

EMAIL MARKETING

2003 GENERAL SESSION

STATE OF UTAH

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This act modifies the Unsolicited Commercial and Sexually Explicit Email Act to provide additional definitions and eliminate the requirement for the sender of a sexually explicit email to provide a toll-free telephone number. The act makes certain modifications to a sender's obligations and defenses, and modifies the available civil action for a violation. The act makes technical changes.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

13-36-102, as enacted by Chapter 229, Laws of Utah 2002

13-36-103, as enacted by Chapter 229, Laws of Utah 2002

13-36-105, as enacted by Chapter 229, Laws of Utah 2002

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **13-36-102** is amended to read:

13-36-102. Definitions.

As used in this chapter:

(1) "Commercial" means for the purpose of promoting the sale, lease, or exchange of goods, services, or real property.

(2) "Computer network" means two or more computers that are interconnected to exchange electronic messages, files, data, or other information.

(3) (a) "Email" means an electronic message, file, data, or other information that is transmitted to an email address:

~~[(a)]~~ (i) between two or more computers, computer networks, or electronic terminals;

or

~~[(b)]~~ (ii) within a computer network.



(b) "Email" does not include an Internet-based electronic advertisement that is not transmitted to a specific email address.

(4) "Email address" means a destination, commonly expressed as a string of characters, to which email may be sent or delivered.

(5) "Email service provider" means a person that:

(a) is an intermediary in the transmission of email from the sender to the recipient; or

(b) provides to end users of email service the ability to send and receive email.

(6) "Internet domain name" means a globally unique, hierarchical reference to an Internet host or service, assigned through centralized Internet authorities, comprising a series of character strings separated by periods, with the right-most string specifying the top of the hierarchy.

(7) (a) "Preexisting business relationship" means a relationship formed by voluntary two-way communication, with or without an exchange of consideration, if:

(i) the recipient has indicated a willingness to receive email from the sender;

(ii) the recipient has requested information, goods, or services from the sender; or

(iii) the recipient has entered into a financial transaction with the sender.

(b) "Preexisting business relationship" does not include a relationship in which:

(i) the recipient has provided to the sender the notice described in Subsection 13-36-103(3); and

(ii) a reasonable period of time has expired since the recipient has provided to the sender the notice described in Subsection 13-36-103(3).

(8) "Sender" means a person that:

(a) sends an email:

(i) directly; or

(ii) through an intermediary;

(b) causes an email to be sent:

(i) directly; or

(ii) through an intermediary; or

(c) is a subsidiary or affiliate of a person described in Subsection (8)(a) or (b).

~~[(7)]~~ (9) (a) "Sexually explicit email" means an email that contains, promotes, or contains an electronic link to material that is harmful to minors, as defined in Section

76-10-1201.

(b) An email is a "sexually explicit email" if it meets the definition in Subsection ~~[(7)]~~ (9)(a), even if the email also meets the definition of a commercial email.

(10) "Transmitted accidentally" includes, but is not limited to, a situation where:

(a) a sender possesses a good faith belief that the recipient had given permission to receive commercial email; or

(b) the email was sent within a reasonable period of time after the recipient provided to the sender the notice described in Subsection 13-36-103(3).

~~[(8)]~~ (11) (a) "Unsolicited" means without the recipient's express permission, except as provided in Subsection ~~[(8)]~~ (11)(b).

(b) A commercial email is not "unsolicited" if the sender has:

(i) a preexisting business ~~or~~ relationship with the recipient; or

(ii) a preexisting personal relationship with the recipient.

Section 2. Section **13-36-103** is amended to read:

13-36-103. Unsolicited commercial or sexually explicit email -- Requirements.

(1) Each person who sends or causes to be sent an unsolicited commercial email or an unsolicited sexually explicit email through the intermediary of an email service provider located in the state or to an email address held by a resident of the state shall:

(a) conspicuously state in the email ~~the~~ a sender's:

(i) legal name;

(ii) correct street address; and

(iii) valid Internet domain name, if the sender has a valid Internet domain name;

(b) include in the email a subject line that contains:

(i) for a commercial email, "ADV:" as the first four characters; or

(ii) for a sexually explicit email, "ADV:ADULT" as the first nine characters;

(c) provide the recipient a convenient, no-cost mechanism to notify the sender not to send any future email to the recipient, including ~~[-(i)]~~ return email to a valid, functioning return electronic address; and

~~[(ii) for a sexually explicit email and if the sender has a toll-free telephone number, the sender's toll-free telephone number; and]~~

(d) conspicuously provide in the text of the email a notice that ~~[-(i)]~~ informs the

recipient that the recipient may conveniently and at no cost be excluded from future commercial or sexually explicit email, as the case may be, from the sender[~~;~~and].

