

SOUTH DAKOTA

Sections 37-24-41 through 37-24-48, and portions of Section 37-24-6, of the *South Dakota Codified Laws Annotated* govern the transmission of commercial electronic mail. Those provisions:

- Apply to email sent to or from South Dakota;
- Require the sender of an unsolicited email containing advertising or sexually explicit material to put a label on its subject line, and imposes criminal penalties on violators;
- Forbid a sender to use another person's domain name without permission, or to falsify the header information or subject line of an email;
- Classify certain violations as an unfair or deceptive acts; and
- Entitle a recipient or service provider to sue a violator for damages, attorney's fees, and costs.

S.D. Codified Laws Ann.

§37-24-6. Specific Deceptive Practices; Criminal Penalty

It is a deceptive act or practice for any person to:

(1) Knowingly and intentionally act, use, or employ any deceptive act or practice, fraud, false pretense, false promises, or misrepresentation or to conceal, suppress, or omit any material fact in connection with the sale or advertisement of any merchandise, regardless of whether any person has in fact been misled [*sic*], deceived, or damaged thereby;

(2) Advertise price reductions without satisfying one of the following:

- (a) Including in the advertisement the specific basis for the claim of a price reduction; or
- (b) Offering the merchandise for sale at the higher price from which the reduction is taken for at least seven consecutive business days during the 60-day period prior to the advertisement.

Any person advertising consumer property or services in this state, which advertisements contain representations or statements as to any type of savings claim, including reduced price claims and price comparison value claims, shall maintain reasonable records for a period of two years from the date of sale and advertisement, which records shall disclose the factual basis for such representations or statements and from which the validity of any such claim be established. However, these reasonable record provisions do not apply to the sale of any merchandise which:

- (a) Is of a class of merchandise that is routinely advertised on at least a weekly basis in newspapers, shopping tabloids, or similar publications; and
- (b) Has a sales price before price reduction that is less than \$15 per item;

(3) Represent a sale of merchandise at reduced rates due to the cessation of business operations and after the date of the first advertisement remain in business under the same, or substantially the same, ownership or trade name, or continue to offer for sale the same type of merchandise at the same location for more than 120 days;

(4) Give or offer a rebate, discount, or anything of value to an individual as an inducement for selling consumer property or services in consideration of giving the names of prospective purchasers or otherwise aiding in making a sale to another

person, if the earning of the rebate, discount, or other thing of value is contingent upon the occurrence of an event subsequent to the time the individual agrees to the sale;

(5) Engage in any scheme or plan for disposal or distribution of merchandise whereby a participant pays a valuable consideration for the chance to receive compensation primarily for introducing one or more additional persons into participation in the planner's scheme or for the chance to receive compensation when the person introduced by the participant introduces a new participant;

(6) Send, deliver, provide, mail, or cause to be sent, delivered, provided, or mailed any unordered consumer property or service, or any bill or invoice for unordered consumer property or service provided;

(7) Advertise a rate, price, or fee for a hotel, motel, campsite, or other lodging accommodation which is not in fact available to the public under the terms advertised. It is not a violation of this subdivision to establish contract rates which are different than public rates;

(8) Charge a rate, price, or fee for a hotel, motel, campsite, or other lodging accommodation which is different than the rate, price, or fee charged on the first night of the guest's stay unless, at the initial registration of the guest, a written notification of each price, rate, or fee to be charged during the guest's reserved continuous stay is delivered to the guest and an acknowledgment of receipt of the notice is signed by the guest and kept by the innkeeper for the same period of time as is required by §34-18-21 [*which governs inspections of lodging establishments and campgrounds*];

(9) Knowingly and intentionally fail to mail to a future guest a written confirmation of the date and rates of reservations made for any accommodation at a hotel, motel, campsite, or other lodging accommodation when a written request for confirmation is received from the future guest;

(10) Refuse to return or reverse the charge for a deposit upon any hotel, motel, campsite, or other lodging accommodation which is canceled by the guest more than 30 days before the date of the reservation. The innkeeper may establish a policy requiring a longer time for notice of cancellation or a handling fee in the event of cancellation, which may not exceed \$25, if the policy is in writing and is delivered or mailed to the guest at or near the making of the reservation;

(11) Knowingly advertise or cause to be listed through the internet or in a telephone directory a business address that misrepresents where the business is actually located or that falsely states that the business is located in the same area covered by the telephone directory. This subdivision does not apply to a telephone service provider, an internet service provider, or a publisher or distributor of a telephone directory, unless the conduct proscribed in this subdivision is on behalf of the provider, publisher, or distributor;

