

Do-Not-E-mail My Child: States Launch New Registries

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Michigan and Utah have recently launched similar child protection registries to enable parents to shield children from unwanted e-mail messages. Public registration in Michigan began July 1, 2005, and sender compliance begins August 1, 2005. Public registration in Utah began July 15, 2005, and sender compliance begins August 15, 2005. The new laws are particularly relevant to advertisers of products or services that are legally prohibited for children, such as pornography, tobacco, gambling, alcohol, prescription drugs and firearms. If you are an advertiser of any of these products or services, please be aware that these new laws may impact your ability to send commercial e-mails to certain e-mail addresses.

Overview Of Michigan Law

The Michigan Children's Protection Registry Act (MICH. COMP. LAWS § 752.1061 *et seq.* (2005)) (hereinafter "Michigan Act"), administered by the Department of Labor and Economic Growth, allows parents, guardians, schools, and other institutions or entities primarily serving minors to register e-mail addresses to which minors have access. At some point in the future, instant message identities, mobile phone numbers, fax numbers, pager numbers, and other "contact points" will be capable of being registered. Additionally, schools and other entities primarily serving minors may register one or more contact points, or may make one registration for all contact points of the entity by including the entity's entire Internet domain name in the registration.

The law states that "[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, 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." MICH. COMP. LAWS § 752.1065. In practical terms, the sending of a message to a registered e-mail address is prohibited only if it is otherwise a crime for the minor to purchase, view, possess, participate in, or otherwise receive the advertised product or service.

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Senders of prohibited messages are required to remove registered e-mail addresses from their mailing lists within 30 days of such contact point's registration with the Michigan Act. Address registrations are effective for three years or until the youngest child with access to the e-mail address reaches the age of 18. Registrations may be revoked or renewed at any time.

There is no cost to register an e-mail address. However, those who send messages subject to the Michigan Act must pay a fee for compliance. Senders of prohibited e-mail messages must scrub their mailing lists against the Michigan registry, and a fee of \$0.007 is charged per e-mail address checked (by way of example, if a sender maintained a list of 1,000,000 e-mail addresses, the cost would be \$7,000 to run the list against the Michigan registry).

Marketers who fail to comply with the law face criminal penalties of up to three years in jail, and criminal fines of up to \$30,000. Additionally, all money and other income received as a result of the defendant's violations of the Michigan Act, and all computer equipment, all computer software, and all personal property used in connection with any violation of the Michigan Act, are subject to lawful seizure and forfeiture by the Michigan government. Marketers may also face civil penalties of up to \$5,000 per message sent in violation of the law, to a maximum of \$250,000 per day. Civil suits may be filed by the Michigan attorney general, Internet service providers, and parents on behalf of their children.

Marketers of relevant products or services should begin complying with the Michigan Children's Protection Registry beginning August 1, 2005, one month after the opening of public registration, when compliance systems become available online. Tools available through <https://www.protect-michild.com> beginning August 1, 2005 will allow marketers to scrub their mailing lists in compliance with the law.

Although the consent of a minor or third party to receive the message is not a defense to a violation, it is a defense



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that the communication was transmitted accidentally, with the burden of proving that the communication was transmitted accidentally on the sender. More information about the law and compliance is available at: <https://www.protect-michild.com>.

Overview Of Utah Law

Similarly, the Utah Child Protection Registry (UTAH CODE § 13-39-101 *et seq.* (2005)) (hereinafter "Utah Act"), a secure database of protected e-mail addresses administered by the Division of Consumer Protection in the Department of Commerce, allows Utah's parents and schools to register e-mail addresses that children may access.

Once an e-mail address has been registered, senders of e-mail messages that advertise or link to prohibited products or services for children are required to remove the address from their mailing lists within 30 days. The law states that "[a] person may not send, cause to be sent, or conspire with a third party to send a communication to a contact point or domain that has been registered for more than 30 calendar days ... if the communication ... advertises a product or service that a minor is prohibited by law from purchasing; or ... contains or advertises material that is harmful to minors." UTAH CODE § 13-39-202. The covered categories of messages include, but are not limited to, sexually explicit materials, tobacco products, illegal drugs, gambling opportunities, and alcoholic beverages. Address registrations are effective for two years, but may be renewed at any time for an additional two-year period.

While there is no cost to register an e-mail address, marketers must pay a \$.005 fee per e-mail checked against the Utah registry. Marketers who fail to comply with the law face potential felony charges and civil and criminal penalties from \$1,000 to \$5,000 per message sent in violation of the law. Civil suits may be filed by the Utah attorney general, the Utah Division of Consumer Protection, Internet service providers, and parents on behalf of their children.

The consent of a minor is not a defense to a violation. However, it is a

defense that a sender reasonably relied on the mechanism established by the Utah online compliance system, and took reasonable measures to comply with the Utah Act.

Marketers of relevant products or services should comply with the Utah Child Protection Registry beginning August 15, 2005, one month after the opening of public registration, when compliance systems become available online. Tools available through <https://www.utahkidsregistry.com/index.html> beginning August 15, 2005 will allow marketers to scrub their mailing lists in compliance with the law. More information about the law and compliance is available at: <https://www.utahkidsregistry.com/index.html>, including a policy statement setting forth the position of the Utah Division of Consumer Protection on this new law.

Uncertainty Remains

These laws are the first of their kind to establish any sort of "do-not-e-mail" list which requires e-mail marketers to take affirmative steps to prevent the sending of even one e-mail to an address on the list. It operates much more like the national Do-Not-Call registry which prohibits any call to a number on the registry (with certain exceptions), as opposed to the federal Can Spam Act of 2003 which permits sending e-mails to any address, provided that the recipient is given the opportunity to opt-out of further communications. Therefore, a great deal of uncertainty exists. For one matter, Section 8 of the Can Spam Act contains a specific provision designed to preempt any state law that regulates the use of e-mail to send commercial messages. Though the Can Spam Act does contain some exceptions to this preemption clause, it is unclear whether or not the Michigan and Utah laws would withstand any challenge on these grounds.

Additionally, since the laws are not product-specific, and merely refer to any "...product or service that a minor is prohibited by law from purchasing, viewing, possessing, participating in, or otherwise receiving," it is unclear how broadly this might be interpreted and what products may ultimately be covered.

While the Acts have not yet been enforced by regulators or tested in court, compliance with the Acts is not unduly burdensome, and the penalties for non-compliance may be severe. However, if other states begin to adopt similar registry procedures and requirements, this could become a challenging and expensive burden to e-mail marketers.

Practical Suggestions

All senders of commercial e-mails containing any offers of products or services not meant for children should review the Michigan and Utah Acts to consider the need for compliance pursuant to the procedures outlined on the States' respective websites listed above.

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