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CHILDREN'S DO NOT E-MAIL REGISTRIES: GOOD POLITICS, BAD POLICY

By

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Last year, Michigan and Utah passed laws creating registries where parents can register their children's e-mail addresses and other electronic identities to not receive advertisements for products that are illegal for minors to purchase or view, such as alcohol, tobacco, and pornography ("Children's Do Not E-mail Registries").¹ These laws garnered widespread support, passing unanimously in the legislatures of both states. The reasons these laws are politically popular are obvious: 1) nearly everyone with an e-mail address receives spam and is annoyed by it and 2) few people want children to receive e-mails containing pornography or advertisements for products such as cigarettes and pornography.

While the goals of these laws are laudable, the reality is that until technology is available to authenticate the origin of an e-mail, these laws will likely prove ineffective at keeping spam out of children's inboxes and may in fact increase the amount of spam received by minors on the list. For these reasons, the Federal Trade Commission ("FTC") rejected the idea of a Do Not E-mail Registry when it examined the issue in June 2004.²

This LEGAL BACKGROUNDER briefly describes the Michigan and Utah laws; explains why the registries will likely prove ineffective at filtering inappropriate spam; describes the security concerns with the registries; and describes the unreasonable burdens the registries will have on legitimate businesses.

The Children's Do Not E-mail Registry Laws. The Michigan and Utah laws allow parents to submit their children's e-mail addresses, and certain other electronic identities, such as instant message identities, wireless telephone numbers and pager numbers, to a registry.³ Additionally, a school or other institution that

¹MICH. COMP. LAWS § 752.1061-68 (2005); UTAH CODE ANN. § 13-39-101-304 (2005).

²Federal Trade Comm'n, 108th Cong., *National Do Not Email Registry: A Report to Congress* (June 2004) ("FTC Report"). The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act") required the FTC to examine the issue and report to Congress. 15 U.S.C. § 7708(a).

³MICH. COMP. LAWS § 752.1063(2); UTAH CODE ANN. § 13-39-201(3)(a).

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primarily serves minors may submit its entire domain name (e.g. "wlf.org") to the registry.⁴ The laws essentially prohibit a person from sending a message to an address or domain name that has been in the registry for more than 30 days if the primary purpose of the message is to advertise a product or service that minors are prohibited from purchasing or viewing.⁵ Persons advertising such products must submit their mailing lists to the contractors maintaining the registries, who then remove the names of minors in the registries from the advertisers' mailing lists.⁶

A person who sends a prohibited message to a registered e-mail address or domain name may face state-imposed criminal or civil penalties,⁷ and civil suits from recipients of the e-mails.⁸ Both registries are currently accepting registrations for e-mail addresses, but not other electronic identities.⁹ Utah is currently requiring full compliance by senders, while Michigan has postponed compliance indefinitely.¹⁰

The Michigan and Utah Children's Do Not E-mail Registries Will Likely Do Little to Stop the Most Offensive Spam. As noted above, in June 2004, the FTC examined the issue of whether to implement a National Do Not E-mail Registry and concluded that, without the ability to authenticate the source of an e-mail, it is likely that a Do Not E-mail Registry would not significantly lower the amount of spam registrants receive because most spammers will not comply with the law.¹¹ The FTC reasoned that since the vast majority of spammers have not complied with the other provisions of the federal CAN-SPAM Act,¹² they are unlikely to comply with a Do Not E-mail Registry.¹³ Even one of the staunchest defenders of Michigan and Utah's laws admitted that a Children's Do Not E-mail Registry will not stop the most malicious spammers.¹⁴

Spammers ignore anti-spam laws by using various techniques to hide their identities, such as falsifying header information, making it extremely difficult, and sometimes impossible, to identify them by the e-mails they send.¹⁵ Until technology is advanced enough to allow law enforcement to authenticate the domain from which an e-mail originates, enforcement of a Do Not E-mail Registry will likely prove difficult to impossible.¹⁶ In June 2005, the FTC reiterated its view that while the marketplace was moving towards an authentication standard, the technology was not yet in place.¹⁷ There are currently several different standards

⁴MICH. COMP. LAWS § 752.1063(4); UTAH CODE ANN. § 13-39-201(3)(b).

⁵See MICH. COMP. LAWS § 752.1065(1); UTAH CODE ANN. § 13-39-202(1); Utah Dep't of Commerce, "Policy Statement Concerning UTAH CODE ANN. § 13-39-202(1)" (July 8, 2005), at 2, available: <http://www.dcp.utah.gov/PolicyStatement.pdf> ("Utah Policy Statement").

⁶MICH. ADMIN. CODE r. 484.510; UTAH ADMIN. CODE r. 152-39-5.

⁷MICH. COMP. LAWS § 752.1067-68; UTAH CODE ANN. § 13-39-301, 303.

