

2003 DRAFTING REQUEST

Bill

Received: 10/02/2002

Received By: rkite

Wanted: As time permits

Identical to LRB:

For: Steven Foti (608) 266-2401

By/Representing: Adam Raschka

This file may be shown to any legislator: NO

Drafter: rkite

May Contact:

Addl. Drafters:

Subject: Trade Regulation - electron com

Extra Copies: MGG

Submit via email: YES

Requester's email: Rep.Foti@legis.state.wi.us

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Prohibiting certain e-mail solicitations

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	rkite 10/09/2002	jdyer 10/25/2002					State
/1			jfrantze 10/25/2002		lemery 10/29/2002	sbasford 08/07/2003	
			chaugen 10/29/2002			sbasford 08/07/2003	

Vers. Drafted Reviewed Typed Proofed Submitted Jacketed Required

FE Sent For:

Att intro.

<END>

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FE Sent For:

1 10/25 jld

54 10/25

cln 5/11/02

<END>

Kite, Robin

From: Kunkel, Mark
Sent: Wednesday, October 02, 2002 3:36 PM
To: Raschka, Adam
Cc: Kite, Robin
Subject: RE: 2001 AB 416

Adam:

I forwarded your request to another attorney here, Robin Kite. She will redraft the bill, as amended, for you. If you have any questions, you can reach her at 266-7291.

-- Mark

-----Original Message-----

From: Raschka, Adam
Sent: Wednesday, October 02, 2002 2:04 PM
To: Kunkel, Mark
Subject: 2001 AB 416

Hi Mark,

I understand you drafted 2001 AB 416 for Rep. Foti last session. Could we please have the same bill drafted for 2003 with the addition of an amendment drafted by Robin Kite, LRBa1278/1.

Please give me a call if you have any questions.

Thank you,

Adam

Adam Raschka
Office of Majority Leader Steve Foti
608-264-8516
adam.raschka@legis.state.wi.us

D-Note

3
2004 ASSEMBLY BILL 1161

May 18, 2001 - Introduced by Representatives FOTI, MILLER, McCORMICK, TURNER, LIPPERT, SHILLING, J. FITZGERALD, D. MEYER, AINSWORTH, ALBERS, FREESE, FRISKE, HAHN, HOVEN, KRAWCZYK, LADWIG, LASSA, M. LEHMAN, OTT, PETROWSKI, PETTIS, PLOUFF, RHOADES, SKINDRUD, STONE, SYKORA, URBAN, VRAKAS and WADE, cosponsored by Senators PANZER, M. MEYER, S. FITZGERALD, DARLING, HARS DORF, HUELSMAN, HANSEN, ROESSLER and SCHULTZ. Referred to Committee on Information Policy and Technology.

Regen

1 AN ACT *to amend* 100.264 (2) (intro.); and *to create* 100.52 of the statutes;
2 **relating to:** prohibiting certain electronic mail solicitations and providing a
3 penalty. ✓

✓ (electronic mail solicitation)

Analysis by the Legislative Reference Bureau

This bill imposes certain requirements on a person who sends an ~~electronic mail solicitation, which is defined as an~~ electronic mail message ~~sent~~ without the consent of the recipient for the purpose of selling or leasing or offering to sell or lease property, goods, or services to the recipient. Under the bill, a person who sends an electronic mail solicitation must maintain a toll-free telephone number or return electronic mail address that the recipient may use to direct the person not to send any other electronic mail solicitation to the recipient. In addition, an electronic mail solicitation must include a statement that notifies the recipient about the toll-free number or return electronic mail address. ~~The statement must be displayed in the same font size as the majority of the text of the electronic mail solicitation.~~ Also, if the person sending an electronic mail solicitation does not have a previous business relationship with the recipient, the electronic mail solicitation must include the letters "ADV" at the beginning of the subject of the electronic mail solicitation.

