

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: CS/SB 438
SPONSOR: Communication and Public Utilities Committee, Senator Campbell, and others
SUBJECT: Commercial Electronic Messages
DATE: April 11, 2003 REVISED: 4/15/03 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Wiehle</u>	<u>Caldwell</u>	<u>CU</u>	<u>Favorable/CS</u>
2.	<u>Cibula</u>	<u>Maclure</u>	<u>CM</u>	<u>Fav/2 amendments</u>
3.	_____	_____	<u>JU</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The committee substitute provides that a person is prohibited from transmitting unsolicited commercial electronic mail messages that:

- contain false transmission or routing information;
- contain false or misleading information in subject lines;
- use a third party's Internet address or domain name without the third party's consent;
- fail to contain "ADV:" as the first characters of a subject line; or
- fail to provide a mechanism for recipients to easily, and at no cost, remove themselves from the sender's electronic mailing lists.

A person who is injured by an unsolicited electronic mail message sent in violation of the provisions of this committee substitute may receive damages for his or her injuries including lost profits. A recipient or an electronic mail service provider who is injured as a result of an unsolicited commercial electronic mail message sent in violation of this committee substitute may recover attorneys' fees and costs, and actual damages or the greater of \$10 for each unsolicited commercial electronic mail message sent in violation of this committee substitute or \$25,000. A recipient of an unsolicited commercial electronic mail message does not have a cause of action against an electronic mail service provider for transmitting an unsolicited message or for blocking a message believed to be in violation of the provisions of this committee substitute.

In actions brought to enforce the provisions of this committee substitute, courts are authorized to conduct their proceedings in a manner that protects the secrecy and security of computers, computer networks, computer data, computer software, and programs to prevent future violations of the provisions of this committee substitute and protects a party's trade secrets.

This bill creates unnumbered sections of the Florida Statutes.

II. Present Situation:

According to the Coalition Against Unsolicited Commercial Email (CAUCE), unsolicited commercial email creates problems for Internet service providers and consumers.

<http://www.cauce.org/about/problem.shtml>. The costs associated with unsolicited commercial email are initially borne by the Internet service provider (ISP) but are passed on to users in higher monthly fees. *Id.* These costs include additional need for bandwidth, processing time for the large number of additional emails, filter-related expenses, direct and indirect (customer dissatisfaction) costs associated with the impact of such emails on access, speed, and reliability of service, and hiring personnel to deal with these problems. *Id.*

Filters set up by the ISPs and consumers can help cut down the numbers of unsolicited commercial emails, but spammers use tricks that help disguise the origin of their messages. *Id.* One of the most common tricks is to relay their messages off the mail server of an innocent third party, which floods both the receiving system and the innocent relay system with junk email and often shifts the complaints to the innocent site because it was made to look like the origin of the spam. *Id.* Another common trick that spammers use is to forge the headers of messages, making it appear as though the message originated elsewhere, again providing a convenient target. *Id.* Many states have prohibited certain abusive commercial electronic mail messages.

Survey of State Laws Regulating Unsolicited Commercial Electronic Mail Messages

California

California law prohibits a registered user of an electronic mail service provider from using the service provider's equipment located within California in violation of the service provider's policy prohibiting use of its service or equipment for the initiation of unsolicited electronic mail advertisements. Cal. Business and Professions Code s. 17538.45. It also prohibits an individual, corporation, or other entity from using, by initiating an unsolicited electronic mail advertisement, an electronic mail service provider's equipment located within California in violation of that electronic mail service provider's policy prohibiting or restricting the use of its equipment to deliver unsolicited electronic mail advertisements to its registered users. It provides that an electronic mail service provider is not required to create a policy prohibiting or restricting the use of its equipment for the initiation or delivery of unsolicited electronic mail advertisements. As to damages, in addition to any other action available under law, any electronic mail service provider whose policy on unsolicited electronic mail advertisements is violated may bring a civil action to recover the actual monetary loss suffered by that provider by reason of that violation, or liquidated damages of \$50 for each electronic mail message initiated or delivered in violation of this section, up to a maximum of \$25,000 per day, whichever amount is greater. The court may award reasonable attorneys' fees to a prevailing party. The electronic mail service provider is required to establish as an element of its cause of action that, prior to the alleged violation, the defendant had actual notice of both the electronic mail service provider's policy on unsolicited electronic mail advertising and the fact that the defendant's unsolicited electronic mail advertisements would use or cause to be used the electronic mail service provider's equipment located in California.

