

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1363 Commercial Relations
SPONSOR(S): Benson
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2574 (s)

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Commerce	18 Y, 1 N	McDonald	Billmeier
2) Judiciary		Thomas	Havlicak
3) Appropriations			
4)			
5)			

SUMMARY ANALYSIS

The bill creates Part III of Chapter 668, F.S., the "Electronic Mail Communications Act." The new law addresses actions not preempted by the federal "CAN SPAM Act of 2003." The bill provides that its intent is to promote the integrity of electronic commerce and is to be construed liberally in order to protect the public and legitimate businesses from deceptive and unsolicited commercial electronic mail.

The bill gives the Attorney General authority to bring a civil action and seek injunctive relief against any violation of this bill under the Florida Deceptive and Unfair Trade Practices Act. Specific prohibited activities under the bill include initiating or assisting in the transmission of an unsolicited commercial electronic mail message which uses a third party's Internet domain name without permission, contains false or deceptive information about the origin or path of unsolicited commercial electronic mail messages, or contains false or deceptive information in the subject line, and distributing software or any other system designed to falsify missing information which would identify the origin or path of the commercial electronic mail messages.

It is not known how many cases will be brought under this bill and what costs will be incurred by the Department of Legal Affairs. The Office of the Attorney General, however, states that it can enforce the bill with existing resources. The bill does not appear to have a fiscal impact on local governments.

The bill takes effect July 1, 2004.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1363b.ju.doc
DATE: March 25, 2004

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

The bill prohibits certain activity which is presently lawful and provides for increased government involvement in this area.

B. EFFECT OF PROPOSED CHANGES:

CAN-SPAM Act of 2003¹

Based upon the findings enumerated in the CAN-SPAM Act (Act), Congress found the following:

1. there is a substantial government interest in regulation of commercial electronic mail on a nationwide basis;
2. senders of commercial electronic mail should not mislead recipients as to the source or content of such mail; and
3. recipients of commercial electronic mail have a right to decline to receive additional commercial electronic mail from the same source.²

The Act requires unsolicited commercial e-mail messages to be labeled, although not by a standard method, and to include opt-out instructions and the sender's physical address. It prohibits the use of deceptive subject lines and false headers in such messages. The act creates liabilities for certain specified actions relating to unsolicited commercial e-mail and provides civil and criminal penalties. The Federal Trade Commission (FTC) is authorized to establish a "do-not-e-mail" registry. State laws that require labels on unsolicited commercial e-mail or prohibit such messages are preempted, although state laws addressing falsity and deception are still authorized. Reports are required to be prepared by the FTC and presented to Congress within 6 months and 24 months of the January 1, 2004 effective date of the Act.

General Provisions

The following is a summary of general provisions of the Act,:

- Requires senders of all commercial e-mail to provide recipients with ability to opt out of receiving such e-mail;
- Prohibits false or misleading transmission information;
- Prohibits deceptive subject headings;
- Prohibits sending additional e-mail to a person who has opted out;

¹ Public Law 108-187. The "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003" or the "CAN-SPAM Act of 2003" was signed into law by President Bush on December 16, 2003 and became law on January 1, 2004.

² Public Law 108-187, sec. 2.

- Requires e-mail to be identified as advertisement or commercial;
- Requires physical address of sender be included in e-mail;
- Prohibits harvesting of e-mail addresses and dictionary attacks as being “aggravated offenses,” i.e., cannot be alleged independently;
- Prohibits relaying e-mail off of network without authorization, which is also considered an “aggravated offense;”
- Requires sexually-oriented e-mail to be labeled as such in subject line and prohibits inclusion in first view of sexually-oriented e-mail of anything other than labeling, certain notices, or instructions on how to access the content that is offered;³
- Creates liability for merchants whose goods and/or services are promoted in unlawful e-mail even when actual procurement of spammer’s services by the merchant cannot be proved;
- Creates liability for those who pay spammers to send e-mail on their behalf, i.e., procuring services;
- Requires the Federal Communications Commission (FCC) to promulgate rules within 270 days of enactment of the Act to protect consumers from unwanted mobile service commercial messages;
- Requires the FTC to submit a plan and timetable for implementation of a “do not e-mail registry” within 6 months of enactment of Act, and provides authorization of such a registry no earlier than 9 months of such enactment;
- Provides for criminal and civil actions for violations;
- Provides an incentive of 20 percent of total civil penalty collected for a violation to first person providing information about violation (a report is required to Congressional Committees on how to implement within 9 months of enactment of the Act);
- Requires the FTC to study the viability of a “do-not e-mail registry” and the effect in general of other provisions of the Act.⁴

