

Substitute for SENATE BILL No. 467

AN ACT concerning consumer protection; relating to disasters; concerning information technology; providing protection from deceptive and unwanted electronic mail messages; establishing certain acts a violation of the Kansas consumer protection act; allowing for either a cause of action or civil penalty for a violation.

*Be it enacted by the Legislature of the State of Kansas:*

Section 1. (a) This act shall be known as the commercial electronic mail act.

(b) As used in this act:

(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 that the initiator of the commercial electronic mail message is engaged, or intends to engage, in any practice that violates the Kansas consumer protection act.

(2) “Commercial electronic mail message” means an electronic mail message sent for the purpose of promoting property or services for sale or lease, but shall not include electronic mail messages sent by a natural person volunteering to send such messages on behalf of a charitable organization as defined by K.S.A. 17-1760, and amendments thereto.

(3) “Electronic mail address” means a destination, commonly expressed as a string of characters, to which electronic mail may be sent or delivered.

(4) “Established business relationship” means a prior and existing relationship formed by a voluntary two-way communication between a sender and a recipient with or without an exchange of consideration, on the basis of an express authorization, application, purchase or transaction by the recipient regarding products or services offered by such sender, which relationship has not been previously terminated by either party.

(5) “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, that the person initiating the transmission is engaged, or intends to engage, in any act or practice that violates the Kansas consumer protection act.

(6) “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.

(7) “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.

(8) “Express authorization” means an express affirmative act by a recipient clearly agreeing to receive commercial electronic messages from a specified and identifiable sender, or from multiple persons.

(c) No person shall:

(1) 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 Kansas or to an electronic mail address that the sender knows, is held by a Kansas 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;

(B) contains false or misleading information in the subject line;

(C) does not contain as the first four characters of the subject line “ADV:”; Provided, however, the characters “ADV” shall not be required in the subject line if the recipient has an established business relationship or has given express authorization to receive commercial electronic mail messages or in electronic mail messages, other than messages of a sexually explicit or otherwise adult oriented nature, sent to less than 500 recipients per month. The sender claiming exemption under this subsection shall have the burden of proving the exemption by a preponderance of the evidence;

(D) does not contain instructions, in text at least as large as the majority of the text in the transmission, for the recipient to follow to notify the sender not to send any subsequent communications, with a valid sender operated return electronic mail address to which the recipient may reply to notify the sender not to send any further commercial electronic mail messages and the legal name of the person or entity initiating the transmission, including such person's or entity's (i) physical address for the receipt of the United States mail or (ii) a toll free telephone number that the recipient may call to notify the sender not to send any subsequent communications. It shall be prima facie evidence that the sender is in violation of this section if the recipient's reply electronic mail message is returned to the recipient as undeliverable, or is otherwise not accepted by the sender of the original commercial electronic mail message; or

(E) contains advertising material for viewing, use, consumption, sale, lease or rental only by persons over 18 years of age, including but not limited to content of sexual, sexually explicit or otherwise adult-oriented nature, unless the first eight characters of the subject line are "ADV:ADLT."

(2) 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 Kansas or to an electronic mail address that the sender knows, is held by a Kansas resident that is made after the recipient thereof has notified the sender not to send any subsequent communications.

(3) Give, transfer, sell or otherwise share with another the electronic mail address of any recipient who has notified the sender not to send any subsequent communications for any use other than for the third party to place the address on a do not contact list.

(4) Assist in the transmission of a commercial electronic mail message, when the person providing the assistance knows, that the initiator of the commercial electronic mail message is engaged, or intends to engage, in any act or practice that violates the Kansas consumer protection act.

(5) Knowingly sell, give or otherwise distribute or possess with the intent to sell, give or distribute software that:

(A) Is primarily designed or produced for the purpose of facilitating or enabling the falsification of electronic mail transmission information or other routing information;

(B) 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

(C) 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.

(d) For purposes of this section, a person knows or has reason to know that the intended recipient of a commercial electronic mail message is a Kansas resident if that information is available, upon request, from the registrant of the internet domain name contained in the recipient's electronic mail address.

(e) 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.

(f) No interactive computer service may 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 act.

(g) Any violation of this section is an unconscionable act and practice under the Kansas consumer protection act.

(h) Any person alleging a violation of this section including an interactive computer service damaged by a violation, shall be deemed a consumer who has been aggrieved by a violation of the Consumer protection act and to have suffered actual loss as referred to in K.S.A. 50-634 and 50-636 and amendments thereto.

(i) Any person alleging a violation of this section may bring a private action to seek relief pursuant to K.S.A. 50-634, 50-636 and this section,

and amendments thereto, and such person shall be considered a consumer pursuant to K.S.A. 50-624, and amendments thereto, for the purposes of such private action.

(j) Any person that violates this section shall be subject to a civil penalty of not less than \$500 nor more than \$10,000 for each such violation instead of the penalty provided for in subsection (a) of K.S.A. 50-636, and amendments thereto.

(k) It shall be an affirmative defense to a violation of this section if the person can demonstrate, by clear and convincing evidence, (1) that the sender at the time of the alleged violation had: (A) Maintained a list of consumers who have notified the person not to send any subsequent commercial electronic messages; (B) established and implemented, with due care, reasonable practices and procedures to effectively prevent unsolicited commercial electronic mail messages in violation of this section; (C) trained the sender's personnel in the requirements of this section; and (D) maintained records demonstrating compliance with this section; and (2) the unsolicited commercial electronic message was the result of an error. Such defense shall not be exercised by any person more than once within the state of Kansas in any 12-month period. A person shall be deemed to have exercised such defense if asserted in response to any consumer complaint about a violation of this section, regardless of whether litigation has been initiated.

(l) The legislature finds that the practices covered by this section are matters vitally affecting the public interest for the purpose of applying the Kansas consumer protection act. A violation of this section is not reasonable or necessary for the development and preservation of commerce and is an unconscionable act in violation of the Kansas consumer protection act.

(m) This section shall be a part of and supplemental to the Kansas consumer protection act.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

I hereby certify that the above BILL originated in the SENATE, and passed that body

\_\_\_\_\_  
SENATE adopted  
Conference Committee Report \_\_\_\_\_

\_\_\_\_\_  
*President of the Senate.*

\_\_\_\_\_  
*Secretary of the Senate.*

Passed the HOUSE  
as amended \_\_\_\_\_

HOUSE adopted  
Conference Committee Report \_\_\_\_\_

\_\_\_\_\_  
*Speaker of the House.*

\_\_\_\_\_  
*Chief Clerk of the House.*

APPROVED \_\_\_\_\_

\_\_\_\_\_  
*Governor.*