Colorado

Colorado law makes it unlawful for any person who sends an unsolicited commercial electronic mail message:

- to fail to disclose the actual point-of-origin electronic mail address of the unsolicited commercial electronic mail message;
- to falsify electronic mail transmission information or other routing information for the unsolicited commercial electronic mail message;
- to use a third party's Internet address or domain name without the third party's consent for the purposes of transmitting electronic mail;
- to fail to use the exact characters "ADV:" as the first four characters in the subject line of an unsolicited commercial electronic mail message unless the sender:
 - is an organization using electronic mail to communicate exclusively with its members;
 - is an organization using electronic mail to communicate exclusively with its employees or contractors, or both; or
 - has a current or prior business relationship with the recipient;
- to fail to provide a mechanism allowing recipients to easily, and at no cost, remove themselves from the sender's electronic mail address lists so that they are not included in future mailings. Colo. Rev. Stat. s. 6-2.5-103.

It is also unlawful to send unsolicited commercial electronic mail messages to any person who has requested to be removed from the sender's electronic mail lists or to provide the electronic mail address of any such person to any third party, whether or not such third party is part of the sender's business organization. However, electronic mail addresses may be provided to any such person or to any third party for the sole purpose of inclusion in do-not-email lists. *Id.*

Receipt of an unsolicited commercial electronic mail message sent in violation of Colorado laws governing such messages provides a cause of action against the sender of the message regardless of whether the recipient of the message suffers a financial loss or injury. Colo. Rev. Stat. s. 6-2.5-104. A recipient of an unsolicited commercial electronic mail message may recover attorneys' fees and costs and \$10 for each unsolicited commercial electronic mail message sent in violation of Colorado law. *Id.*

Kansas

Section 50-6,107, Kan. Stat., makes it unlawful to:

- Initiate the transmission, conspire with another to initiate the transmission, or assist the transmission of a commercial electronic mail message from a computer located in Kansas or to an electronic mail address that the sender knows is held by a Kansas resident that:

- uses a third party's Internet domain name without permission of the third party, or otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message;
 - contains false or misleading information in the subject line;
 - does not contain as the first four characters of the subject line "ADV: "; provided, however, the characters "ADV" are not required in the subject line if the recipient has an established business relationship or has given express authorization to receive commercial electronic mail messages or in electronic mail messages, other than messages of a sexually explicit or otherwise adult-oriented nature, sent to less than 500 recipients per month;
 - does not contain instructions, in text at least as large as the majority of the text in the transmission, for the recipient to follow to notify the sender not to send any subsequent communications, with a valid sender operated return electronic mail address to which the recipient may reply to notify the sender not to send any further commercial electronic mail messages and the legal name of the person or entity initiating the transmission, including such person's or entity's (i) physical address for the receipt of the United States mail or (ii) a toll-free telephone number that the recipient may call to notify the sender not to send any subsequent communications; or
 - contains advertising material for viewing, use, consumption, sale, lease, or rental only by persons over 18 years of age, including but not limited to content of sexual, sexually explicit, or otherwise adult-oriented nature, unless the first eight characters of the subject line are "ADV:ADLT."
- Initiate the transmission, conspire with another to initiate the transmission, or assist the transmission of a commercial electronic mail message from a computer located in Kansas or to an electronic mail address that the sender knows is held by a Kansas resident that is made after the recipient thereof has notified the sender not to send any subsequent communications.
 - Give, transfer, sell or otherwise share with another the electronic mail address of any recipient who has notified the sender not to send any subsequent communications for any use other than for the third party to place the address on a do-not-contact list.
 - Assist in the transmission of a commercial electronic mail message, when the person providing the assistance knows that the initiator of the commercial electronic mail message is engaged, or intends to engage, in any act or practice that violates the Kansas consumer protection act.
 - Knowingly sell, give, or otherwise distribute or possess with the intent to sell, give, or distribute software that:
 - is primarily designed or produced for the purpose of facilitating or enabling the falsification of electronic mail transmission information or other routing information;
 - has only limited commercially significant purpose or use other than to facilitate or enable the falsification of electronic mail transmission information or other routing information; or

