

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 2574

SPONSOR: Senator Garcia

SUBJECT: Commercial Relations/Electronic Mail

DATE: April 5, 2004

REVISED: 04/13/04 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Wiehle</u>	<u>Caldwell</u>	<u>CU</u>	<u>Favorable</u>
2.	<u>Kruse</u>	<u>Maclure</u>	<u>CM</u>	<u>Favorable</u>
3.	_____	_____	<u>CJ</u>	<u>Withdrawn</u>
4.	<u>Cibula</u>	<u>Lang</u>	<u>JU</u>	<u>Fav/1 amendment</u>
5.	_____	_____	<u>ACJ</u>	_____
6.	_____	_____	<u>AP</u>	_____

I. Summary:

The bill prohibits commercial electronic mail messages that falsely identify the origin or identity of the sender or contain false or misleading information in the subject line. Additionally, the bill:

- authorizes the Department of Legal Affairs to bring an action for damages, or to seek declaratory or injunctive relief, or to impose a civil penalty for a violation of the prohibited activities outlined in the bill;
- creates a cause of action for a person who receives an unsolicited commercial electronic mail message in violation of the bill's provisions;
- provides that a violation of the bill's prohibited activities is also a violation of the Florida Deceptive and Unfair Trade Practices Act;
- provides an exemption from liability for certain commercial electronic mail providers and wireless providers who transmit commercial electronic mail, and allows an interactive computer service provider to block transmission of a commercial electronic message it believes may be sent in violation of the bill's provisions;
- provides that any person outside this state who initiates or assists in the transmission of a commercial electronic mail message received in this state and who knows, or should have known, that the commercial electronic mail message will be received in this state, submits to the jurisdiction of this state;
- provides that the bill's provisions do not interfere with the confidential status of certain information relating to intelligence or investigative information; and
- provides that an action must be commenced within 4 years following the date of any prohibited activity.

The bill creates the following sections of the Florida Statutes: 668.60, 668.601, 608.602, 668.603, 668.604, 668.605, 668.606, and 668.6075.

II. Present Situation:

Congressional Action

Congress recently passed the “Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003” or the “CAN-SPAM Act of 2003.” S.B. 877, 108th Cong., 1st Session (2003). It was signed by the President on December 16, 2003, and took effect January 1, 2004.

Congressional Determination of Public Policy

The federal “CAN-SPAM” act found that:

- (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 mail from the same source.

Prohibited Practices Under the Federal Act

Prohibition Against Predatory and Abusive Commercial E-Mail

Section 4 of the federal “CAN-SPAM” act provides that if the activity is in or affects interstate or foreign commerce, it is unlawful to knowingly:

- Access a protected computer without authorization, and intentionally initiate the transmission of multiple commercial electronic mail messages from or through the computer.
- Use a protected computer to relay or retransmit multiple commercial electronic mail messages, with the intent to deceive or mislead recipients, or any Internet access service, as to the origin of such messages.
- Materially falsify header information in multiple commercial electronic mail messages and intentionally initiate the transmission of such messages.
- Register, using information that materially falsifies the identity of the actual registrant, for five or more electronic mail accounts or online user accounts or two or more domain names, and intentionally initiate the transmission of multiple commercial electronic mail messages from any combination of such accounts or domain names.
- Falsely represent oneself to be the registrant or the legitimate successor in interest to the registrant of five or more Internet Protocol addresses, and intentionally initiate the transmission of multiple commercial electronic mail messages from such addresses.

The act specifies the penalties for a violation which may include a fine, imprisonment of up to five years, or both. Additionally, the court may order forfeiture of any property constituting or traceable to gross proceeds obtained from the offense or any equipment used or intended to be used to commit the offense.

