

1 **AMENDMENTS TO UNSOLICITED**
2 **COMMERCIAL AND SEXUALLY EXPLICIT**
3 **EMAIL ACT**

4 2003 GENERAL SESSION

5 STATE OF UTAH

6 **Sponsor: Patrice M. Arent**

7 **This act modifies the Unsolicited Commercial and Sexually Explicit Email Act by**
8 **providing additional definitions, placing the burden to prove a preexisting business or**
9 **personal relationship on the sender of an email, allowing class actions, eliminating the**
10 **requirement for the sender of a sexually explicit email to provide a toll-free telephone**
11 **number, changing the damages for a violation, and making technical changes.**

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

13 AMENDS:

14 **13-36-102**, as enacted by Chapter 229, Laws of Utah 2002

15 **13-36-103**, as enacted by Chapter 229, Laws of Utah 2002

16 **13-36-105**, as enacted by Chapter 229, Laws of Utah 2002

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

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

19 **13-36-102. Definitions.**

20 As used in this chapter:

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

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

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

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



28 or

29 ~~(b)~~ (ii) within a computer network.

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

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

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

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

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

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

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

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

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

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

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

47 (i) the recipient has provided to the sender the notice described in Subsection

48 13-36-103(3); and

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

51 (8) "Sender" means a person that:

52 (a) sends an email:

53 (i) directly; or

54 (ii) through an intermediary; or

55 (b) causes an email to be sent:

56 (i) directly; or

57 (ii) through an intermediary.

58 ~~(7)~~ (9) (a) "Sexually explicit email" means an email that contains, promotes, or

59 contains an electronic link to material that is harmful to minors, as defined in Section
60 76-10-1201.

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

63 ~~[(8)]~~ (10) (a) "Unsolicited" means without the recipient's express permission, except as
64 provided in Subsection ~~[(8)]~~ (10)(b).

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

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

67 (ii) a preexisting personal relationship with the recipient.

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

69 **13-36-103. Unsolicited commercial or sexually explicit email -- Requirements.**

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

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

74 (i) legal name;

75 (ii) correct street address; and

76 (iii) valid Internet domain name;

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

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

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

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

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

85 (d) conspicuously provide in the text of the email a notice that~~[-(i)]~~ informs the
86 recipient that the recipient may conveniently and at no cost be excluded from future
87 commercial or sexually explicit email, as the case may be, from the sender~~[-and]~~.

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

90 ~~excluded from future email from the sender.]~~

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

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

96 (b) misrepresent any information in identifying the point of origin or the transmission
97 path of the email; or

98 (c) fail to include in the email the information necessary to identify the point of origin
99 of the email.

100 (3) If the recipient of an unsolicited commercial email or an unsolicited sexually
101 explicit email notifies the sender that the recipient does not want to receive future commercial
102 email or future sexually explicit email, respectively, from the sender, the sender may not, after
103 a reasonable period of time has expired, send that recipient a commercial email or a sexually
104 explicit email, as the case may be, either directly or through a subsidiary or affiliate.

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

106 **13-36-105. Civil action for violation -- Election on damages -- Costs and attorney**
107 **fees -- Defense.**

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

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

111 (b) an email service provider through whose facilities the unsolicited commercial email
112 or unsolicited sexually explicit email was transmitted.

113 (2) A person may bring an action under Subsection (1) as a class action if a court of
114 competent jurisdiction certifies the class.

115 ~~[(2)]~~ (3) In each action under Subsection (1):

116 (a) a recipient or email service provider may:

117 (i) recover actual damages; or

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

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

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

122 (b) each prevailing recipient or email service provider shall be awarded costs and
123 reasonable attorney fees.

124 [~~(3)~~] (4) An email service provider does not violate Section 13-36-103 solely by being
125 an intermediary between the sender and recipient in the transmission of an email that violates
126 that section.

127 [~~(4)~~] (5) The violation of Section 13-36-103 by an employee does not subject the
128 employee's employer to liability under that section if the employee's violation of Section
129 13-36-103 is also a violation of an established policy of the employer that requires compliance
130 with the requirements of Section 13-36-103.

131 [~~(5)~~] (6) It is a defense to an action brought under this section that the unsolicited
132 commercial email or unsolicited sexually explicit email was transmitted accidentally.

133 (7) (a) There is a rebuttable presumption that a sender does not have:

134 (i) a preexisting business relationship with a recipient; or

135 (ii) a preexisting personal relationship with a recipient.

136 (b) A sender may overcome the rebuttable presumption described in Subsection (7)(a)
137 by providing business records, documents, or other evidence:

138 (i) that satisfies the requirements of Subsection 13-36-102(7); or

139 (ii) establishing that the sender has a preexisting personal relationship with a recipient.

140 (c) In a class action, a sender must overcome the rebuttable presumption described in
141 Subsection (7)(a) with respect to each recipient.

Legislative Review Note
as of 12-6-02 4:54 PM

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 SB0059****Amendments to Unsolicited Commercial and Sexually Explicit Email
Act***30-Jan-03**3:14 PM*

State Impact

No fiscal impact.

Individual and Business ImpactNo fiscal impact.

Office of the Legislative Fiscal Analyst