- is marketed by that person or another acting in concert with that person with that person's knowledge for use in facilitating or enabling the falsification of electronic mail transmission information or other routing information.

For purposes of s. 50-6,107, Kan. Stat., a person knows or has reason to know that the intended recipient of a commercial electronic mail message is a Kansas resident if that information is available, upon request, from the registrant of the Internet domain name contained in the recipient's electronic mail address.

An interactive computer service may, upon its own initiative, block the receipt or transmission through its service of any commercial electronic mail that it reasonably believes is, or will be, sent in violation of Kansas law. No interactive computer service may be held liable for any action voluntarily taken in good faith to block the receipt or transmission through its service of any commercial electronic mail which it reasonably believes is, or will be, sent in violation of this Kansas law.

Any person that violates the section is subject to a civil penalty of not less than \$500 nor more than \$10,000 for each such violation.

Minnesota

Section 325F.694, Minn. Stat., prohibits any person from initiating the transmission of a commercial electronic mail message that:

- uses a third party's Internet domain name without permission of the third party, or otherwise misrepresents any information in identifying the point of origin or the transmission path of a commercial electronic mail message; or
- contains false or misleading information in the subject line.

The statute also requires that the subject line of a commercial electronic mail message must include "ADV" as the first characters. If the message contains information that consists of material of a sexual nature that may only be viewed by an individual 18 years of age and older, the subject line of the message must include "ADV-ADULT" as the first characters. *Id.*

A sender initiating the transmission of a commercial electronic mail message must establish a toll-free telephone number, a valid sender-operated return electronic mail address, or another easy-to-use electronic method that the recipient of the commercial electronic mail message may call or access by electronic mail or other electronic means to notify the sender not to transmit by electronic mail any further unsolicited commercial electronic mail messages. The notification process may include the ability for the commercial electronic mail messages recipient to direct the initiator to transmit or not transmit particular commercial electronic mail messages based upon products, services, divisions, organizations, companies, or other selections of the recipient's choice. *Id.*

A commercial electronic mail message must include a statement informing the recipient of a toll-free telephone number that the recipient may call, or a valid return address to which the recipient may write or access by electronic mail or another electronic method established by the initiator,

notifying the sender not to transmit to the recipient any further unsolicited commercial electronic mail messages to the electronic mail address, or addresses, specified by the recipient, and explaining the manner in which the recipient may specify what commercial electronic mail messages the recipient does and does not wish to receive. *Id.*

No electronic mail service provider may be held liable in an action by a recipient for any act voluntarily taken in good faith to block the receipt or transmission through its service of any commercial electronic mail message that the electronic mail service provider reasonably believes is, or will be, sent in violation of s. 325F.694, Minn. Stat.

A person injured by a violation of the statute may recover damages caused by the violation as set out below.

An injured person, other than an electronic mail service provider, may recover:

- the lesser of \$25 for each commercial electronic mail message received that violates the prohibition against misrepresentation of the point of origin or path of a message or contains false or misleading information in the subject line, or \$35,000 per day; or
- the lesser of \$10 for each commercial electronic mail message received that violates the requirement that ADV or ADV-ADULT appear in the subject disclosure, or \$25,000 per day.