Other Protections For Users of Commercial Electronic Mail

E-Mail Heading

Section 5 of the federal “CAN-SPAM” act makes it unlawful for any person to initiate a transmission, to a protected computer, of a commercial electronic mail message, or a transactional or relationship message, that contains, or is accompanied by, header information that is materially false or materially misleading. For purposes of this provision:

- Header information that is technically accurate but includes an originating electronic mail address, domain name, or Internet Protocol address the access to which for purposes of initiating the message was obtained by means of false or fraudulent pretenses or representations shall be considered materially misleading.
- A “from” line (the line identifying or purporting to identify a person initiating the message) that accurately identifies any person who initiated the message shall not be considered materially false or materially misleading.
- Header information shall be considered materially misleading if it fails to identify accurately a protected computer used to initiate the message because the person initiating the message knowingly uses another protected computer to relay or retransmit the message for purposes of disguising its origin.

Subject Heading

Section 5 also makes it unlawful for any person to initiate a transmission to a protected computer of a commercial electronic mail message if such person has actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that a subject heading of the message would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.

Return E-Mail Address

Section 5 also makes it unlawful for any person to initiate a transmission to a protected computer of a commercial electronic mail message that does not contain a functioning return electronic mail address or other Internet-based mechanism, clearly and conspicuously displayed, that:

- a recipient may use to submit, in a manner specified in the message, a reply electronic mail message or other form of Internet-based communication requesting not to receive future commercial electronic mail messages from that sender at the electronic mail address where the message was received; and
- remains capable of receiving such messages or communications for no less than 30 days after the transmission of the original message.

Opt-Out Request

If a recipient makes a request not to receive some or any commercial electronic mail messages from such sender, then it is unlawful:

- for the sender to initiate the transmission to the recipient, more than 10 business days after the receipt of such request, of a commercial electronic mail message that falls within the scope of the request;

- for any person acting on behalf of the sender to initiate the transmission to the recipient, more than 10 business days after the receipt of such request, of a commercial electronic mail message with actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that such message falls within the scope of the request;
- for any person acting on behalf of the sender to assist in initiating the transmission to the recipient, through the provision or selection of addresses to which the message will be sent, of a commercial electronic mail message with actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that such message would violate these provisions; or
- for the sender, or any other person who knows that the recipient has made such a request, to sell, lease, exchange, or otherwise transfer or release the electronic mail address of the recipient (including through any transaction or other transfer involving mailing lists bearing the electronic mail address of the recipient) for any purpose other than compliance with this act or other provision of law.

These prohibitions do not apply if there is affirmative consent by the recipient subsequent to the request.

Other E-Mail Sender Information

Section 5 also makes it unlawful for any person to initiate the transmission of any commercial electronic mail message to a protected computer unless the message provides:

- clear and conspicuous identification that the message is an advertisement or solicitation;
- clear and conspicuous notice of the opportunity to decline to receive further commercial electronic mail messages from the sender; and
- a valid physical postal address of the sender.

Business Knowingly Promoted With False or Misleading Transmission Information

Section 6 of the federal “CAN-SPAM” act makes it unlawful for a person to promote, or allow the promotion of, that person’s trade or business, or goods, products, property, or services sold, offered for sale, leased or offered for lease, or otherwise made available through that trade or business, in a commercial electronic mail message the transmission of which is in violation of the prohibition on false or misleading transmission information if that person:

- knows, or should have known in the ordinary course of that person’s trade or business, that the goods, products, property, or services sold, offered for sale, leased or offered for lease, or otherwise made available through that trade or business were being promoted in such a message;
- received or expected to receive an economic benefit from such promotion; and
- took no reasonable action:
 - to prevent the transmission; or
 - to detect the transmission and report it to the Federal Trade Commission.

The FTC has exclusive enforcement power for this section.

Enforcement

Section 7 provides that a violation of the act is an unfair and deceptive act or practice and may be enforced by the Federal Trade Commission. Additionally, a state attorney general may bring an action on behalf of the residents of the state in a federal district court in any case in which the attorney general has reason to believe that an interest of the residents of the state has been, or is threatened to be, adversely affected by any person who violates specified sections of the act. The attorney general may seek an injunction against further violations or to obtain damages in an amount equal to the greater of actual monetary losses suffered by residents or statutory damages consisting of up to \$250 per violation. In a successful action, the court may award attorney fees and costs to the state.

