

AN ACT

ENTITLED, An Act to restrict unsolicited commercial electronic mail advertisements.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. Terms used in this Act mean:

- (1) "Advertiser," a person or entity that advertises through the use of commercial e-mail advertisements;
- (2) "Commercial e-mail advertisement," any electronic mail message initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit;
- (3) "Direct consent," the recipient has expressly consented to receive e-mail advertisements from the advertiser, either in response to a clear and conspicuous request for the consent or at the recipient's own initiative;
- (4) "Domain name," any alphanumeric designation that is registered with or assigned by any domain name registrar as part of an electronic address on the internet;
- (5) "Electronic mail" or "e-mail," an electronic message that is sent to an e-mail address and transmitted between two or more telecommunications devices, computers, or electronic devices capable of receiving electronic messages, whether or not the message is converted to hard copy format after receipt, viewed upon transmission, or stored for later retrieval. Electronic mail, or e-mail, includes electronic messages that are transmitted through a local, regional, or global computer network;
- (6) "Electronic mail address" or "e-mail address," a destination, commonly expressed as a string of characters, to which electronic mail can be sent or delivered. An electronic mail address, or e-mail address, consists of a user name or mailbox and a reference to an internet domain;

- (7) "Electronic mail service provider," any person, including an internet service provider, that is an intermediary in sending or receiving electronic mail or that provides to end users of the electronic mail service the ability to send or receive electronic mail;
- (8) "Initiate," to transmit or cause to be transmitted a commercial e-mail advertisement or assist in the transmission of a commercial e-mail advertisement by providing electronic mail addresses where the advertisement may be sent, but does not include the routine transmission of the advertisement through the network or system of a telecommunications utility or an electronic mail service provider through its network or system;
- (9) "Incident," a single transmission or delivery to a single recipient or to multiple recipients of an unsolicited commercial e-mail advertisement containing substantially similar content;
- (10) "Internet," the international computer network of both federal and nonfederal interoperable packet switched data networks, including the graphical subnetwork called the world wide web;
- (11) "Preexisting or current business relationship," as used in connection with the sending of a commercial e-mail advertisement, means that the recipient has made an inquiry and has provided his or her e-mail address, or has made an application, purchase, or transaction, with or without consideration, regarding products or services offered by the advertiser. Commercial e-mail advertisements sent pursuant to the exemption that is provided for a preexisting or current business relationship shall provide the recipient of the commercial e-mail advertisement with the ability to opt-out from receiving further commercial e-mail advertisements by calling a toll-free telephone number or by sending an unsubscribe e-mail to the advertiser offering the products or services in the commercial e-mail advertisement. This opt-out provision does not apply to recipients who are receiving free

e-mail service with regard to commercial e-mail advertisements sent by the provider of the e-mail service;

- (12) "Recipient," the addressee of an unsolicited commercial e-mail advertisement. If an addressee of an unsolicited commercial e-mail advertisement has one or more e-mail addresses to which an unsolicited commercial e-mail advertisement is sent, the addressee is deemed to be a separate recipient for each e-mail address to which the e-mail advertisement is sent;
- (13) "Routine transmission," the transmission, routing, relaying, handling, or storing of an electronic mail message through an automatic technical process. Routine transmission does not include the sending, or the knowing participation in the sending, of unsolicited commercial e-mail advertisements;
- (14) "South Dakota electronic mail address" or "South Dakota e-mail address," any of the following:
 - (a) An e-mail address furnished by an electronic mail service provider that sends bills for furnishing and maintaining that e-mail address to a mailing address in this state;
 - (b) An e-mail address ordinarily accessed from a computer located in this state; or
 - (c) An e-mail address furnished to a resident of this state;
- (15) "Unsolicited commercial e-mail advertisement," a commercial e-mail advertisement sent to a recipient who meets both of the following criteria:
 - (a) The recipient has not provided direct consent to receive advertisements from the advertiser; or
 - (b) The recipient does not have a preexisting or current business relationship with the advertiser promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

Section 2. No person or entity may do any of the following unless the subject line complies with the requirements set forth in subdivision 37-24-6(13):

- (1) Initiate or advertise in an unsolicited commercial e-mail advertisement from South Dakota or advertise in an unsolicited commercial e-mail advertisement sent from South Dakota; or
- (2) Initiate or advertise in an unsolicited commercial e-mail advertisement to a South Dakota electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a South Dakota electronic mail address.