An injured electronic mail service provider may recover actual damages or elect, in lieu of actual damages, to recover:

- the lesser of \$25 for each commercial electronic mail message received that violates the prohibition against misrepresentation of the point of origin or path of a message or contains false or misleading information in the subject line, or \$35,000 per day; or
- the lesser of \$10 for each commercial electronic mail message received that violates the requirement that ADV or ADV-ADULT appear in the subject disclosure, or \$25,000 per day.

The remedies provided are in addition to remedies under other law. A court may award costs and reasonable attorneys' fees to a party awarded damages for a violation of the statute. No class action may be brought.

South Dakota

In South Dakota, it is a class-2 misdemeanor and a deceptive act or practice for any person to send or cause to be sent an unsolicited commercial electronic mail message that does not include in the subject line of such message "ADV:" as the first four characters. S.D. Codified Laws Ann. s. 37-24-6(13). If the message contains information that consists of explicit sexual material that may only be viewed, purchased, rented, leased, or held in possession by an individual 18 years of age and older, the subject line of each message must include "ADV:ADLT" as the first eight characters. An unsolicited commercial electronic mail message does not include a message sent to a person with whom the initiator has an existing personal or business relationship or a message sent at the request or express consent of the recipient.

Each act in violation of the statute is a class-2 misdemeanor. Any subsequent conviction of an act in violation of this statute which occurs within two years is a class-1 misdemeanor. Any subsequent conviction of an act in violation of this statute which occurs within two years of a conviction of a class-1 misdemeanor pursuant to this statute is a class-6 felony. *Id.*

Tennessee

Tennessee statutes prohibit any person or entity conducting business in that state from sending by fax or causing to be faxed, or sending by e-mail or causing to be e-mailed, documents consisting of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit unless that person or entity establishes a toll-free telephone number or return e-mail address that a recipient of the unsolicited faxed or e-mailed documents may call to notify the sender not to fax or e-mail the recipient any further unsolicited documents. Tenn. Code Ann. s. 47-18-2501. All such faxed or e-mailed documents must include a statement informing the recipient of the toll-free telephone number that the recipient may call, or a valid return address to which the recipient may write or e-mail, as the case may be, notifying the sender not to fax or e-mail the recipient any further unsolicited documents to the fax number, or numbers, or addresses specified by the recipient. Upon notification by a recipient of the recipient's request not to receive any further unsolicited faxed or e-mailed documents, no person or entity conducting business in this state may fax or cause to be faxed, or e-mail or cause to be e-mailed, any unsolicited documents to that recipient. In the case of e-mail, that person or entity shall establish a toll-free telephone number or valid sender operated return e-mail address that the recipient of the unsolicited documents may call or e-mail to notify the sender not to e-mail any further unsolicited documents.

With an e-mail that consists of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit, the subject line of each and every message must include "ADV:" as the first four characters. If these messages contain information that consists of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit that may only be viewed, purchased, rented, leased, or held in possession by an individual 18 years of age or older, the subject line of each and every message must include "ADV:ADLT" as the first eight characters. *Id.*

For unsolicited bulk e-mail, the statute applies when the unsolicited e-mailed documents are delivered to a Tennessee resident via an electronic mail service provider's service or equipment located in the state. For these purposes, "electronic mail service provider" means any business or organization qualified to do business in the state that provides individuals, corporations, or other entities the ability to send or receive electronic mail through equipment located in the state and that is an intermediary in sending or receiving electronic mail. *Id.*

Any person whose property or person is injured by reason of a violation of any provision of the statute may sue and recover for any damages sustained, with damages including loss of profits, together with costs. If the injury arises from the transmission of unsolicited bulk electronic mail, the injured person, other than an electronic mail service provider, may also recover attorneys' fees and costs, and may elect, in lieu of actual damages, to recover the lesser of \$10 for each and every unsolicited bulk electronic mail message transmitted in violation of the statute, or \$5,000

per day. The injured person does not have a cause of action against the electronic mail service provider that merely transmitted the unsolicited bulk electronic mail over its computer network. If the injury arises from the transmission of unsolicited bulk electronic mail, an injured electronic mail service provider may also recover attorneys' fees and costs, and may elect, in lieu of actual damages, to recover the greater of \$10 for each and every unsolicited bulk electronic mail message transmitted in violation of the statute, or \$5,000 per day.

