

- SUBJECT:** Transmission of unsolicited commercial emails by zombie or botnet
- COMMITTEE:** Business and Industry — committee substitute recommended
- VOTE:** 8 ayes — Giddings, Elkins, Darby, Bohac, Castro, Martinez, Solomons, Zedler
- 0 nays
- 1 absent — Bailey
- WITNESSES:** For — Ronald Chichester, Texas Business Law Foundation; (*Registered, but did not testify:* Joseph Jacobson, Texas Business Law Foundation; Irene Kosturakis, Texas Business Law Foundation)
- Against — None
- On — Brad Schuelke, Texas Attorney General
- BACKGROUND:** In 2005, the 79th Legislature enacted SB 327 by Zaffirini, the Consumer Protection Against Spyware Act (Business and Commerce Code, ch. 48). This act defines violations for unauthorized use of another person's computer and sets forth related civil penalties. A civil litigant can recover damages in an amount equal to the greater of actual damages arising from the violation or \$100,000 for each violation of the same nature.
- DIGEST:** CSHB 3173 would add violations to the Consumer Protection Against Spyware Act for unauthorized creation or use of zombies or botnets. The bill would define a zombie as a computer that had been compromised so that it could be controlled by another person or program without the knowledge of the computer's owner. A botnet would be a collection of zombies.
- For the purpose of sending unsolicited commercial emails, a person could not knowingly:
- cause or offer to cause a computer to become a zombie;
  - create, use, or offer to create or use a zombie or botnet;

- purchase or rent a zombie or botnet; or
- sell, lease, or offer for use a zombie or botnet.

It also would constitute a violation if a person was willfully ignorant of these acts involving zombies and botnets.

The bill would take effect September 1, 2007, and apply only to conduct associated with the provisions of this bill that occurred on or after this date.

**SUPPORTERS  
SAY:**

CSHB 3173 would provide the tools to curb a pervasive problem that seriously injures consumers and businesses. Botnets consisting of more than a million zombies have been used to spam consumers. Internet service providers (ISPs) can monitor spam practices, and ISPs estimate that spam constitutes more than 90 percent of email, and 70 percent or more of spam is sent by botnets. This year, spam will cost Texas businesses and consumers over \$1.9 billion.

Also, the use of botnets can run companies out of business through denial of service attacks. Those operating botnets — known as “botnet herders” — can flood a business' servers so that the servers no longer can function. Botnet herders successfully have extorted businesses for thousands of dollars in exchange for restoring server operating capacity. Beyond the financial costs associated with the use of botnets, unsolicited emails are a general nuisance to email recipients. If a consumer's computer becomes a zombie, it can drain a person's storage capacity and processing speed.

While ISPs can monitor the majority of botnet activities, it is too costly for the ISP to take action against a botnet herder. Through the civil remedies afforded in CSHB 3173, the bill would provide economic incentives for ISPs to both take action to rectify consumer issues with zombies and to pursue legal action against botnet herders. In addition, if ISPs gather information regarding botnet herders for civil suits, this information could be used by the attorney general to prosecute botnet herders criminally. The civil remedies provided in the Consumer Protection Against Spyware Act would be sufficiently punitive to dissuade botnet herders from extorting businesses and spamming consumers.

**OPPONENTS  
SAY:**

While CSHB 3173 would be positive in its prohibition of using zombies or botnets to send unsolicited emails, it should define civil remedies specific to the to the violations defined in this bill. The current civil remedies from

the Consumer Protection Against Spyware Act would be difficult to apply to violations involving unauthorized use of zombies and botnets. The bill instead should allow a civil litigant to recover damages in an amount equal to the greater of actual damages arising from the violation; \$500,000 for each violation consisting of the same course of conduct; or \$100,000 for each zombie used to commit the violation. These penalties, such as those found in SB 1009 by Zaffirini, would be more fitting to the type and severity of violations associated with zombies and botnets.

**NOTES:**

The companion bill, SB 1544 by Fraser, has been referred to Senate Business and Industry Committee.

SB 1009 by Zaffirini, which passed the Senate by 30-0 on April 26, would include the provisions of CSHB 3173 and also would define additional violations for unauthorized use of zombies and botnets, including civil penalties specific to these violations.