

TEXAS

Sections 46.001 through 46.011 of the *Texas Business & Commerce Code* govern commercial electronic mail. Those code sections:

- Forbid the sender to falsify an email's routing information or put false information in its subject line;
- Make it illegal for a sender to use another person's domain name without consent;
- Require the sender to put a label on the subject line of an unsolicited email containing advertising or sexually explicit material;
- Require the sender to establish a mechanism by which a recipient can ask not to be contacted, and forbids the sender to forward the email address of a person on its do-not-contact list;
- Imposes criminal penalties on violators who send sexually explicit email;
- Authorizes the Attorney General and local prosecutors to file suit seeking civil penalties and an injunction against future violations;
- Entitles a recipient or a service provider to sue a violator for damages, attorney's fees and costs, and an injunction; and
- Classifies violations as deceptive trade practices.

Tex. Bus. & Com. Code

§46.001. Definitions Pertaining to Commercial Electronic Mail

In this chapter [*§§46.001-46.011 of the Business & Commerce Code*]:

(1) "Commercial electronic mail message" means an electronic mail message that advertises, offers for sale or lease, or promotes any goods, services, business opportunity, property, or any other article, commodity, or thing of value.

(2) "Electronic mail" means a message, file, or other information that is transmitted through a local, regional, or global computer network, regardless of whether the message, file, or other information is viewed, stored for retrieval at a later time, printed, or filtered by a computer program that is designed or intended to filter or screen those items.

(3) "Electronic mail service provider" means a person that:
(3)(A) is qualified to do business in this state;
(3)(B) is an intermediary in sending or receiving electronic mail; and
(3)(C) provides an end user of an electronic mail service the ability to send or receive electronic mail.

(4) "Established business relationship" means a prior or existing relationship of a person formed by a voluntary two-way communication between a person and another person, regardless of whether consideration is exchanged, regarding products or services offered by one of the persons, that has not been terminated by either party.

(5) "Internet domain name" refers to a globally unique, hierarchical reference to an Internet host or service, assigned through a centralized Internet naming authority and composed of a series of character strings separated by periods with the right-most string specifying the top of the hierarchy.

(6) "Obscene" has the meaning assigned by §43.21, Penal Code.

(7) "Sender" means a person who initiates an electronic mail message.

(8) "Sexual conduct" has the meaning assigned by §43.25, Penal Code.

(9) "Unsolicited commercial electronic mail message" means a commercial electronic mail message sent without the consent of the recipient by a person with whom the recipient does not have an established business relationship. The term does not include electronic mail sent by an organization using electronic mail for the purpose of communicating exclusively with members, employees, or contractors of the organization.

Created by Chapter 1053, §1, Laws of 2003, effective September 1, 2003.

§46.002. Commercial Electronic Mail Containing False or Misleading Information

(a) A person may not intentionally transmit a commercial electronic mail message that:

- (a)(1) falsifies electronic mail transmission information or other routing information for an unsolicited commercial electronic mail message; or
- (a)(2) contains false, deceptive, or misleading information in the subject line.

(b) A person may not intentionally send a commercial electronic mail message that uses another person's Internet domain name without the other person's consent.

Created by Chapter 1053, §1, Laws of 2003, effective September 1, 2003.

§46.003. Sender's Obligation to Label Electronic Mail and Provide Opt-Out Mechanism

(a) A person may not intentionally take any action to send an unsolicited commercial electronic mail message unless:

- (a)(1) "ADV:" is used as the first four characters in the subject line of the message or, if the message contains any obscene material or material depicting sexual conduct, "ADV: ADULT ADVERTISEMENT" is used as the first word in the subject line of the message; and
- (a)(2) the sender of the message or a person acting on behalf of the sender provides a functioning return electronic mail address to which a recipient may, at no cost to the recipient, send a reply requesting the removal of the recipient's electronic mail address from the sender's electronic mail list.

(b) A sender shall remove a person's electronic mail address from the sender's electronic mail list not later than the 3rd day after the date on which the sender receives a request for removal of that address under Subsection (a)(2).

Created by Chapter 1053, §1, Laws of 2003, effective September 1, 2003.

§46.004. Unauthorized Forwarding of Electronic Mail Address

A sender or a person acting on behalf of the sender may not sell or otherwise provide the electronic mail address of a person who requests the removal of that address from the sender's electronic mail list under §46.003(a)(2), except as required by other law.

Created by Chapter 1053, §1, Laws of 2003, effective September 1, 2003.

§46.005. Criminal Penalty for Sending Sexually Explicit Electronic Mail

A person commits an offense if the person intentionally takes any action to send a message containing obscene material or material depicting sexual conduct in violation of §46.003(a)(1). An offense under this section is a Class B misdemeanor.
Created by Chapter 1053, §1, Laws of 2003, effective September 1, 2003.