In addition to these remedies, if a person sends an unsolicited email in violation of these provisions to a recipient who has previously notified the initiator that the recipient does not want to receive any further email messages from the initiator, it is an unfair trade practice under the Consumer Protection Act to the extent that:

- Such unfair trade practice disrupts the normal flow of business of the person who has received such unsolicited advertising material; or
- The violator has engaged in a pattern or practice of refusing to comply with requests of those who have notified the initiator that the recipient does not want to receive any further unsolicited facsimile or e-mail messages from the initiator.

Tenn. Code Ann. s. 47-18-1602. The person sending the unsolicited email is subject to a civil penalty of not less than \$100 nor more than \$500, to be assessed by the appropriate regulatory agency with the funds collected deposited in the state general fund.

Utah

Utah statutes require that each person who sends or causes to be sent an unsolicited commercial email or an unsolicited sexually explicit email through the intermediary of an email service provider located in the state or to an email address held by a resident of the state must:

- conspicuously state in the email the sender's:
 - legal name;
 - correct street address; and
 - valid Internet domain name;
- include in the email a subject line that contains:
 - for a commercial email, "ADV:" as the first four characters; or
 - for a sexually explicit email, "ADV:ADULT" as the first nine characters;
- provide the recipient a convenient, no-cost mechanism to notify the sender not to send any future email to the recipient.

Utah Code Ann. s. 13-36-103.

A person who sends or causes to be sent an unsolicited commercial email or an unsolicited sexually explicit email through the intermediary of an email service provider located in the state or to an email address held by a resident of the state may not:

- use a third party's Internet domain name in identifying the point of origin or in stating the transmission path of the email without the third party's consent;

- misrepresent any information in identifying the point of origin or the transmission path of the email; or
- fail to include in the email the information necessary to identify the point of origin of the email.

If the recipient of an unsolicited commercial email or an unsolicited sexually explicit email notifies the sender that the recipient does not want to receive future commercial email or future sexually explicit email, respectively, from the sender, the sender may not send that recipient a commercial email or a sexually explicit email, as the case may be, either directly or through a subsidiary or affiliate.

For any violation of one of these provisions, an action may be brought by:

- a person who received the unsolicited commercial email or unsolicited sexually explicit email with respect to which the violation under s. 13-36-103 occurred; or
- an email service provider through whose facilities the unsolicited commercial email or unsolicited sexually explicit email was transmitted.

Utah Code Ann. s. 13-36-105.

In such an action:

- a recipient or email service provider may:
 - recover actual damages; or
 - elect, in lieu of actual damages, to recover the lesser of:
 - \$10 per unsolicited commercial email or unsolicited sexually explicit email received by the recipient or transmitted through the email service provider; or
 - \$25,000 per day that the violation occurs; and
 - each prevailing recipient or email service provider shall be awarded costs and reasonable attorneys' fees.

An email service provider does not violate the statute solely by being an intermediary between the sender and recipient in the transmission of an email that violates the statute.