Section 3. Nothing in this Act may be construed to limit or restrict the adoption, implementation, or enforcement by a provider of internet access service of a policy of declining to transmit, receive, route, relay, handle, or store certain types of electronic mail messages.

Section 4. No person may collect electronic mail addresses posted on the internet if the purpose of the collection is for the electronic mail addresses to be used to do either of the following:

- (1) Initiate or advertise in an unsolicited commercial e-mail advertisement from South Dakota, or advertise in an unsolicited commercial e-mail advertisement sent from South Dakota; or
- (2) Initiate or advertise in an unsolicited commercial e-mail advertisement to a South Dakota electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to South Dakota electronic mail address.

Section 5. No person may use an electronic mail address obtained by using automated means based on a combination of names, letters, or numbers to do either of the following:

- (1) Initiate or advertise in an unsolicited commercial e-mail advertisement from South Dakota, or advertise in an unsolicited commercial e-mail advertisement sent from South Dakota; or

- (2) Initiate or advertise in an unsolicited commercial e-mail advertisement to a South Dakota electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a South Dakota electronic mail address.

Section 6. No person may use scripts or other automated means to register for multiple electronic mail accounts from which to do, or to enable another person to do, either of the following:

- (1) Initiate or advertise in an unsolicited commercial e-mail advertisement from South Dakota, or advertise in an unsolicited commercial e-mail advertisement sent from South Dakota; or
- (2) Initiate or advertise in an unsolicited commercial e-mail advertisement to a South Dakota electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a South Dakota electronic mail address.

Section 7. No person may advertise in a commercial e-mail advertisement either sent from South Dakota or sent to a South Dakota electronic mail address under any of the following circumstances:

- (1) The e-mail advertisement contains or is accompanied by a third-party's domain name without the permission of the third party;
- (2) The e-mail advertisement contains or is accompanied by falsified, misrepresented, or forged header information;
- (3) The e-mail advertisement has a subject line that a person knows would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.

Section 8. The recipient of an unsolicited commercial e-mail advertisement, an electronic mail service provider, or the attorney general may bring an action against any person that violates section 2, 4, 5, 6, or 7 of this Act and may recover either or both of the following:

- (1) Actual damages; or

- (2) Liquidated damages of one thousand dollars for each unsolicited commercial e-mail advertisement transmitted in violation of such section, up to one million dollars per incident.

The recipient, an electronic mail service provider, or the attorney general, if the prevailing plaintiff, may also recover reasonable attorney's fees and costs.

However, there may be no cause of action under this section against an electronic mail service provider that is only involved in the routine transmission of the e-mail advertisement over its computer network.

If the court finds that the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent unsolicited commercial e-mail advertisements that are in violation of this Act, the court shall reduce the liquidated damages recoverable under this section to a maximum of one hundred dollars for each unsolicited commercial e-mail advertisement, or a maximum of one hundred thousand dollars per incident.

Section 9. That § 37-24-36 be repealed.

Section 10. That § 37-24-37 be repealed.

Section 11. That § 37-24-38 be repealed.

Section 12. That § 37-24-39 be repealed.

Section 13. That § 37-24-40 be repealed.

An Act to restrict unsolicited commercial electronic mail advertisements.

I certify that the attached Act
originated in the

HOUSE as Bill No. 1285

Chief Clerk

Speaker of the House

Attest:

Chief Clerk

President of the Senate

Attest:

Secretary of the Senate

House Bill No. 1285

File No. _____

Chapter No. _____

Received at this Executive Office
this _____ day of _____ ,

20____ at _____ M.

By _____
for the Governor

The attached Act is hereby
approved this _____ day of
_____, A.D., 20____

Governor

STATE OF SOUTH DAKOTA,
SS.
Office of the Secretary of State

Filed _____, 20____
at _____ o'clock __ M.

Secretary of State

By _____
Asst. Secretary of State