Preemption

Section 8 of the federal “CAN-SPAM” act states that this act supersedes any state statute, regulation, or rule that expressly regulates the use of electronic mail to send commercial messages, except to the extent that such law prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto. The act does not preempt state laws that are not specific to electronic mail or other state laws to the extent that those laws relate to acts of fraud or computer crime.

Additionally, the act is not to be construed to have any effect on 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.

III. Effect of Proposed Changes:

The bill prohibits commercial electronic mail messages that falsely identify the origin or identity of the sender or contain false or misleading information in the subject line and provides a mechanism to enforce the provisions of the bill in a new part in ch. 668, F.S.

Short Title

The short title for the part is the “Electronic Mail Communications Act.”

Legislative Intent

The bill provides that its provisions are intended to promote the integrity of electronic commerce and must be construed liberally to protect the public and legitimate businesses from deceptive and unsolicited commercial electronic mail.

Definitions

Several definitions are created by the bill, including:

- “Affirmative consent,” which means that the recipient of electronic mail expressly consented to receive the message either in response to a clear and conspicuous request for the recipient’s consent or at the recipient’s own initiative. The definition also provides how affirmative consent may be deemed to have been given by a recipient.

- “Commercial electronic mail message,” which means an electronic mail message sent to promote the sale or lease of, or investment in, property, goods, or services related to any trade or commerce.
- “Initiate the transmission,” which means the action taken by the original sender with respect to a commercial electronic mail message.
- “Unsolicited commercial electronic mail message,” which means any commercial electronic mail message that is sent to a recipient without the recipient’s affirmative consent. The term does not include a transactional or relationship message.

Prohibited Activities

The bill provides that it is unlawful to:

- Initiate the transmission of an unsolicited commercial electronic mail message from a computer located in this state or to an electronic mail address that is held by a resident of this state which:
 - Uses a third party’s Internet domain name without permission of the third party;
 - Contains falsified or missing routing information or otherwise misrepresents, falsifies, or obscures any information in identifying the point of origin or the transmission path of the unsolicited commercial electronic mail message; or
 - Contains false or misleading information in the subject line.
- Assist in the transmission of an unsolicited commercial electronic mail message when the person providing the assistance knows, or has reason to know, that the initiator of the commercial electronic mail message is engaged in or intends to engage in a practice that violates this section.
- Distribute software or any other system designed to falsify missing routing information identifying the point of origin or the transmission path of the commercial electronic mail message.

Enforcement

The bill authorizes the Department of Legal Affairs, of the Florida Attorney General’s Office, to bring an action for damages, or for declaratory or injunctive relief, or to impose a civil penalty. The bill creates a cause of action, without regard to any other remedy or relief to which a person is entitled, including the right to seek declaratory and injunctive relief against a person who initiates or assists in the transmission of a commercial electronic mail message that violates, or has violated the prohibited activities outlined above, for:

- A person who receives an unsolicited commercial electronic mail message; and
- An interactive computer service, telephone company, or cable provider that handles or retransmits the commercial electronic mail message.

A prevailing plaintiff in an action filed under the bill is entitled to:

- An injunction to enjoin future violations;

- Compensatory damages equal to any actual damage proven by the plaintiff to have resulted from the initiation of the unsolicited commercial electronic mail message or liquidated damages of \$500 for each unsolicited commercial electronic mail message when that message is sent by the defendant:
 - To the plaintiff;
 - Through the plaintiff's interactive computer service; or
 - To any consumer in this state, if the department is the plaintiff.
- Attorney's fees and other litigation costs reasonably incurred in connection with the action.

Although the bill states in s. 668.606(1), F.S., that the Department of Legal Affairs "may impose a *civil penalty* as provided in this section." The section does not provide for any civil penalty, only compensatory damages and declaratory and injunctive relief. The intent of the bill may be to authorize the Department of Legal Affairs to enforce the bill under the provisions of the Florida Deceptive and Unfair Trade Practices Act or to authorize civil penalties of \$500 for each unsolicited message.