Virginia

Virginia law makes it unlawful for any person to use a computer or computer network without authority and with the intent to falsify or forge electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited bulk electronic mail through or into the computer network of an electronic mail service provider or its subscribers. Va. Code s. 18.2-152.4. A violation is a class-3 misdemeanor. *Id.* Additionally, any person whose property or person is injured by reason of a violation may sue and recover for any damages sustained and the costs of suit. Va. Code s. 18.2-152.12. Without limiting the generality

of the term, “damages” includes loss of profits. *Id.* The following damage provisions apply if the injury arises from the transmission of unsolicited bulk electronic mail:

- An injured person, other than an electronic mail service provider, may also recover attorneys’ fees and costs, and may elect, in lieu of actual damages, to recover the lesser of \$10 for each and every unsolicited bulk electronic mail message transmitted in violation of the statute, or \$25,000 per day. The injured person does not have a cause of action against the electronic mail service provider that merely transmits the unsolicited bulk electronic mail over its computer network.
- An injured electronic mail service provider may also recover attorneys’ fees and costs, and may elect, in lieu of actual damages, to recover the greater of \$10 for each and every unsolicited bulk electronic mail message transmitted in violation of this article, or \$25,000 per day.

Compensable Injuries

Existing case law appears to be silent on the issue of whether a consumer receives a compensable injury by merely receiving an unsolicited commercial electronic mail message. At least one state’s law regulating unsolicited commercial electronic mail messages, however, authorizes a recipient of such electronic messages to receive \$10 for each message received in violation of the law. Section 6-2.5-104, Co. St. In effect, an injury is presumed when one receives an electronic message sent in violation of Colorado law.

Electronic mail service providers, however, have prevailed in lawsuits against senders of unsolicited commercial electronic mail for trespass to chattels. In *America Online, Inc., v. National Health Care Discount, Inc.*, 174 F. Supp. 890 (N.D. Iowa, 2001), America Online, Inc., was injured by increased operating costs for handling unsolicited commercial electronic messages.

III. Effect of Proposed Changes:

The committee substitute provides that a person is prohibited from transmitting unsolicited commercial electronic mail messages that:

- contain false transmission or routing information;
- contain false or misleading information in subject lines;
- use a third party’s Internet address or domain name without the third party’s consent;
- fail to contain “ADV:” as the first characters of a subject line; or
- fail to provide a mechanism for recipients to easily, and at no cost, remove themselves from the sender’s electronic mailing lists.

A person who is injured by an unsolicited electronic mail message sent in violation of the provisions of this committee substitute may receive damages for their injuries including lost profits. A recipient or an electronic mail service provider who is injured as a result of an unsolicited commercial electronic mail message sent in violation of this committee substitute may recover attorneys’ fees and costs, and actual damages or the greater of \$10 for each unsolicited commercial electronic mail message sent in violation of this committee substitute or

\$25,000. A recipient of an unsolicited commercial electronic mail message does not have a cause of action against an electronic mail service provider for transmitting an unsolicited message or for blocking a message believed to be in violation of the provisions of this committee substitute.

In actions brought to enforce the provisions of this committee substitute, courts are authorized to conduct their proceedings in a manner that protects the secrecy and security of computers, computer networks, computer data, computer software, and programs to prevent future violations of the provisions of this committee substitute and protects a party's trade secrets.

The bill takes effect July 1, 2003.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Commercial Speech

The First Amendment to the U.S. Constitution limits government regulation of commercial speech. Section 365.1657, F.S., and 47 U.S.C. s. 227 are examples of restrictions on commercial speech that prohibit the use or the transmission of unsolicited advertisements to facsimile machines. The federal law has been held constitutional when challenged on First Amendment grounds in *State of Missouri v. American Blast Fax, Inc.*, Nos. 02-2705-2707 (8th Cir., 2003). The federal law, however, was held unconstitutional in *Rudgayzer & Gratt v. Enine, Inc.*, 749 N.Y.S.2d 855 (Civ. Ct., City of New York, 2002). According to *Rudgayzer*, facsimile advertisements are protected commercial speech under the First Amendment as long as they concern lawful activity and are not misleading.

Unlike the above laws, the provisions of the committee substitute only prohibit the transmission of certain deceptive unsolicited commercial advertisements. As such, the provisions of this bill are likely permissible under the First Amendment to the U.S. Constitution.

