

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 & Public Utilities Committee, Senators Campbell, Cowin & others
SUBJECT: Electronic Messages
DATE: April 8, 2003 REVISED: _____

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

I. Summary:

The bill creates definitions, makes it unlawful to transmit specified types of commercial electronic messages, and provides for damages.

The bill creates unnumbered sections of the Florida Statutes.

II. Present Situation:

Unsolicited commercial email issues

According to the Coalition Against Unsolicited Commercial Email (CAUCE), unsolicited commercial email is the largest and most pressing spam or junk email related problem. <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 they were 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.

Florida law on unsolicited faxes

Florida law does not address unsolicited commercial email, but does address unsolicited advertising via fax. Section 365.1657, F.S., makes it unlawful for any person to use a machine that electronically transmits facsimiles of documents through connection with a telephone network to transmit within this state unsolicited advertising material for the sale of any real property, goods, or services. The Attorney General may bring an action to impose a civil penalty and to seek injunctive relief. The civil penalty cannot exceed \$500 per violation. Each transmission is considered a separate violation.

A similar federal law makes it unlawful for any person to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine. Title 47 U.S.C. s. 227. This federal law has been held constitutional when challenged on a First Amendment basis, most recently in *State of Missouri v. American Blast Fax, Inc.* No. 02-2705-2707 (8th Cir. March 21, 2003).

Unsolicited Commercial or Advertising Email Law in Other States

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 fifty dollars (\$50) for each electronic mail message initiated or delivered in violation of this section, up to a maximum of twenty-five thousand dollars (\$25,000) per day, whichever amount is greater. The court may award reasonable attorney's 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 this state.

Colorado

Colorado law makes it unlawful for any person that 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; or
 - 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, as defined in section 6-2.5-102 (1);
- 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 that 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.

Kansas

Kansas statutes make 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" is 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. The sender claiming exemption under this subsection has the burden of proving the exemption by a preponderance of the evidence;

- 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. It is prima facie evidence that the sender is in violation of this section if the recipient's reply electronic mail message is returned to the recipient as undeliverable, or is otherwise not accepted by the sender of the original commercial electronic mail message; 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.

Kan. Stat. s. 50-6,107

For purposes of this section, 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 this chapter. 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 act.

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.

It is an affirmative defense if the person can demonstrate, by clear and convincing evidence:

- that the sender at the time of the alleged violation had:
 - maintained a list of consumers who have notified the person not to send any subsequent commercial electronic messages;
 - established and implemented, with due care, reasonable practices and procedures to effectively prevent unsolicited commercial electronic mail messages in violation of this section;
 - trained the sender's personnel in the requirements of this section; and
 - maintained records demonstrating compliance with this section; and
- the unsolicited commercial electronic message was the result of an error.

This defense is not to be exercised by any person more than once within the state of Kansas in any 12-month period. A person is deemed to have exercised the defense if asserted in response to any consumer complaint about a violation of this section, regardless of whether litigation has been initiated.

The Kansas law defines the following terms:

- “Assist the transmission” means “actions taken by a person to provide substantial assistance or support which enables any person to formulate, compose, send, originate, initiate or transmit 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 practice that violates the Kansas consumer protection act.”
- “Commercial electronic mail message” means “an electronic mail message sent for the purpose of promoting property or services for sale or lease, but shall not include electronic mail messages sent by a natural person volunteering to send such messages on behalf of a charitable organization as defined by K.S.A. 17-1760, and amendments thereto.”
- “Electronic mail address” means “a destination, commonly expressed as a string of characters, to which electronic mail may be sent or delivered.”
- “Established business relationship” means “a prior and existing relationship formed by a voluntary two-way communication between a sender and a recipient with or without an exchange of consideration, on the basis of an express authorization, application, purchase or transaction by the recipient regarding products or services offered by such sender, which relationship has not been previously terminated by either party.”
- “Initiate the transmission” refers to “the action by the original sender of an electronic mail message, not to the action by any intervening interactive computer service that may handle or retransmit the message, unless such intervening interactive computer service assists in the transmission of an electronic mail message when it knows, that the person

initiating the transmission is engaged, or intends to engage, in any act or practice that violates the Kansas consumer protection act.”

- “Interactive computer service” means “any information service, system or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and such systems operated or services offered by libraries or educational institutions.”
- “Internet domain name” refers to “a globally unique, hierarchical reference to an internet host or service, assigned through centralized internet naming authorities, comprising a series of character strings separated by periods, with the right-most string specifying the top of the hierarchy.”
- “Express authorization” means “an express affirmative act by a recipient clearly agreeing to receive commercial electronic messages from a specified and identifiable sender, or from multiple persons.”

Minnesota

Minnesota law 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.

Minn. Stat. s. 325F.694

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.

The statute does not include a message within the term “commercial electronic mail message”:

- if the recipient has consented to receive or has solicited electronic mail messages from the initiator;
- from an organization using electronic mail to communicate exclusively with its members;
- from an entity which uses electronic mail to communicate exclusively with its employees or contractors; or
- if there is a business or personal relationship between the initiator and the recipient.

For purposes of this provision, “business relationship” means a prior or existing relationship formed between the initiator and the recipient, with or without an exchange of consideration, on the basis of an inquiry, application, purchase, or use by the recipient of or regarding products, information, or services offered by the initiator or an affiliate or agent of the initiator. For purposes of this paragraph, “affiliate” means a person that directly or indirectly controls, is controlled by, or is under common control with a specified person.