Effect On Other Federal Laws and Preemption of State Laws

The CAN SPAM Act provides that it should not be construed to interfere with the enforcement of the provisions of the Communications Act of 1934,⁵ chapters 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18 of the United States Code, or any other Federal criminal statute.⁶ Nothing in the CAN SPAM Act is to be construed to affect the Federal Trade Commission’s (FTC) authority under the FTC Act for materially false or deceptive representations or unfair practices in commercial e-mail messages.⁷ The Act specifically provides that it preempts, or supersedes, state and local statutes, regulations, and rules that expressly regulate the use of e-mail to send commercial messages except to the extent that such state statutes, regulations, or rules prohibit falsity or deception in any portion of a commercial e-mail message or information attached to the e-mail message.⁸ For example, a state law requiring some or all commercial e-mail to carry specific types of labels, or to follow a certain format or contain specified content, would be preempted; but, a state law prohibiting fraudulent or deceptive headers, subject lines, or content in commercial e-mail would not be preempted. The act provides that it does not preempt state laws that do not expressly regulate e-mail, such as state common law, general anti-fraud law, and computer crime law.⁹

The Act provides for civil enforcement by a state when there is reason to believe that an interest of the residents of the state has been or is threatened or adversely affected by any person who violates

³ Public Law 108-187, sec. 5, requires that no later than 120 days from the effective date of the Act, the FTC in consultation with the Attorney General is to prescribe clearly identifiable marks or notices to be included in or associated with such e-mail in order to inform the recipient of that fact and to facilitate filtering of such e-mail.

⁴ Public Law 108-187, sec. 10, requires a report by the FTC to Congress within 24 months of enactment of the Act.

⁵ 47 U.S.C. 223 or 231, respectively.

⁶ Public Law 108-187, sec. 8(a)(1).

⁷ Public Law 108-187, sec. 8(a)(2).

⁸ Public Law 108-187, sec. 8(b)(1)

⁹ Public Law 108-187, sec. 8(b)(2).

section 5(a)(1) or (2) or section 5(d)(3), (4), or (5).¹⁰ The state can bring civil action on behalf of the residents in a district court of the United States of appropriate jurisdiction to enjoin further violation or to obtain damages on behalf of residents.¹¹

Florida Deceptive and Unfair Trade Practices Act¹²

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) states that unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful.¹³ "Trade or commerce," which includes the conduct of any trade or commerce, however denominated, including any nonprofit or not-for-profit person or activity, is defined as

the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated.¹⁴

The provisions of the FDUTPA are to be liberally construed to promote the following practices:

1. Simplify, clarify, and modernize the law governing consumer protection, unfair methods of competition, and unconscionable, deceptive, and unfair trade practices;
2. Protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce; and,
3. Make state consumer protection and enforcement consistent with established policies of federal law relating to consumer protection.¹⁵

The enforcing authority of FDUTPA is the local state attorney for violations within a single judicial circuit or the Department of Legal Affairs if the violation occurs in or affects more than one judicial circuit or, in cases affecting a single judicial circuit, when the office of the state attorney defers to the department in writing, or fails to act upon a violation within 90 days after a written complaint has been filed with the state attorney.¹⁶ The act provides for cease and desist orders, remedies by the enforcing authority, civil penalties, and receipt by the prevailing party of attorney's fees and costs in civil litigation.¹⁷

¹⁰ Public Law 108-187, sec. 7(f).

¹¹ Public Law 108-187, sec. 5 (a) (1) - (5): prohibition of false or misleading transmission information and deceptive subject headings, inclusion of return addressor comparable mechanism in commercial electronic mail; prohibition of transmission of commercial e-mail after objection; required inclusion of identifier, opt-out provision, and physical address in commercial e-mail; section 5(d) relates to required placement of warning labels on commercial e-mail containing sexually oriented material.

¹² Chapter 501, part II, F.S.

¹³ Section 501.204, F.S.,

¹⁴ Section 501.203(8), F.S.

¹⁵ Section 501.202, F.S.

¹⁶ Section 501.203(2), F.S.

