

NetChoice *Promoting Convenience, Choice, and Commerce on the Net*

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Rep. Yvette Herrell
PO Box 4338
Alamogordo, NM 88311

February 16, 2015

RE: Opposition to HB 237, Prohibition on advertising

Dear Chairwoman Herrell and members of Regulatory & Public Affairs Committee:

While well intentioned, we respectfully ask that you not move HB 237, which would fail at its mission to protect minors from select electronic advertisements by creating a "do not contact" list. In fact, HB 237 may actually endanger minors and would certainly impede legitimate online marketing by New Mexico's businesses.

Under HB 237, once a minor is registered on the state's list, certain businesses cannot advertise to that minor and must pay a fee to check against the registry. On its face this bill appears to protect minors and raise revenue.

But this approach is ineffective, and has actually endangered minors in states where similar laws were enacted. Moreover, this law would disincite businesses from transacting with New Mexico, negatively impact the state budget, and could send up to 85% of the raised money to a Utah company.

In other words, HB 237 would be *all pain and no gain*.

Email registries Do Not Work and put at risk the personal information of the minors who sign up to them

In 2004, the Federal Trade Commission (FTC) reported to the US Congress that email registries, like the ones proposed by HB 237, do not prevent unwanted emails.¹ In this report, the FTC stated,

*"A National Do Not Email Registry . . . would fail to reduce the burden of spam and may even increase the amount of spam received by consumers."*²

*"[T]he possibility that such a list could fall into the hands of the Internet's most dangerous users, including pedophiles, is truly chilling."*³

In its report, the FTC identified the need for a complete authentication mechanism to make any email registry work.⁴ New Mexico has no such plans for a complete authentication mechanism.

¹ See *National Do Not Email Registry A Report to Congress*, FTC, June 2004.

² *Id.* at i (emphasis added).

³ *Id.* at 33-34 (emphasis added).

When Illinois and Hawaii considered a similar email registry, the FTC warned that since “such a registry cannot be effectively monitored for abuse, it may have the unintended consequence of providing spammers with a mechanism for verifying the validity of email addresses.”⁵ In essence, the email registry would provide spammers with a listing of valid email addresses.

So, an email registry might “actually increase the amount of spam sent to registered children’s addresses in general, including spam containing adult content.”⁶ The end result of HB 237 will be more commercial email to minors, not less.

Email registries endanger minors – as Utah learned when personal information of children on its registry was divulged

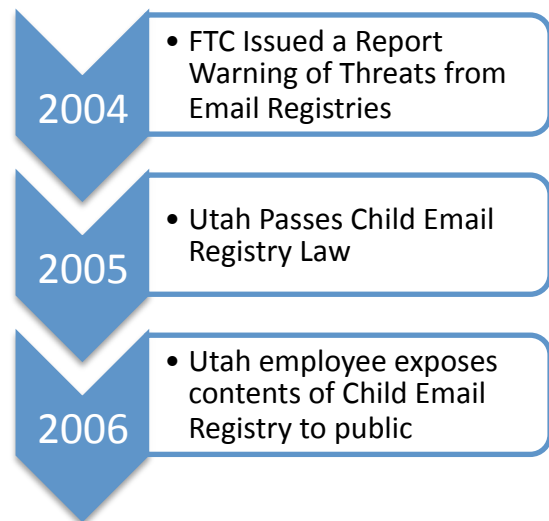
When minors and children’s email addresses are gathered in one database, they become a rich target for pedophiles and people with bad intentions. The FTC has taken a position against state-managed “do not contact” lists since they are a danger to minors⁷ and because data breaches and hacks could expose minors’ email addresses to sexual predators. This concern is especially relevant given all the recent data breach attempts.

Unspam Technologies, the email registry for Utah and Michigan, recognized the security risks in maintaining a minors registry list. And despite Unspam’s declaration that “it was inconceivable that the list of registered addresses could ever be divulged,”⁸ in 2006 a Utah employee mistakenly exposed children’s email addresses collected in that state’s “do not contact” list. Suddenly, the email addresses of hundreds of children were exposed to potential sexual predators.

When Illinois and Hawaii considered a child email registry, the FTC warned of the dangers to children stating:

“Because existing computer security techniques are inadequate to prevent the abuse of such a registry, [this law] may provide pedophiles and other dangerous persons with a list of contact points for Illinois children.”⁹

“It is well known that ... the hashed list of email addresses, which is such a valuable target, is almost certain to be compromised ... The technology does not exist to protect it against insiders.”¹⁰



⁴ “Without effective authentication of email, any Registry is doomed to fail.” *Id.* at ii.

⁵ Letter from FTC to the Honorable Angelo Saviano, Re: Illinois HB 0572, Oct. 25, 2005.