The bill prohibits a person from sending an electronic mail solicitation to a recipient who uses the toll-free number or return electronic mail address to direct the person not to send additional electronic mail solicitations to the recipient. In addition, a person may not send an electronic mail solicitation to an address that an employer maintains for an employee if the employer uses the toll-free telephone

ASSEMBLY BILL 416

The prohibitions under the bill do not apply to an internet service provider that transmits electronic mail messages as an intermediary.
number or return electronic mail address to direct the person not to send electronic mail solicitations to the address maintained by the employer. The bill also prohibits a person that sends an electronic mail solicitation from misrepresenting the person's identity or knowingly providing a false or inaccurate toll-free telephone number or return electronic mail address. *λ*

The bill's prohibitions are enforced by the department of agriculture, trade and consumer protection. Any person who violates the bill's prohibitions is subject to a civil forfeiture of not less than \$100 nor more than \$10,000 for each violation. In addition, for a violation perpetrated against an elderly or disabled person, a court may, under certain circumstances, impose a supplemental forfeiture of no more than \$10,000.

Finally, the bill provides that its prohibitions apply to any interstate electronic mail solicitation sent or received by a person in this state and to any intrastate electronic mail solicitation.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

X
SECTION 1. 100.264 (2) (intro.) of the statutes is amended to read:

100.264 (2) SUPPLEMENTAL FORFEITURE. (intro.) If a fine or a forfeiture is imposed on a person for a violation under s. 100.16, 100.17, 100.18, 100.182, 100.183, 100.20, 100.205, 100.207, 100.21, 100.30 (3), 100.35, 100.44 ~~or~~, 100.46, or 100.5³~~2~~ or a rule promulgated under one of those sections, the person shall be subject to a supplemental forfeiture not to exceed \$10,000 for that violation if the conduct by the defendant, for which the violation was imposed, was perpetrated against an elderly person or disabled person and if the court finds that any of the following factors is present:

SECTION 2. ~~100.52~~ ^{*X*} 100.53 of the statutes is created to read:

~~100.52~~ ^{100.53 ← (C)} **Electronic mail solicitations.** (1) DEFINITIONS. In this section

"electronic mail solicitation" means an electronic mail message that is sent without

RWF
12 ✓
insert
2-12 →

ASSEMBLY BILL 416

Insert
3-2

NO
4

1 the consent of the recipient for the purpose of selling or leasing or offering to sell or
2 lease property, goods, or services to the recipient.

3 (2) PROHIBITIONS. (a) No person may send an electronic mail solicitation unless
4 the person does all of the following:

5 1. Establishes and maintains a toll-free telephone number or return electronic
6 mail address that allows the recipient of the electronic mail solicitation to direct the
7 person not to send any other electronic mail solicitation to the recipient.

8 2. Includes a statement in the electronic mail solicitation that identifies the
9 toll-free telephone number or return electronic mail address specified in subd. 1. and
10 that notifies the recipient that the recipient may use the toll-free telephone number
11 or return electronic mail address to direct the person not to send any other electronic
12 mail solicitation to the recipient. A statement required under this subdivision shall
13 be displayed in the same font size as the majority of the text in the electronic mail
14 solicitation.

15 3. If the person does not have a previous business relationship with the
16 recipient of the electronic mail solicitation, includes the letters "ADV" at the
17 beginning of the subject of the electronic mail message.

18 (b) Notwithstanding par. (a): no person may do any of the following

19 1. ~~A person may not~~ send an electronic mail solicitation to a recipient of a prior
20 electronic mail solicitation sent by the person if the recipient uses the toll-free
21 telephone number or return electronic mail address specified in par. (a) 1. to direct
22 the person not to send any other electronic mail solicitation to the recipient.

23 2. ~~A person may not~~ send an electronic mail solicitation to an electronic mail
24 address that an employer provides for an employee if the employer uses the toll-free

ASSEMBLY BILL 416

1 telephone number or return electronic mail address specified in par. (a) 1. to direct
2 the person not to send the electronic mail solicitation.

3 ~~(c) No person that~~^{4 3.} sends an electronic mail solicitation ~~may~~^{that} misrepresent the ~~the~~^s
4 identity of the person sending the electronic mail solicitation ~~and~~^{4 4.} knowingly provide
5 a false or inaccurate toll-free telephone number or return electronic mail address
6 specified in par. (a) 1. ✓

7 (3) ENFORCEMENT. (a) The department ✓ shall investigate violations of this
8 section. ✓

9 (b) The department or any district attorney may, on behalf of the state, do any
10 of the following:

11 1. Bring an action for temporary or permanent injunctive or other relief for any
12 violation of this section. ✓

13 2. Bring an action for the recovery of a civil forfeiture against any person that
14 violates this section in an amount of not less than \$100 nor more than \$10,000 for
15 each violation.