§46.006. Action to Recover Civil Penalties and Enjoin Future Violations

- (a) A person who violates this chapter other than §46.009 is liable to the state for a civil penalty in an amount not to exceed the lesser of:
- (a)(1) \$10 for each unlawful message or action; or
 - (a)(2) \$25,000 for each day an unlawful message is received or an action is taken.
- (b) The attorney general or the prosecuting attorney in the county in which the violation occurs may:
- (b)(1) bring suit to recover the civil penalty imposed under Subsection (a); and
 - (b)(2) seek an injunction to prevent or restrain a violation of this chapter.
- (c) The attorney general or the prosecuting attorney may recover reasonable expenses incurred in obtaining a civil penalty under this section, including court costs, reasonable attorney's fees, investigative costs, witness fees, and deposition expenses.
Created by Chapter 1053, §1, Laws of 2003, effective September 1, 2003.

§46.007. Violations Classified as Deceptive Trade Practices

A violation of this chapter is a false, misleading, or deceptive act or practice under Subchapter E, Chapter 17 [§§17.41-17.63, *Business & Commerce Code, The Texas Deceptive Trade Practices-Consumer Protection Act*], and any public or private right or remedy prescribed by that subchapter may be used to enforce this chapter, except as provided by §46.008(d).
Created by Chapter 1053, §1, Laws of 2003, effective September 1, 2003.

§46.008. Recipient's and Service Provider's Remedies

- (a) A person injured by a violation of this chapter may bring an action to recover actual damages, including lost profits. A person who prevails in the action is entitled to reasonable attorney's fees and court costs.
- (b) In lieu of actual damages, a person injured by a violation of this chapter arising from the transmission of an unsolicited or commercial electronic mail message, other than an electronic mail service provider, may recover the lesser of:
- (b)(1) \$10 for each unlawful message; or
 - (b)(2) \$25,000 for each day the unlawful message is received.
- (c) In lieu of actual damages, an electronic mail service provider injured by a violation of this chapter arising from the transmission of an unsolicited or commercial electronic mail message may recover the greater of:
- (c)(1) \$10 for each unlawful message; or
 - (c)(2) \$25,000 for each day the unlawful message is received.
- (d) A court may not certify an action brought under this chapter as a class action.

(e) At the request of a party to any action brought under this chapter, the court, in its discretion, may conduct a legal proceeding in such a manner as to protect the secrecy and security of the computer, computer network, computer data, computer program, and computer software involved to prevent a possible recurrence of the same or a similar act by another person and to protect any trade secrets of a party to the action.

Created by Chapter 1053, §1, Laws of 2003, effective September 1, 2003.

§46.009. Notice of Civil Action; Intervention by Attorney General

(a) A person who brings an action under §46.008 shall give notice of the action to the attorney general by sending a copy of the petition by registered or certified mail not later than the 30th day after the date the petition was filed and at least 10 days before the date set for a hearing on the action.

(b) The attorney general may intervene in the action by:

(b)(1) filing a notice of intervention with the court in which the action is pending;
and

(b)(2) serving each party to the action with a copy of the notice of intervention.

(c) A person who violates Subsection (a) is liable to the state for a civil penalty in an amount not to exceed \$200 for each violation. The attorney general may bring suit to recover the civil penalty imposed under this subsection in the court in which the action is instituted.

Created by Chapter 1053, §1, Laws of 2003, effective September 1, 2003.

§46.010. Service Provider's Rights

An electronic mail service provider may on its own initiative block the receipt or transmission through its service of any commercial electronic mail message that the provider reasonably believes is or will be sent in violation of this chapter if the provider:

(1) provides a process for the prompt, good faith resolution of disputes related to the blocking with senders of commercial electronic mail messages; and

(2) makes contact information publicly accessible on its Internet website for the purpose of dispute resolution.

Created by Chapter 1053, §1, Laws of 2003, effective September 1, 2003.

§46.011. Telecommunication Utility's Immunity; Defenses to Liability

(a) In this section, "telecommunications utility" has the meaning assigned by §51.002, Utilities Code.

(b) A telecommunications utility or an electronic mail service provider may not be held liable under §46.002 or 46.003 and is not subject to the penalties provided under this chapter.

(c) A person injured by a violation of this chapter does not have a cause of action against a telecommunications utility or an electronic mail service provider under this chapter solely because the utility or provider:

(c)(1) is an intermediary between the sender, or any person acting on behalf of the

sender, and the recipient in the transmission of electronic mail that violates this chapter;

(c)(2) provides transmission, routing, relaying, handling, or storing, through an automatic technical process, of an unsolicited commercial electronic mail message through the utility's or provider's computer network or facilities; or

(c)(3) provides telecommunications services, information services, or other services used in the transmission of an electronic mail message that violates this chapter.

(d) An electronic mail service provider that provides for a dispute resolution process as described by §46.010 may not be held liable for blocking the receipt or transmission through its service of any commercial electronic mail message that the provider reasonably believes is or will be sent in violation of this chapter.

(e) A person may not be held liable under this chapter for a commercial electronic mail message that is sent as a result of an error or accidental transmission.

(f) A sender may not be held liable for the transmission of an electronic mail message that violates this chapter if the sender:

(f)(1) contracts in good faith with an electronic mail service provider to transmit electronic mail messages for the sender; and

(f)(2) has no reason to believe the electronic mail service provider will transmit any of the sender's messages in a manner that violates this chapter.

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