⁸Both laws expressly created a private right of action. MICH. COMP. LAWS § 752.1068; UTAH CODE ANN. § 13-39-302.

⁹Michigan Children's Protection Registry: Answer," Online, Nov. 9, 2005, available: <https://www.protectmichild.com/answer.html?src=q&id=45>; Utah Children's Protection Registry: Answer," Online, Nov. 9, 2005, available: <https://www.utahkidsregistry.com/answer.html?src=q&id=107>.

¹⁰"Michigan Children's Protection Registry: Home," Online, Nov. 9, 2005, available: <https://www.protectmichild.com/>; "Utah Children's Protection Registry: Home," Online, Nov. 9, 2005, available: <https://www.utahkidsregistry.com/index.html>.

¹¹FTC Report 31-33.

¹²Among other things, the CAN-SPAM Act prohibits the use of false or misleading header information in e-mail advertisements and other commercial e-mails, prohibits the use of false or misleading subject lines in e-mail advertisements and requires senders of e-mail advertisements to: 1) identify the e-mail as an advertisement; 2) include a return e-mail address and an option that allows the recipient to decline to receive future e-mail advertisements from the sender; and 3) include a valid postal address. 15 U.S.C. § 7704.

¹³FTC Report 32. For example, even by August 2005, only 3% of unsolicited commercial e-mail fully complied with the CAN-SPAM Act. "MX Logic Reports Spam Accounts for 67 Percent of All Email in 2005; Compares to 76 Percent for Same Time Frame in 2004; While Improved Technology and High-Profile Prosecutions Have Positive Effect, Spam Zombies Still a Significant Source of Internet Pollution," *Business Wire* (Sept. 22, 2005).

¹⁴In a June 16, 2004 online chat on washingtonpost.com, Matthew Prince, co-founder of UnSpam, LLC, stated, "Clearly there are some spammers who will not comply with any law." "Defending the Do-Not-Spam List," Transcript of washingtonpost.com chat with Matthew Prince (June 16, 2004).

¹⁵See FTC Report 8-13.

¹⁶See *id.* at 8.

¹⁷Federal Trade Comm'n, 109th Cong., *Subject Line Labeling As a Weapon Against Spam: A CAN-SPAM Act Report to Congress* (June 2005).

for e-mail authentication, and to date, none of them have been widely implemented.¹⁸ Thus, it does not appear that Children's Do Not E-mail Registries will be effective in slowing the most offensive spam.

Michigan and Utah's Children's Do Not E-mail Registries May Result in More Spam to the Registrants. While difficulty of enforcement alone may not be a valid reason not to pass a law, there are also serious problems with how a Children's Do Not E-mail Registry could be exploited by spammers to send more spam to children. The FTC has concluded that it is likely that a National Do Not E-mail Registry would actually *increase* the amount of spam people in the Registry receive.¹⁹ Similar concerns exist for Michigan and Utah Children's Do Not E-mail Registries.

First, in its Report, the FTC noted that spammers place a high value on valid e-mail addresses. Unlike telephone numbers, which are generally published, e-mail addresses are initially private when created.²⁰ Also, when spammers send out e-mails with a high percentage of undeliverable addresses, servers' filters flag the messages as spam and refuse to deliver them.²¹ Thus, there is a premium on valid addresses.

Second, Michigan and Utah's method of compliance presents two major problems with the security of the addresses. First, marketers who submit their lists to the registries would know which addresses were removed. Thus, spammers may submit their lists to the registries in order to know which e-mail addresses are presumably valid. Second, legitimate businesses that use the registries would have to maintain records of which addresses were removed from their mailing lists, and thus, spammers may attempt to hack into their potentially unsecured records to obtain these valid addresses.²² Since authentication technology has not advanced far enough to identify the origin of an e-mail, when spammers obtain addresses from the registries by either of these methods, it will likely result in an increase of spam to those addresses as spammers will likely compile the addresses they verify and sell them to other spammers.²³

Furthermore, the FTC concluded that earmarking particular e-mail addresses in a National Do Not E-mail Registry as belonging to children would raise "very grave concerns" due to the security issues with the Registry.²⁴ The FTC further stated, "The possibility that such a list could fall into the hands of the Internet's most dangerous users, including pedophiles, is truly chilling."²⁵ Utah actually acknowledges these dangers in its disclosures to registrants, noting in part, "No solution is completely secure. The most effective way to protect children on the Internet is to supervise use and review all email messages and other correspondence... registrants and their guardians should be aware that their contact points may be at greater risk of being misappropriated by marketers who choose to disobey the law."²⁶ As such, Michigan and Utah's Children's Do Not E-mail Registries may actually lead to an increase in spam, or even danger, for registered children.

The Michigan and Utah Children's Do Not E-mail Registries Will Place a Significant Burden on Legitimate Businesses, Without Significantly Reducing Spam. While the Children's Do Not E-mail Registries will have little impact on spammers, they will significantly burden legitimate businesses.

