



## Michigan & Utah Children's Protection Registries

This document was prepared in conjunction with the E-mail Service Providers Coalition (ESPC), and the Institute for Spam and Internet Public Policy (ISIPP).

The information in this POV is not intended as legal advice. Many of the questions raised by the new laws will require careful analysis by your legal counsel.

### Overview

The following is an update on recent legislation passed in Michigan and Utah.

- [Michigan SB 1025 – Act 214 of 2004 Children's Protection Registry Act](#)
- [Utah HB 165 Child Protection Registry](#)

The two laws prohibit communications (e-mail, telephone, fax, IM, etc.) to registered contact points when the content of the message includes an advertisement for or a link to content and/or product that the minor cannot obtain under existing laws. The Utah law broadly prohibits sending messages that contain material that is "harmful to minors." The covered categories of messages include, but are not necessarily limited to:

- Alcohol
- Tobacco
- Pornography/Obscene Material
- Gambling
- Lotteries
- Fireworks/Firearms
- Illegal or Prescription Drugs

Michigan law does not preclude a minor from purchasing a legally prescribed prescription drug. Therefore, messages regarding prescription drugs may be sent to e-mail addresses contained in the Protect MI Child Registry. Messages regarding illegal drugs may not be sent to e-mail addresses contained in the Protect MI Child Registry, whether or not they were requested by someone using a registered e-mail address."

The Child Protection laws require that both states create and operate e-mail address registries where people can add any e-mail address that a minor may have access to. Schools and other child-focused organizations may also register entire Internet domains.

*Regardless of previous opt-in status*, commercial e-mailers are prohibited from sending e-mail to addresses on the registry that contains advertising, or links to advertising, for products or services that a minor is otherwise legally prohibited from accessing. Marketers and e-mail service providers (ESP's) are required to match their mailing lists against the registries on a monthly basis. Michigan and Utah will charge for the use of this registry.

*Many of the questions raised by the statutes will require careful analysis by your legal counsel. If you think your e-mail campaigns are within scope of this law we will work with you to ensure the proper use of the registries.*



## Michigan SB 1025 Act 214 of Children's Protection Registry Act

Under the law, "a person shall not send, cause to be sent, or conspire with a third party to send a message to a contact point that has been registered for more than 30 calendar days with the department if the primary purpose of the message is to, directly or indirectly, advertise or otherwise link to a message that advertises a product or service that a minor is prohibited by law from purchasing, viewing, possessing, participating in, or otherwise receiving."

**When does this law take effect?** The law goes into effect on July 21, 2004; however, the enforcement section does not go into effect until July 1, 2005.

**What does this act require?** When a contact point has been on the registry for thirty days, messages with the primary purpose of directly or indirectly advertising or linking to anything that by law a minor cannot obtain, (pornography, gambling, etc.) may not be sent to those contact points.

The Department of Labor and Economic Growth must establish a fee based mechanism for senders to verify their compliance with the registry.

**What is a contact point?** A contact point is defined as "any electronic identification to which messages can be sent." These include instant message identities, wireless communications devices, fax numbers, e-mail addresses, etc.

**What remedies are available under this Act?** Effective July 1, 2005, a violation of the Children's Protection Registry Act is punishable as a computer crime as follows:

- A misdemeanor for the first violation, punishable by imprisonment for not more than 1 year or a fine of not more than \$10,000.00, or both.
- A felony for the second violation, punishable by imprisonment for not more than 2 years or a fine of not more than \$20,000.00, or both.
- A felony for the third and any subsequent violation, punishable by imprisonment for not more than 3 years or a fine of not more than \$30,000.00, or both.

A civil action based on the computer crime committed is available to an authorized individual or contact point registrant on behalf of the minor or the Attorney General to recover actual damages including attorney's fees or the lesser of \$5,000 per message received or transmitted or \$250,000 per day that the violation occurred.