(12) Sell, market, promote, advertise, or otherwise distribute any card or other purchasing mechanism or device that is not insurance that purports to offer discounts or access to discounts from pharmacies for prescription drug purchases if:

(12)(a) The card or other purchasing mechanism or device does not expressly state in bold and prominent type, prevalently placed, that discounts are not

insurance;

(12)(b) The discounts are not specifically authorized by a separate contract with each pharmacy listed in conjunction with the card or other purchasing mechanism or device; or

(12)(c) The discount or access to discounts offered, or the range of discounts or access to the range of discounts, is misleading, deceptive, or fraudulent, regardless of the literal wording.

The provisions of this subdivision do not apply to a customer discount or membership card issued by a store or buying club for use in that store or buying club, or a patient access program voluntarily sponsored by a pharmaceutical manufacturer, or a consortium of pharmaceutical manufacturers, that provide free or discounted prescription drug products directly to low income or uninsured individuals either through a discount card or direct shipment.

(13) Send or cause to be sent an unsolicited commercial electronic mail message that does not include in the subject line of such message "ADV:" as the first four characters. If the message contains information that consists of explicit sexual material that may only be viewed, purchased, rented, leased, or held in possession by an individual 18 years of age and older, the subject line of each message shall include "ADV:ADLT" as the first eight characters. An unsolicited commercial electronic mail message does not include a message sent to a person with whom the initiator has an existing personal or business relationship or a message sent at the request or express consent of the recipient.

Each act in violation of this section is a Class 2 misdemeanor. Any subsequent conviction of an act in violation of this statute, which occurs within two years is a Class 1 misdemeanor. Any subsequent conviction of an act in violation of this statute, which occurs within two years of a conviction of a Class 1 misdemeanor pursuant to this statute, is a Class 6 felony. *Created by Chapter 218, §2(a), Laws of 1971. Amended by Chapter 190, §294, Laws of 1977; Chapter 324, §1, Laws of 1986; Chapter 281, §2, Laws of 1987; Chapter 338, §1, Laws of 1989; Chapter 278, §1, Laws of 1992; Chapter 243, §1, Laws of 1998; Chapter 202, §1, Laws of 1999; Chapter 214, §§1-2, Laws of 2001; Chapter 185, §1, Laws of 2002, effective July 1, 2002; and Chapter 225, §1, Laws of 2007, effective July 1, 2007.*

§37-24-36. Definitions Pertaining to Computer Fraud [repealed]

Terms used in §§37-24-36 to 37-24-40, inclusive [*which govern commercial electronic mail*], mean:

(1) "Assist the transmission," actions taken by a person to provide substantial assistance or support that enables any person to formulate, compose, send, originate, initiate, or transmit a commercial electronic mail message if the person providing the assistance knows or consciously avoids knowing that the initiator of the commercial electronic mail message is engaged, or intends to engage, in any practice that violates this chapter;

(2) "Commercial electronic mail message," an electronic mail message sent for the purpose of promoting real property, goods, or services for sale or lease. The term does not mean an electronic mail message to which an interactive computer service provider has attached an advertisement in exchange for free use of an electronic mail account, if the sender has agreed to such an arrangement;

(3) "Electronic mail address," a destination, commonly expressed as a string of characters, to which electronic mail may be sent or delivered;

(4) "Initiate the transmission," the action by the original sender of an electronic mail message. The term does not refer 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 if it knows, or consciously avoids knowing, that the person initiating the transmission is engaged, or intends to engage, in any act or practice that violates this chapter;

(5) "Interactive computer service," 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 systems operated or services offered by libraries or educational institutions;

(6) "Internet domain name," 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.

Created by Chapter 186, §1, Laws of 2002, effective July 1, 2002. Repealed by Chapter 226, §9, Laws of 2007, effective July 1, 2007.

§37-24-37. Transmission of False or Misleading Electronic Mail [repealed]

No person may 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 South Dakota or to an electronic mail address that the sender knows, or has reason to know, is held by a South Dakota resident that:

- (1) 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; or
- (2) Contains false or misleading information in the subject line.

For purposes of this section, a person knows that the intended recipient of a commercial electronic mail message is a South Dakota resident if that information is available, upon request, from the registrant of the internet domain name contained in the recipient's electronic mail address.

Created by Chapter 186, §2, Laws of 2002, effective July 1, 2002. Repealed by Chapter 226, §10, Laws of 2007, effective July 1, 2007.