16 (4) TERRITORIAL APPLICATION. This section applies to any interstate electronic
17 mail solicitation sent or received by a person in this state and any intrastate
18 electronic mail solicitation.

19 (END)

D-note
↓

**ASSEMBLY AMENDMENT ,
TO 2001 ASSEMBLY BILL 416**

Inserts

in providing

insert 2-12

1 ~~At the locations indicated, amend the bill as follows.~~

2 ~~1. Page 2, line 11: delete "section," and substitute "section:".~~

3 ~~2. Page 2, line 12: delete that line and substitute:~~

4 ~~(a) "Electronic mail service provider" means any person that is an~~
5 ~~intermediary in sending or receiving electronic mail and that provides to~~ *with* ~~Internet~~
6 ~~users the ability to send or receive electronic mail.~~

7 (b) "Electronic mail solicitation" means an electronic mail message that is sent
8 without ~~the~~

Insert 3-2

9 ~~3. Page 3, line 2: after that line insert:~~

10 (c) "Internet user" means a person that maintains an electronic mail address
11 with an electronic mail service provider.



INS 3-2 cont
an electronic mail

1 (d) "Send" means to initiate the transmission of an electronic mail message, but
2 does not include any transmission of ~~the~~ message by an electronic mail service
3 provider. ⁹⁹

(end ins 3-2)

(END)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0316/1dn

RNK: ^:...

Jld

This is a redraft of 2001 Assembly Bill 416. It also incorporates LRBa1278/1. I have made some minor non-substantive changes in the draft for the purposes of clarity only.

As Mark Kunkel, who prepared last session's version of this draft, indicated in a drafter's note to you, this ~~bill~~^{draft} could be subject to a constitutional challenge on the basis that it violates the Commerce Clause of the U.S. Constitution. The Commerce Clause limits the authority of the states to enact legislation affecting interstate commerce.

Generally, the U.S. Supreme Court has identified two areas of inquiry in examining whether a statute violates the Commerce Clause. The court first asks if the statute discriminates against interstate commerce. If the court concludes that the statute does not discriminate against interstate commerce, the court then asks whether the statute imposes a burden on interstate commerce that is clearly excessive in relation to the local state interest. In other words, under the second inquiry, the court applies a balancing test.

There are two recent cases that have examined the question of whether a state law regulating unsolicited e-mail (spam) violates the commerce clause. In State of Washington v. Heckel, 24 P. 3d 404 (2001), and Ferguson v. Friendfinders, 94 Cal. App 4th 1255 (2002), the Washington Supreme Court and the California appeals court concluded, respectively, that the Washington and California statutes regulating the sending of spam do not violate the Commerce Clause. Both states have laws that are similar to the proposal contained in this ~~bill~~^{draft}. There are certain differences, however, that are worth noting.

Under the Washington law, the regulation of ~~unsolicited e-mail~~^{spam} only applies to a person that sends e-mail from a computer in Washington to a Washington resident. The California law specifies that the requirements of the law only apply when the ~~unsolicited e-mail~~^{spam} is "delivered to a California resident via an electronic mail service provider's service or equipment located" in California. These laws are distinguishable from the proposal contained in this ~~bill~~^{draft} because this draft applies to any person who sends ~~unsolicited e-mail~~^{spam} to a Wisconsin resident. This distinction may be sufficient to cause a Wisconsin court to conclude that this proposal improperly imposes a burden on interstate commerce.

Because a Wisconsin court is not bound by any decision of the court of another state, and because it is difficult to predict how a Wisconsin court would rule if this proposal was challenged on constitutional grounds, you might want to consider drafting this

proposal more narrowly to avoid such a challenge. If you would like to discuss this issue in more detail, please feel free to contact me.

Robin N. Kite
Legislative Attorney
Phone: (608) 266-7291
E-mail: robin.kite@legis.state.wi.us

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0316/1dn
RNK:jld:jf

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