisions have upheld anti-spam laws similar to that proposed by HB 1282. For example, a California appeals court ruled in January of 2002 that a state law requiring the labeling of unsolicited commercial e-mail “does not discriminate against or directly regulate or control interstate commerce” and is therefore constitutional. Also, in 2001 the U.S. Supreme Court declined to hear an appeal of a Washington Supreme Court decision upholding an anti-spam law in that state. Given the emerging consensus concerning the constitutionality of anti-spam laws, there is no reason to fear that this law would be overturned.

**OPPONENTS
SAY:**

It is outside the jurisdiction of the state of Texas to regulate commercial e-mail advertising originating from other states. Some courts in other states have struck down laws similar to HB 1282 because anti-spam laws violate the interstate commerce clause of the U.S. Constitution. Regulation of these messages should be handled by the federal government, rather than the states.

Although many people find spam annoying, e-mail solicitation is the only type of advertising that many small businesses can afford. These messages generally are easy for users to detect and delete if they are unwanted. By restricting small businesses from advertising through e-mail, HB 1282 would harm people whose livelihoods relied on this type of marketing and also could run afoul of constitutional protections of commercial speech.

HB 1282 would grant too much authority to service providers to block e-mails originating from certain domains that they believed their customers would not want to receive. In such an effort, service providers inevitably would overstep their bounds by blocking some e-mails that their customers did wish to receive.

NOTES:

The companion bill, SB 698 by Duncan, has been referred to the Senate Business and Commerce Committee.

A similar bill, HB 519 by Menendez, which also would require labeling of commercial messages, but would include a penalty of \$500 per prohibited message and would classify any violation as a class B misdemeanor, is pending in the Economic Development Committee.