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.

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.

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 this section.

A person is not liable for a commercial electronic mail message sent in violation of the statute if the person can show by a preponderance of the evidence that the commercial electronic mail message was not initiated by the person or was initiated in a manner and form not subject to the control of the person. It is also a defense that the defendant has established and implemented reasonable practices and procedures to prevent violations of the statute.

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 attorney fees to a party awarded damages for a violation of the statute. No class action may be brought.

The statute provides the following definitions:

- “Commercial electronic mail message” means “an electronic mail message sent through an Internet service provider's facilities located in this state to a resident of this state for promoting real property, goods, or services for sale or lease.”
- “Electronic mail address” means “a destination, commonly expressed as a string of characters, to which electronic mail may be sent or delivered.”
- “Electronic mail service provider” means “a business, nonprofit organization, educational institution, library, or government entity that provides a set of users the ability to send or receive electronic mail messages via the Internet.”
- “Initiate the transmission” refers to the action by the original sender of an electronic mail message, not to the action by an intervening Internet service provider or electronic mail service provider that may handle or retransmit the message.”
- “Internet service provider” means “a business or person who provides users authenticated access to, or presence on, the Internet by means of a switched or dedicated telecommunications channel upon which the provider provides transit routing of Internet Protocol (IP) packets for and on behalf of the user.”
- “Internet domain name” refers to a globally unique, hierarchical reference to an Internet host or service, assigned through centralized Internet naming authorities, comprising a series of character strings separated by periods, with the rightmost string specifying the top of the hierarchy.”

South Dakota

South Dakota statutes make it 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. 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 eighteen 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.

Tennessee

Tennessee statutes prohibit any person or entity conducting business in that state from sending by fax or cause to be faxed, or sending by e-mail or cause 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-mail 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 eighteen years of age or older, the subject line of each and every message must include "ADV:ADLT" as the first eight characters.

With 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.

It also is unlawful for any person to sell, give or otherwise distribute or possess with the intent to sell, give or distribute software which:

- 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.

As used in the statute, "e-mail" or "cause to be e-mailed" does not include or refer to the transmission of any documents by the telecommunications utility or Internet service provider to the extent that the telecommunications utility or Internet service provider merely carries that transmission over its network.

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 ten dollars for each and every unsolicited bulk electronic mail message transmitted in violation of the statute, or five thousand dollars 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 ten dollars for each and every unsolicited bulk electronic mail message transmitted in violation of the statute, or five thousand dollars 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 one hundred dollars nor more than five hundred dollars, 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, including:
 - return email to a valid, functioning return electronic address; and
 - for a sexually explicit email and if the sender has a toll-free telephone number, the sender's toll-free telephone number; and

- conspicuously provide in the text of the email a notice that:
- informs the recipient that the recipient may conveniently and at no cost be excluded from future commercial or sexually explicit email, as the case may be, from the sender; and
- for a sexually explicit email and if the sender has a toll-free telephone number, includes the sender's valid, toll-free telephone number that the recipient may call to be excluded from future email from the sender.

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 Section 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 attorney 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.

If an employee violates the statute, this does not subject the employee's employer to liability if the employer has an established policy that requires compliance with the statutory requirements. It is a defense that the unsolicited commercial email or unsolicited sexually explicit email was transmitted accidentally.

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 ten dollars 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 which 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 ten dollars for each and every unsolicited bulk electronic mail message transmitted in violation of this article, or \$25,000 per day.

III. Effect of Proposed Changes:

Section 1 of the bill creates definitions.

Section 2 makes it unlawful for any person to transmit a commercial email that:

- Falsifies transmission or routing information for an unsolicited commercial email;
- Contains false or misleading information on the subject line;
- Uses a third person's Internet address or domain name without permission in a way that makes it appear the third person sent the email;
- Fails to use, in an unsolicited commercial email, the exact characters “ADV:” as the first four characters in the subject line;
- Fails to provide, in an unsolicited commercial email, a mechanism allowing recipients to easily and at no cost remove themselves from the sender's address lists so they are not included in future mailings.

Section 3 provides for damages. Any person injured by a violation of these provisions may recover damages, including lost profits, together with a attorney's fees and costs. In lieu of actual damages, an injured person other than an email service provider may recover the lesser of \$10 for each unsolicited commercial email transmitted in violation of these provisions or \$25,000 per day, and an injured email service provider may recover the greater of \$10 for each unsolicited

commercial email transmitted in violation of these provisions or \$25,000 per day. There is no cause of action against an email service provider that merely transmits an unsolicited commercial email over its system.

The section also provides that, at the request of any party, a court may conduct all proceedings in a way that protects the security and secrecy of computers, networks, data, and so forth so as to prevent recurrence of the violation and to protect trade secrets.

It also provides that an email service provider does not violate these provisions and that an injured party has no cause of action against the email service provider because the provider either:

- Is an intermediary between the recipient and the sender of an email that violates these provisions;
- Provides transmission of unsolicited commercial emails over its network; or
- Facilitates or voluntarily and in good faith takes action to block the receipt or transmission through its system of any email it believes is or will be in violation of these provisions.

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.

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, and may be able to obtain injunctive relief against further violations. Persons violating the prohibition may have such awards and orders entered against them.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

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