~~[(ii) for a sexually explicit email and if the sender has a toll-free telephone number, includes the sender's valid, toll-free telephone number that the recipient may call to be excluded from future email from the sender.]~~

(2) A person who sends or causes to be sent an unsolicited commercial email or an unsolicited sexually explicit email through the intermediary of an email service provider located in the state or to an email address held by a resident of the state may not:

(a) use a third party's Internet domain name in identifying the [point of origin] sender or in stating the transmission path of the email without the third party's consent;

(b) misrepresent any information in identifying the [point of origin] sender or the transmission path of the email; or

(c) fail to include in the email the information necessary to identify the [point of origin] sender of the email.

(3) If the recipient of an unsolicited commercial email or an unsolicited sexually explicit email notifies the sender that the recipient does not want to receive future commercial email or future sexually explicit email, respectively, from the sender[~~;~~];

(a) the sender may not, after a reasonable period of time:

(i) send that recipient a commercial email or a sexually explicit email, as the case may be, either directly or through a subsidiary or affiliate[~~;~~]; or

(ii) sell, lease, exchange, license, or engage in any other transaction involving an email address list bearing the email address of the recipient; and

(b) the sender shall, within a reasonable period of time, delete or suppress the email address of that recipient from all email address lists owned or controlled by the sender.

Section 3. Section **13-36-105** is amended to read:

13-36-105. Civil action for violation -- Election on damages -- Costs and attorney fees -- Defense.

(1) For any violation of a provision of Section 13-36-103, an action may be brought by:

(a) a person who received the unsolicited commercial email or unsolicited sexually explicit email with respect to which the violation under Section 13-36-103 occurred; or

(b) an email service provider through whose facilities the unsolicited commercial email

or unsolicited sexually explicit email was transmitted.

(2) In each action under Subsection (1):

(a) a recipient or email service provider may, with respect to an unsolicited commercial email:

(i) recover actual damages; or

(ii) elect, in lieu of actual damages, to recover the lesser of:

(A) ~~[\$10]~~ \$75 per unsolicited commercial email ~~[or unsolicited sexually explicit email]~~ received by the recipient or transmitted through the email service provider; or

(B) ~~[\$25,000]~~ \$5,000 per day that the violation occurs; ~~[and]~~

(b) a recipient or email service provider may, with respect to an unsolicited sexually explicit email:

(i) recover actual damages; or

(ii) elect, in lieu of actual damages, to recover the lesser of:

(A) \$1,000 per unsolicited commercial email received by the recipient or transmitted through the email service provider; or

(B) \$25,000 per day that the violation occurs; and

~~[(b)]~~ (c) each prevailing ~~[recipient or email service provider]~~ party shall be awarded costs and reasonable attorney fees.

(3) An email service provider does not violate Section 13-36-103 solely by being an intermediary between the sender and recipient in the transmission of an email that violates that section.

(4) The violation of Section 13-36-103 by an employee does not subject the employee's employer to liability under that section if the employee's violation of Section 13-36-103 is also a violation of an established policy of the employer that requires compliance with the requirements of Section 13-36-103.

(5) It is a defense to an action brought against an individual under this section that the unsolicited commercial email or unsolicited sexually explicit email was transmitted accidentally.

(6) It is a defense to an action brought against an entity under this section that a sender can demonstrate by a preponderance of the evidence:

(a) that the sender at the time of the violation of this chapter had:

152 (i) maintained a list of consumers who have notified the sender not to send any
153 subsequent commercial email or sexually explicit email;
154 (ii) established and implemented, with due care, reasonable practices and procedures to
155 effectively prevent commercial email or sexually explicit email in violation of this chapter;
156 (iii) trained the personnel of the sender in the requirements of this chapter; and
157 (iv) maintained records demonstrating compliance with this chapter; and
158 (b) the unsolicited commercial email or unsolicited sexually explicit email was
159 transmitted accidentally.

Legislative Review Note**as of 2-11-03 7:27 AM**

A limited legal review of this legislation raises no obvious constitutional or statutory concerns.

Office of Legislative Research and General Counsel

Fiscal Note**Bill Number HB0312****Email Marketing***21-Feb-03**4:33 PM*

State Impact

No fiscal impact.

Individual and Business Impact

Individual and business impacts will vary according to circumstances.

Office of the Legislative Fiscal Analyst