**Are there any exceptions?** An intermediary between the sender and recipient in the transmission of an electronic message that violates the act does not violate the act or unknowingly providing transmission of electronic messages over the person's computer network or facilities that violate the act.

**Are there any defenses available?** It is a defense to an action brought under this section that the communication was transmitted accidentally. The burden of proving that the communication was transmitted accidentally is on the sender.

It is still a violation and not a defense when the message is sent to the contact point with the consent of either the minor or a third party.



## Utah HB 165 Child Protection Registry

**When does this law take effect?** July 1, 2005

**What does this Act require?** The prohibits sending or causing messages to be sent to a contact point after that contact point has been on the registry for thirty days and

- The message advertises a product or service that by law a minor cannot purchase (pornography, gambling, etc.).
- The message includes material that is considered "harmful to minors."

Harmful to minors is defined as "that quality of any description or representation, in whatsoever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse when it: (a) taken as a whole, appeals to the prurient interest in sex of minors; (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and (c) taken as a whole, does not have serious value for minors. Serious value includes only serious literary, artistic, political or scientific value for minors."

The Division of Consumer Protection in the Department of Commerce is required to provide a mechanism for verification of compliance with the registry and to remove registered contact points from communications in a way that protects the privacy and security of the registered contact points.

**What is a contact point?** A contact point is defined as "an electronic identification to which a communication may be sent." Some contacts points include an e-mail address, instant message identity, telephone number, or fax number.

**What contact points are on the registry?** The following types of contact points may be registered on the child protection registry:

- The contact point belongs to a minor; or
- The contact point is accessible to minors.
- The domain belongs to a school or institution that primarily serves minors.

**Are there any defenses available?** A defense is available where a person reasonably relied on the mechanism established by the division to verify compliance and the person took reasonable steps to comply with the Act

**What are the remedies available under this act?** A violation of this law is a computer crime punishable as:

- A class B misdemeanor for a first offense,
- A class A misdemeanor for subsequent offenses.
- A second degree felony if they use information obtained to violate this law, improperly acquires, or attempts to acquire contact points, or uses information from the registry to send a solicitation to a contact point or transfers it to a third party for the same use.

A private right of action is available to a contact point user or user of a domain registered with the division, or their legal guardian to recover:

- The greater of actual damages or \$1,000 per violating communication.
- Prevailing party receives reasonable attorney fees and costs.

Where there is an intentional violation (a violation that occurs after the person has been duly notified of their violation) an administrative fine of up to \$5,000 per intentional violation may be imposed.



## CAN-SPAM Compliance

The CAN-SPAM Act of 2003 *preempts all existing state laws regulating commercial e-mail, except to the extent such laws regulate false or deceptive e-mails.*

Because the two new laws are intended to regulate e-mail they may in fact be pre-empted by CAN-SPAM. Additionally, the registries look very much like the national "do not e-mail" list FTC rejected as ineffective. It would not be surprising to see a legal challenge to these laws in the coming months. Until such a decision is made it will be necessary to comply with the new legislation.

## e-Dialog Recommendations

- The intent of these laws is to stop the bad spammers from sending inappropriate content to minors. We fully support that concept and expect the enforcement effort to be focused on the bad actors. e-Dialog does not have (nor do we allow) any clients with e-mail content currently that we believe would violate these laws, however there are sometimes shades-of-gray in the interpretations of violating content that must be considered and avoided.
- *Going forward, e-Dialog recommends asking for state of residence and where appropriate, date of birth in all opt-in registration forms.*
- It is critical that you have the documentation to prove consent or an existing/preexisting business relationship with your customers. Proper documentation will protect you in the event of litigation by an e-mail recipient who claims that they did not give you permission to e-mail them.
- If your opt-in applications do not currently send a confirmation e-mail after a person has opted in, we strongly recommend adding that step to your opt-in process. The confirmation message should allow the recipient to opt out. This will help to protect you from potential claims from individuals that another unauthorized person must have opted them in.
- *As stated above many of the questions raised by the statutes will require careful analysis by your legal counsel.*