Additional Remedies

The bill states that a violation of the prohibited activities in the bill is deemed an unfair and deceptive trade practice within the meaning of part II of ch. 501, F.S., which is the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). In addition to any remedies or penalties set forth in FDUTPA, a violator shall be subject to the penalties and remedies provided for in the bill. Also, the remedies of this bill are in addition to remedies otherwise available for the same conduct under federal or state law.

Long-Arm Jurisdiction

The bill establishes that any person outside this state who initiates or assists in the transmission of a commercial electronic mail message received in this state which violates the provisions of the bill outlining prohibited activities, and who knows, or should have known, that the commercial electronic mail message will be received in this state, submits to the jurisdiction of this state.

E-Mail Providers

The bill provides that it 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 that violates the provisions of the bill outlining prohibited activities.

The bill also provides that a person is not initiating a transmission if the activity is undertaken by an intervening interactive computer service or wireless network that handles a commercial mail message, unless the intervening service or network has reason to know that the person initiating the transmission will commit an act that violates the bill's provisions.

The bill provides that an interactive computer service may, upon its own initiative, block the receipt or transmission through its service of any commercial electronic mail message that it

reasonably believes is, or will be sent, in violation of the prohibited activities outlined in the bill. It also shields an interactive computer service from liability for any action voluntarily taken in good faith to block the receipt or transmission through its service of any commercial electronic mail message that it reasonably believes is, or will be sent, in violation of the prohibited activities outlined in the bill.

Intelligence Investigations

The bill also states that its provisions do not contravene the provisions of s. 501.2065, F.S., which provides for maintaining the confidential status of certain information relating to intelligence or investigative information on alleged violations of the unfair and deceptive trade practices act.

Statute of Limitations

The bill also creates a statute of limitations, providing that an action under this section must be commenced within 4 years following the date of any prohibited activity.

Severability Clause

The bill provides that if any provision of this bill or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this bill which can be given effect without the invalid provision or application, and to this end the provisions of this bill are severable.

Effective Date

The bill takes effect July 1, 2004.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Constitutional Issues:

The federal "CAN-SPAM" act (see discussion in **Present Situation** section above) provides that it "supersedes any statute, regulation, or rule of a State or political subdivision of the 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." This statement suggests that a state is free to pass a law relating to commercial electronic mail as long as the law addresses falsity or deception in

any portion of the message or information attached and does not venture beyond this restriction. To the extent that this bill addresses such activity, it appears to fall under the exception provided for in the federal act and therefore, does not appear to be preempted by the federal act.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Persons and businesses injured by unlawful commercial e-mail activity may have a cause of action to recover damages.

C. Government Sector Impact:

The Office of the Attorney General has stated that it can enforce the bill's provisions within existing resources.

VI. Technical Deficiencies:

Although the bill states in s. 668.606(1), F.S., that the Department of Legal Affairs (department) "may impose a *civil penalty* as provided in this section." The section does not provide for any civil penalty, only compensatory damages and declaratory and injunctive relief. The intent of the bill may be to authorize the Department of Legal Affairs to enforce the bill under the provisions of the Florida Deceptive and Unfair Trade Practices Act or to authorize civil penalties of \$500 for each unsolicited message.

The Legislature may wish to clarify the civil penalty that may be imposed by the department.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Judiciary:

- Expands the type of commercial electronic messages regulated by the bill to include messages that send computer viruses or contain false or deceptive information in the body of the message.
- Limits the class of persons who assist in the transmission of an electronic message and are regulated under the bill to those persons who know or have reason to know that the message will be sent in violation of ch. 668, F.S.

- Defines “computer virus,” “person,” and “routine conveyance.” (WITH TITLE AMENDMENT)

This Senate staff analysis does not reflect the intent or official position of the bill’s sponsor or the Florida Senate.