⁶ *Id.*

⁷ *Id.*

⁸ Despite the breach in Utah, the Unspam CEO Matthew Prince once stated in an affidavit, “[e]ven if ordered by a court or held at gunpoint, there is no feasible way that I, any Unspam employee, or any state official could provide you even a single address that has been submitted for compliance by any sender.” *E-mail guardians let guard down*, L. Fantin, Salt. Lake Trib., Oct. 13, 2006

⁹ Letter from FTC to the Honorable Angelo Saviano, Re: Illinois HB 0572, Oct. 25, 2005.

¹⁰ *Id.* at p. 7 n. 33 (emphasis added).

If the legislature advances this bill, we ask that you consider the possibility and harm of a release or breach of an email database for thousands of New Mexico's minors.

HB 237 impacts local businesses like New Mexico Supermarkets

It's not just companies transacting by email that are impacted by the effects of HB 237— it is local businesses that communicate with their customers via emails. Consider Peppers Supermarket in Deming. Their weekly flier includes ads for beer and wine – prohibited items under HB 237. Since HB 237 would prohibit emails with such ads, Peppers Supermarket would need to check against HB 237's registry - at significant cost - before emailing their weekly flyer to New Mexico customers. This is just one of the New Mexico businesses impacted by HB 237 – forcing them to pay new fees and incur significant legal.



ADDRESS 812 E Florida Deming, NM 88030
PHONE 575-546-3922
FAX 575-546-7840
EMAIL info@demingpeppers.com

OUR DOORS ARE OPEN FROM
6:00 AM to 10:00 PM
SEVEN DAYS A WEEK *

* we tried closing on weekends but people didn't like it.

BOTTOMS (responsibly) UP!

At Peppers Supermarket we have the best selection of Beer, Wine, and Spirits in Deming, NM. If you do not see something on the shelf we are able to do special orders to accommodate you. We can order Wine, and Spirits by the bottle or by the case. We can also order beer by the case if it is something we do not carry. All Wine and Spirit case buys get a 10% discount. Come on in and get your Beer, Wine, and Spirits for any occasion.

DEPARTMENT MANAGER



HB 237 would discourage businesses from transacting with New Mexico

HB 237 exposes businesses to significant liability through costs of referencing to the listed registry, obtaining parental consent, and statutory damages for failure to comply.

When an advertiser checks against the list of registered email addresses, the advertiser must pay a fee for each email checked against the list – which can add up to significant costs. If Peppers Supermarket emailed its weekly flyer to only 100,000 customers, the cost to check these email address against the registry would be \$156,000/year. This cost can be particularly burdensome to small businesses, some of which have very small annual incomes.

Should an advertiser want to send an email to a minor on the “do not contact” list for an item determined to be “harmful to minors,” the advertiser must face additional costs from:

- Conducting a face-to-face meeting with the adult of the registered minor;
- Verifying the age of the adult by collecting yet more personal information or inspecting government documents and records;
- Determining whether the adult has legal authority to give consent for the minor;

- Obtaining written consent from the adult to send the advertisement;
- Recording and notifying the New Mexico government of the adult's consent.

Finally, HB 237 allows for statutory damages, even where there is no harm. HB 237 creates statutory fines of \$5,000 for each communication sent that does not comply with the law and/or \$250,000 per day. This means one mistake can put a New Mexico business out of business.

New Mexico would lose – not raise – revenue from HB 237

Neither Michigan nor Utah has seen significant revenue from their email registry laws. The *Salt Lake Tribune* even called Utah's law a "financial failure."¹¹

Moreover, Utah also had to pay Unspam's legal fees when it answered constitutional challenges for enactment of the list. The *Salt Lake Tribune* described the financial situation as:

"Predicted to bring three to six million dollars in revenue to the state, [the registry's] gross revenue ... were only \$187,224. *Eighty percent of that went to Unspam ...* [and] Utah netted just \$37,445, not nearly enough to cover the costs estimated in the original legislation."¹²

New Mexico should not consider this a revenue generator, and instead, prepare to pay to operate the minor registry list and to defend it in court.

HB 237 could send Millions of revenue raised to a Utah company

During a subcommittee hearing, Unspam (the Utah based email registry provider) testified that they could not name a single competitor nor was any other one discussed – helping to ensure that Unspam receives New Mexico's registry contract.

This would mean that the up to 85% of the revenue raised by HB 237 could leave the state and fill the pockets of this Utah company. This is not the best way to help New Mexico, especially when it might be paying Unspam's legal fees as discussed above.

HB 237 is unnecessary

Industry-created mechanisms already allow parents to protect their minors from unwanted commercial emails. Email services like Yahoo Mail, AOL Mail, and Gmail have built-in spam filters that automatically divert spam away from inboxes into a "delete" folder. Also, each of these services allows parents to create "rules" that automatically delete spam by keywords, by sender or by address. These programs already give the consumer a way to banish spam from their inbox at little or no cost to the state or consumer.