¹⁷ See ss. 501.207, 501.2075, 501.2077, 501.208, and 501.2105, F.S. The enforcing agency may bring an action to obtain a declaratory judgment, an action to enjoin, and an action on behalf of one or more consumers or governmental entities for the actual damages caused by an act or practice. Except as provided in s. 501.2077, F.S., involving violations against senior citizens or handicapped persons (whereby civil penalties are increased to not more than \$15,000 per violation), willful violations of the act by a person, firm, corporation, association, or entity, or any agency or employee of the foregoing is liable for a civil penalty of not more than \$10,000 per violation. The penalty may be recovered in any action brought under the act by the enforcing authority or the enforcing authority may terminate an investigation or action upon agreement of payment of a stipulated civil penalty. If civil penalties are assessed, the enforcing authority is entitled to reasonable attorney's fees and costs. A civil penalty so collected shall accrue to the state and be deposited into the General Revenue Fund unallocated.

Effect of Proposed Changes

The bill creates Part III of Chapter 668, F.S., the "Electronic Mail Communications Act." The new law addresses actions not preempted by the federal "CAN SPAM Act of 2003."

The bill provides that the intent of Part III is to promote the integrity of electronic commerce and is to be construed liberally in order to protect the public and legitimate businesses from deceptive and unsolicited commercial electronic mail.

Definitions are provided for "affirmative consent," "assist in the transmission," "commercial electronic mail message," "department," "electronic mail address," "electronic mail message," "initiate the transmission," "interactive computer service," "Internet domain name," "person," "trade or commerce," and "unsolicited commercial electronic mail message." Some of the definitions are either identical or similar to federal definitions used in the CAN-SPAM Act.

The Attorney General is given authority to bring a civil action and seek injunctive relief against a violator of this bill pursuant to FDUTPA. Specific prohibited activities under the bill include:

- initiating or assisting in the transmission of an unsolicited commercial electronic mail message which uses a third party's Internet domain name without permission, contains false or deceptive information about the origin or path of unsolicited commercial electronic mail messages, or contains false or deceptive information in the subject line, and
- distributing software or any other system designed to falsify missing information which would identify the origin or path of the commercial electronic mail messages.

The bill provides a right of action for a person who receives the unsolicited commercial electronic mail message and for the interactive computer service, telephone company or cable provider that handles or retransmits the unsolicited commercial electronic messages prohibited under this action. Violations are not only subject to remedies or penalties under the bill, but also to those under FDUTPA and to any other remedies available for the same conduct under federal or state laws.

Under this bill, a prevailing plaintiff is entitled to an injunction to enjoin future violations; compensatory damages equal to any actual damage proven to have resulted from the unsolicited electronic message or liquidated damages of \$500 per unsolicited commercial electronic mail message violating this part when sent to the plaintiff, through the plaintiff's interactive computer service, or to any consumer in Florida when the Department of Legal Affairs is the plaintiff. Additionally, attorney's fees and other litigation costs reasonably incurred that are related to the action are to be awarded to a prevailing plaintiff. Like the federal law, any action must be commenced within 4 years following the date of any activity in violation of this bill.

For the purposes of this bill, any person outside the state who initiates or assists in the transmission of a commercial electronic mail message received in this state that violates the provisions of this bill and who knows or should have known that it would have been received in Florida submits to the jurisdiction of this state. The bill does not create a cause of action against an interactive computer service, telephone company, or cable provider whose equipment is used to transport, handle, or retransmit a commercial electronic mail message in violation of this bill. As provided in the CAN-SPAM Act, an interactive computer service may block the receipt or transmission through its service of any commercial electronic mail messages that it believes will violate the bill and is not liable for any such action when taken in good faith.

The bill contains a severability clause.

C. SECTION DIRECTORY:

Section 1. Creates part III of ch. 668, F.S., the "Electronic Mail Communications Act."

Section 2. Provides for severability.

Section 3. Provides that the bill takes effect on July 1, 2004.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See "Fiscal Comments."

2. Expenditures:

See "Fiscal Comments."

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local governments' revenues.

2. Expenditures:

The bill does not appear to have any impact on local governments' expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The impact could be positive for private sector businesses through a reduction of unsolicited commercial e-mail messages. Persons and businesses injured by unlawful commercial e-mail activity may be able to recover damages. However, the bill could also be potentially negative upon private sector businesses that utilize such techniques for their businesses.