§37-24-38. Effect of Unlawful Electronic Mail Transmission [repealed]

The Legislature finds that the practices covered by §§37-24-36 to 37-24-40, inclusive, are matters vitally affecting the public interest for the purpose of protecting the public. A violation of §§37-24-36 to 37-24-40, inclusive, is not reasonable in relation to the development and preservation of business and is an unfair or deceptive act in trade or commerce and an unfair method of competition for the purpose of applying this chapter.

Created by Chapter 186, §3, Laws of 2002, effective July 1, 2002. Repealed by Chapter 226, §11, Laws of 2007, effective July 1, 2007.

§37-24-39. Service Provider's Rights [repealed]

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 §§37-24-36 to 37-24-40, inclusive.

No interactive computer service is 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 §§37-24-36 to 37-24-40, inclusive.
Created by Chapter 186, §4, Laws of 2002, effective July 1, 2002. Repealed by Chapter 226, §12, Laws of 2007, effective July 1, 2007.

§37-24-40. Remedies Against Violators [repealed]

A recipient or a provider of internet access services may bring either or both of the following actions:

- (1) An action based on a violation of §37-24-37 to enjoin such violation.
- (2) An action to recover damages for such a violation in an amount equal to the greater of:
 - (a) The amount of the actual monetary loss; or
 - (b) \$500 for each violation, not to exceed a total of \$10,000.

If the court finds that the defendant willfully, knowingly, or repeatedly violated §37-24-37, the court may increase the amount of the award to an amount equal to not more than three times the amount available under this section.

In any such action, the court may require an undertaking for the payment of the costs of such action, and assess reasonable costs, including reasonable attorneys' fees, against any party.

At the request of any party to an action brought pursuant to this section or any other participant in such an action, the court may issue protective orders and conduct legal proceedings in such a way as to protect the secrecy and security of the computer, computer network, computer data, computer program, and computer software involved in order to prevent possible recurrence of the same or a similar act by another person and to protect any trade secrets of any such party or participant.

Created by Chapter 186, §5, Laws of 2002, effective July 1, 2002. Repealed by Chapter 226, §10, Laws of 2007, effective July 1, 2007.

§37-24-41. Definitions Pertaining to Commercial Electronic Mail

Terms used in §§37-24-41 to 37-24-48, inclusive, 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:

(14)(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;

(14)(b) An e-mail address ordinarily accessed from a computer located in this state; or

(14)(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:

(15)(a) The recipient has not provided direct consent to receive advertisements from the advertiser; or

(15)(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.

Created by Chapter 226, §1, Laws of 2007, effective July 1, 2007.

§37-24-42. Prohibited Commercial Electronic Mail Advertisements

No person or entity may do any of the following unless the subject line complies with the requirements set forth in §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.

Created by Chapter 226, §2, Laws of 2007, effective July 1, 2007.

§37-24-43. Service Provider's Right Not to Transmit Electronic Mail Messages

Nothing in §§ 37-24-41 to 37-24-48, inclusive, 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.

Created by Chapter 226, §3, Laws of 2007, effective July 1, 2007.

§37-24-44. Prohibited Collection of Electronic Mail Addresses

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.

Created by Chapter 226, §4, Laws of 2007, effective July 1, 2007.

§37-24-45. Automated Collection of Electronic Mail Addresses

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.

Created by Chapter 226, §5, Laws of 2007, effective July 1, 2007.

§37-24-46. Automated Creation of Multiple Electronic Mail Accounts

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.

Created by Chapter 226, §6, Laws of 2007, effective July 1, 2007.

§37-24-47. Prohibited Commercial Electronic Mail Transmissions

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.

Created by Chapter 226, §7, Laws of 2007, effective July 1, 2007.

§37-24-48. Right of Recipient or Service Provider to Sue; Action by Attorney General

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 §37-24-42, 37-24-44, 37-24-45, 37-24-46, or 37-24-47 and may recover either or both of the following:

- (1) Actual damages; or
- (2) Liquidated damages of \$1,000 for each unsolicited commercial e-mail advertisement transmitted in violation of such section, up to \$1 million 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 §§37-24-41 to 37-24-48, inclusive, the court shall reduce the liquidated damages recoverable under this section to a maximum of \$100 for each unsolicited commercial e-mail advertisement, or a maximum of \$100,000 per incident.

Created by Chapter 226, §8, Laws of 2007, effective July 1, 2007.