In addition to the user-side approach, Internet Service Providers offer email and Internet Website filtering software that can be individually hand tailored for a particular family's needs. This ensures that parents control the content their minors see and can tune the filter. This is especially helpful given that the protection levels for an eight-year-old could be set much higher than for a teenager.

With these resources already available, at no cost to the state and with greater customization for parents, HB 237 is unnecessary.

¹¹ *Taxpayers picking up tab for company's legal troubles*, L. Fantin, Salt. Lake Trib., Apr. 29, 2007.

¹² *Id.* (emphasis added).

Please don't allow HB 237 to become law

Now is not the time for New Mexico to emulate mistakes made by Michigan and Utah in their experiments to protect minors online. Please don't allow HB 237 to deprive New Mexico of the benefits of online services while adding costs to citizens, businesses, and the state government.

Thank you for considering our views and please let me know if we can provide further information.

Sincerely,

A handwritten signature in black ink, appearing to read "Carl Szabo". The signature is fluid and cursive, with the first name "Carl" being more prominent than the last name "Szabo".

Carl M. Szabo
Policy Counsel, NetChoice

NetChoice is trade association of leading e-commerce and online businesses. www.NetChoice.org

The Salt Lake Tribune

E-mail guardians let guard down

BY LINDA FANTIN
THE SALT LAKE TRIBUNE

PUBLISHED OCTOBER 13, 2006 2:03 AM

The Utah agency in charge of policing Web-based purveyors of pornography, alcohol, tobacco and gambling told some parents Thursday it divulged the e-mail addresses of their children - information the state is supposed to safeguard.

The breach of Utah's Child Protection Registry program is a major faux pas for the Utah Division of Consumer Protection. It also could pose a credibility problem for Unspam Technologies Inc., the private company that created the system and is pushing other states to adopt it.

Utah Department of Commerce Director Francine Giani said Thursday that a new consumer protection employee neglected to redact four e-mail addresses from citations obtained through a routine open-records request. Giani learned of the mistake, which occurred Oct. 3, from court papers filed Thursday by a California adult-industry trade group challenging the constitutionality of the controversial registry.

"A fair amount of trust has been placed with us and this is not a good thing," Giani said. "I'm sick about it."

Giani emphasized her department, not Unspam, was responsible.

But that didn't stop the Free Speech Coalition from arguing the entire program is far from foolproof. The breach underscores one of the issues the Federal Trade Commission highlighted in its review of e-mail registries - that the benefits are outweighed by the risk of compromise, said coalition attorney Jerome Mooney.

"It's a substantial failure of a program that's barely one year old," Mooney said. "And it's not like anyone was probing the system to look for weaknesses."

The breach involves citations issued last month to four companies for violating a new law that requires adult-oriented Web sites to screen out the e-mail addresses of minors who appear on the state registry.

Named in the citations were DOS Media Now, an Encinitas, Calif., online gambling site; Golden Arch Casinos, of Overland Park, Kan.; Smoothbeer.com, a United Kingdom beer company; and SoftestGirls.com, a Singapore company that sent pornographic e-mails to Utah minors.

After reports of the crackdown appeared in the media, Justin Weiss of the E-mail Service Provider Coalition requested copies of the citations. The state promptly complied but neglected to redact the e-mail addresses of the children in question.

Weiss, whose trade group is supporting the coalition's legal challenge, alerted state officials to the security breach Oct. 3 and urged them to inform the individuals whose personal information was compromised, according to court filings.

Just two weeks earlier, Matthew Prince, president and CEO of UnSpam, claimed it was impossible for anyone to get their hands on the e-mail addresses on the registry.

"Even if ordered by a court or held at gunpoint, there is no feasible way that I, any Unspam employee, or any state official could provide you even a single address that has been submitted for compliance by any sender," Prince said in an affidavit.

That a state employee got the names and divulged them makes a mockery of Prince's comments, the Free Speech Coalition suggests in court papers. But Brent Hatch, an attorney for Unspam, points out that Prince was speaking only of e-mail lists submitted to his company. The state got the e-mails it divulged from parents who complained that their children were receiving illegal solicitations.

"This has nothing to do with the registry. The registry is completely secure," Hatch said. "The Free Speech

Coalition got it flat wrong. We stand behind Mr. Prince's statement."

Utah and Michigan are the only states to adopt the registry created by Unspam. The company charges a half-cent for each address that is removed. The registry is free for schools, parents and other guardians of minors to use.

Commercial e-mailers argue that the registry's time and cost are an unfair burden. U.S. District Judge Dale Kimball has set a Nov. 9 hearing on the coalition's motion for an injunction, and the state's request to dismiss the coalition's lawsuit.

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