D. FISCAL COMMENTS:

At this time, it is not known how many cases will be brought under this bill and what costs will be incurred by the Department of Legal Affairs. The Office of the Attorney General, however, states that it can enforce the bill with existing resources.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

FIRST AMENDMENT ISSUES

Both the First Amendment to the Constitution of the United States and Article I, Section 4 of the Florida Constitution protect freedom of speech. Florida courts, and federal courts applying Florida law, have interpreted the state constitutional provision to accord with the protections of the First Amendment: i.e., the state constitution guarantees no more protection than does the federal constitution, and Florida regards federal case law interpreting the First Amendment's protection of free speech as authoritative with respect to its own free-speech provision.¹⁸ It is possible that this bill may raise concerns under these provisions.

The Supreme Court of the United States has held that the First Amendment protects commercial speech.¹⁹ However, the Court has also recognized that there is a "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."²⁰ Therefore, while commercial speech is protected to an extent, regulation of commercial speech is subject to a lower standard of judicial scrutiny than is regulation of other forms of speech.²¹

The basic framework for analyzing any regulation of commercial speech was laid out by the Court in *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*.²² Under *Central Hudson*, government may ban commercial speech that is deliberately misleading or relates to unlawful activity,²³ but if the speech does neither of these things, the regulation in question must meet a three-prong test:

- a. the government must have a substantial interest in restricting the speech;
- b. the regulation must directly advance the asserted interest; and
- c. the regulation must be narrowly tailored to serving the asserted interest.²⁴

Thus, it is possible that, applying *Central Hudson*, a court could find that some or all of this bill's provisions do not meet the *Central Hudson* test and are thus unconstitutional restrictions on commercial speech. It is also possible, however, that a court would hold that the government has a substantial interest in restricting the speech - protecting the public and legitimate businesses from deceptive and unsolicited commercial electronic mail - and that the restrictions in this bill are narrowly tailored to advance that interest.

PREEMPTION

The federal act provides that it "supersedes any statute, regulation, or rule of a State . . . that expressly regulates the use of electronic mail to send commercial messages, except to the extent that such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto."²⁵ Generally, when a federal law expressly preempts state law, the states may not enact any law on the specific subject matter of the federal

¹⁸ See, e.g., *University Books and Videos, Inc. v. Metropolitan Dade County*, 78 F.Supp.2d 1327 (S.D. Fla. 1999); *Cafe Erotica v. Department of Transportation*, 830 So.2d 181 (Fla. 1st DCA 2002); *State v. Globe Communications Corp.*, 622 So.2d 1066 (Fla. 4th DCA 1993); *Florida Cannery Assn. v. Department of Citrus*, 371 So.2d 503 (Fla. 2d DCA 1979).

¹⁹ See *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

²⁰ *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, at 455-56 (1978).

²¹ See *id.*

²² 447 U.S. 557 (1980).

²³ This part of commercial-speech doctrine predates *Central Hudson*. See, e.g., *Friedman v. Rogers*, 440 U.S. 1 (1979) (false or misleading advertising); *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376 (1973) (speech promoting an unlawful transaction).

²⁴ See *id.* See also *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989).

²⁵ Public Law 108-187, sec. 8(b)(1)

law. Here, a large part of the federal law regulates falsity or deception in commercial electronic mail messages and expressly preempts state law regulating commercial electronic mail messages; however, it also expressly exempts from this preemption any state law that prohibits falsity or deception in any portion of the email or an attachment.

Under examination, the exemption language means exactly what it appears to say, even though arguably this would somewhat negate the meaning and effect of the bulk of the preemption. Under this interpretation, the states can enact laws prohibiting falsity or deception in *any portion of* the email or an attachment, including information relating to routing, addressing, and so forth. All that would be preempted are requirements such as those relating to labeling and notice to the sender not to send any more e-mails.

The provisions of newly created s. 608.604, F.S., authorizing a service provider to block messages it reasonably believes violates the prohibited activity section and exempting the provider from liability for such blocking, appear to clearly fall within the preemption exemption under the federal act. The federal act's preemption provisions expressly state that it is not to be construed to have any effect on the lawfulness or unlawfulness, under any other provision of law, of the adoption, implementation, or enforcement by a provider of Internet access service of a policy of declining to transmit, route, relay, handle, or store certain types of electronic mail messages.

B. RULE-MAKING AUTHORITY:

The bill does not create the need for rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

None.