Commerce Clause

The regulation of commercial electronic messages under the committee substitute is not limited to messages sent from one location in Florida to another location in Florida. The regulation of commercial electronic messages provided by the committee substitute also includes commercial messages sent from outside this state to a location in this state and commercial electronic messages sent from Florida to a location in another state. Because the committee substitute regulates advertisements that cross state lines, it clearly regulates interstate commerce. As such, this section of this analysis will examine whether the regulation of commercial electronic messages provided by the committee substitute is permissible under the Commerce Clause of the U.S. Constitution.

According to *State v. Heckel*, 24 P.3d 404, 409 (Wash. Sup. Ct. 2001):

The Commerce Clause grants Congress the "power ... [t]o regulate commerce with foreign nations, and among the several states." [U.]S. Const. art. I, § 8, cl. 3. Implicit in this affirmative grant is the negative or "dormant" Commerce Clause-the principle that the states impermissibly intrude on this federal power when they enact laws that unduly burden interstate commerce. See *Franks & Son, Inc. v. State*, 136 Wash.2d 737, 747, 966 P.2d 1232 (1998). Analysis of a state law under the dormant Commerce Clause generally follows a two-step process. We first determine whether the state law openly discriminates against interstate commerce in favor of intrastate economic interests. If the law is facially neutral, applying impartially to in-state and out-of-state businesses, the analysis moves to the second step, a balancing of the local benefits against the interstate burdens:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities....

Id. at 754, 966 P.2d 1232 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970)).

This committee substitute does not discriminate in favor of intrastate interests. All persons who transmit commercial electronic mail messages are subject to the provisions of the committee substitute regardless of their geographic location. The regulations provided by the committee substitute, however, prohibit the use of: falsified routing information; false or misleading information in a subject line; or a third party's Internet address or domain name without permission. The local

benefits of these types of regulations of commercial electronic mail messages were found sufficient to defeat a challenge under the dormant Commerce Clause in *Heckel*, 24 P.3d 404, 409.

The committee substitute also requires “ADV:” to be the first 4 characters of a subject line of an unsolicited commercial electronic mail message. Similarly, s. 325F.694, Minn. Stat., requires “ADV” to be the first characters in the subject line of an unsolicited commercial electronic mail message. However, under s. 325F.694, Minn. Stat., messages containing material of a sexual nature that may only be viewed by an individual 18 years of age and older must contain “ADV-ADULT” as the first characters in the subject line of the advertisement. As such, a commercial electronic mail message sent from Minnesota to Florida containing “ADV-ADULT” as the first characters of the subject line would be in technical violation of the provisions of this committee substitute while in compliance with Minnesota law. This bill requires the fourth character of such messages to be a colon. Minnesota law requires the fourth character of such messages to be a hyphen. When state laws subject a person to conflicting obligations, those state laws may be in violation of the Commerce Clause. *American Libraries Association v. Pataki*, 969 F.Supp. 160, 181-182 (S.D. New York, 1997).

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Persons and interactive computer service providers may be able to recover damages for violations of the prohibition on sending commercial electronic mail messages under specified circumstances. Persons violating the prohibition may have such awards and orders entered against them.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

On page 3, line 2, the cross-reference to subsection (1) of section 1 of the bill should be replaced with a cross-reference to subsection (4).

On page 1, line 29, and page 3, line 31, the bill refers to “this section.” When read in context with the other provisions of the committee substitute, it is clear that “this section” was intended to include all sections of the committee substitute. The Legislature may wish to revise these references to avoid any confusion.

VII. Related Issues:

The Legislature may wish to clarify whether receipt of an unsolicited commercial electronic mail message sent in violation of the provisions of the committee substitute is an injury for which a recipient may recover damages.

VIII. Amendments:

#1 by Commerce, Economic Opportunities, and Consumer Services:

Corrects an error in the use of the word “commerce” when “commercial” was intended.

#2 by Commerce, Economic Opportunities, and Consumer Services:

Corrects an internal cross-reference.

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