First, businesses that wish to comply with the laws, and thus avoid criminal penalties, civil suits, and administrative fines that can reach \$5,000 per message²⁷ will have to submit their *entire* mailing lists to both the Michigan and Utah registries *regardless of where they do business*. Since e-mails do not have a physical

¹⁸See Ken Magill, "Inaction Threatens E-mail Authentication," *Direct*, at 9 (Sept. 15, 2005).

¹⁹FTC Report i.

²⁰*Id.* at 16-17.

²¹*Id.* at 17.

²²Letter from Email Service Provider Coalition to J. Peter Lark, Chairman, Michigan Public Service Commission, re: "Michigan Children's Protection Registry" (Aug. 8, 2005).

²³See FTC Report 18.

²⁴*Id.* at 34.

²⁵*Id.*

²⁶UTAH CODE ANN. § 13-39-201(3)(c).

²⁷MICH. COMP. LAWS § 752.1068(b); UTAH CODE ANN. § 13-39-303.

address attached, the only way for a business to ensure compliance is to send their entire list to both registries.²⁸ Compliance initially costs \$.005 per e-mail address submitted in Utah²⁹ and will likely cost \$.007 per address submitted in Michigan.³⁰ Thus, if a business that markets products that are illegal for minors has 1 million e-mail addresses on its mailing lists, it will cost \$12,000 to check its lists against the Michigan and Utah registries once and \$144,000 per year to fully comply with both laws. This cost is particularly burdensome on businesses that do very little business in Utah and Michigan, but are unsure if any of the e-mail addresses on their lists are from those states.³¹

Another problem is that the registries do not differentiate between e-mail addresses that are used entirely by a child and e-mail addresses shared with one or both parents.³² Thus, if parents register a shared e-mail address, the parents will not be able to receive messages that they have requested, such as newsletters from breweries, wineries, or casinos. While parents could avoid this problem by giving the child his or her own e-mail address, this would make it more difficult for parents to monitor their children's e-mail use, which would increase the risk that children would be viewing inappropriate material.

Yet another problem with these laws is that, as written, they are vague as to what e-mail messages are prohibited from being sent to addresses in the registry. It is clear that advertisements for alcohol, tobacco, pornography, and gambling are prohibited in both Michigan and Utah, however, it is unclear whether certain other products may be advertised to children in the registries of each state. While the Utah Department of Commerce has issued a policy statement attempting to clarify the scope of the law,³³ Michigan has merely issued a non-comprehensive list of products and services whose advertisements people are prohibited from sending to registrants.³⁴ One example of an advertisement that might be questionable under these laws is an advertisement for R-rated movies. Based on Utah's Policy Statement, it appears that an advertisement for R-rated movies would not be prohibited in Utah,³⁵ but it is unclear whether the same advertisement would be prohibited in Michigan. Since there is a private right of action in each state, this confusion could lead to a significant amount of frivolous litigation as plaintiffs test the outer boundaries of the laws.³⁶

Conclusion. While Michigan and Utah's Children's Do Not E-mail Registries have proven to be politically popular, the results of such laws will likely prove to at best be ineffective against spam and burdensome on legitimate business, and at worst, counterproductive or dangerous.

²⁸Ira Teinowitz, "Ad Groups Decry E-mail Version of Do-Not-Call; Critics: State Registries Impose Economic Penalties on Marketers," *Advertising Age*, at 4 (Sept. 26, 2005).

²⁹*Child Protection Registry Rules*, 2005-14 UTAH BULL. 5 (July 15, 2005).

³⁰Michigan planned on pricing the Registry at \$.007 per e-mail submitted, but the wording of the law only allows it to charge a maximum of ".03 cents" per submitted e-mail address. See Ken Magill, "Here Come the Registries? Again," *Direct*, at 10 (Sept 1, 2005); MICH. COMP. LAWS § 752.1063(7). Thus, Michigan will have to work around this problem to fully implement its Registry.

³¹This aspect of the laws could cause them to be in violation of the Commerce Clause of the U.S. Constitution if a court determines that the burden on interstate commerce is "clearly excessive in relation to the putative local benefits" of protecting children from receiving inappropriate material, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), or that the laws discriminate against interstate commerce because they "unfairly apportion[] income from other States." *Armco v. Hardesty*, 467 U.S. 638, 644 (1984). It should also be noted that the laws may be preempted by the federal CAN-SPAM Act, see 15 U.S.C. § 7707(b), or violate the First Amendment freedom of speech. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

³²Teinowitz, *supra* note 28, at 4.

³³Utah Policy Statement.

³⁴"Michigan Children's Protection Registry: Answer," Online, Nov. 9, 2005, available:

<https://www.protectmichild.com/answer.html?src=q&id=65>

³⁵Utah Policy Statement at 1.

³⁶See Magill, "Here Come the Registries? Again."