

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 45 CS

False or Misleading Electronic Mail

SPONSOR(S): Porth

TIED BILLS:

IDEN./SIM. BILLS: SB 80

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Utilities & Telecommunications Committee</u>	<u>12 Y, 1 N, w/CS</u>	<u>Cater</u>	<u>Holt</u>
2) <u>Criminal Justice Committee</u>	<u></u>	<u></u>	<u></u>
3) <u>Criminal Justice Appropriations Committee</u>	<u></u>	<u></u>	<u></u>
4) <u>Commerce Council</u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

The bill amends the Electronic Mail Communications Act (Act) to provide criminal penalties for sending unsolicited commercial electronic mail messages. The bill does the following:

- Provides immunity to service providers, such as interactive computer services, customer premises equipment providers, communications services providers, and cable providers, whose equipment is used to transport, transmit, or retransmit a message that violates the Act.
- Provides that remedies and criminal penalties under the Act are in addition to remedies and criminal penalties otherwise available under federal or state law.
- Provides that a violation of the act is a misdemeanor of the first degree except under certain circumstances.
- Provides that under certain circumstances, a violation is a felony in the third degree.
- Provides criminal penalties for criminal violations.

The fiscal impact of the bill is indeterminate at this time due to the unknown number of cases that may be prosecuted.

This act shall take effect July 1, 2006, and shall apply to violations committed on or after that date.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government/Promote Personal Responsibility-The bill creates criminal penalties for sending false or misleading electronic mail.

B. EFFECT OF PROPOSED CHANGES:

Background

Federal Legislation

In 2003, Congress passed the "Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003" or the "CAN-SPAM Act of 2003." The law took effect January 1, 2004.¹

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 CAN-SPAM 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.

State Legislation

In 2004, the Legislature passed The Electronic Mail Communications Act (Act).² The Act 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 Act in s. 338.603 provides that a person may not:

- 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:

¹ S.B. 877, 108th Cong., 1st Session (2003). (P.L. 108-187).

² Ch. 2004-233, L.O.F. This created sections 668.60 through 668.6075, F.S.

- 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.

Summarily, the Act also:

- 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 Act;
- Creates a cause of action for a person who receives an unsolicited commercial electronic mail message in violation of the Act's provisions;
- provides that a violation of the Act'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 Act's provisions;
- Provides that prevailing plaintiffs are entitled to:
 - An injunction to enjoin future violations of s. 338.603, F.S.
 - Compensatory damages equal to actual damages 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 that violates s. 668.603, F.S.
 - Plaintiff's attorney's fees and other reasonably incurred litigation costs.
- 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 Act'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.

Section 668.6075, F.S., provides that a violation of s. 668.603 shall be considered an unfair and deceptive trade practice within the meaning of part II of ch. 501, F.S., and that in addition to any remedies or penalties set forth in ch. 501, F.S., a violator is subject to the penalties and remedies provided in this part. The remedies in this part are in addition to the remedies otherwise available for the same conduct under federal or state law.

According to the Department of Legal Affairs, two cases under the current Act were litigated in 2005, and at this time, there are other active investigations. Other complaints have been filed, but the Department of Legal Affairs has not been able to determine who sent the message; therefore, has not been able to take further action.

Proposed Legislation

This bill amends the Electronic Mail Communications Act (Act) by creating criminal penalties for sending false or misleading electronic mail. Currently, there are only civil remedies for sending false or misleading electronic mail.

The bill amends s. 668.606, F.S., to provide that the Act does not create a cause of action or provide for criminal charges against service providers, such as interactive computer services, customer premises equipment providers, communications services providers, and cable providers, whose equipment is used to transport, handle, or retransmit a commercial electronic mail message that violates the prohibited activities in s. 668.603, F.S.

The bill provides that the remedies and criminal penalties of the Act are in addition to the remedies and criminal penalties otherwise available under federal or state law, such as the remedies under the unfair and deceptive trade practices act in part II of ch. 501, F.S.

The bill creates s. 668.608, F.S., which provides for criminal violations of the Act. Except as provided, a violation of s. 668.603, F.S., commits a misdemeanor in the first degree, which is punishable by a fine of up to \$1,000³ or imprisonment of up to one year.⁴ A violation of s. 668.603, F.S., is a felony in the third degree if:

- The volume of commercial electronic mail messages transmitted by the person exceeds 10,000 attempted recipients in any 24-hour period;
- The volume of commercial electronic mail messages transmitted by the person exceeds 100,000 attempted recipients in any 30-day period;
- The volume of commercial electronic messages transmitted by the person exceeds 1 million attempted recipients in any 1-year period;
- The revenue generated from a specific commercial electronic mail message transmitted by the person exceeds \$1,000;
- The total revenue generated from all commercial electronic mail messages transmitted by the person to any electronic mail message service provider or its subscribers exceed \$50,000;
- The person knowingly hires, employs, uses, or permits any minor to assist in the transmission of a commercial electronic mail message in violation of s. 668.603, F.S.;
- The person commits a violation within 5 years of a previous conviction under this section.

The felony in the third degree is punishable by a fine of up to \$5,000,⁵ or imprisonment of up to five years.⁶ Felony violations may also be punishable under the provisions for habitual felony offenders contained in s. 775.084, F.S.

C. SECTION DIRECTORY:

Section 1: Amends s. 668.606(2), F.S., relating to civil penalties.

Section 2: Amends s. 338.6075, relating to unfair and deceptive trade practices and renumbers s. 338.6075(2), F.S., as s. 668.610, F.S., relating to cumulative remedies.

Section 3: Creates s. 668.608, F.S., relating to criminal violations.

³ S. 775.083(1)(d), F.S.

⁴ S. 775.082(4)(a), F.S.

⁵ S. 775.083(1)(c), F.S.

⁶ S. 775.082(3)(d), F.S.

Section 4: This act shall take effect July 1, 2006, and shall apply to violations committed on or after that date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

Indeterminate. The bill provides for fines as a penalty for a criminal violation of the Act. It is not known how many cases may be brought under this statute; therefore the revenue impact cannot be determined at this time.

2. Expenditures:

Indeterminate. There will be some expenses involved in investigating and prosecuting violations of this statute. The bill also provides for imprisonment as a penalty for a criminal violation of the act. It is not known how many cases may be brought under this statute; therefore, the expenses cannot be determined at this time.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

None

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

Comments

When ch. 2004-233, L.O.F., passed, to create the Electronic Mail Communications Act, it created civil remedies for the transmission of unsolicited commercial electronic mail. The bill adds criminal penalties to the current civil remedies. However, it is unclear at this time whether or not the addition of criminal penalties will bring about issues with either the First Amendment or Commerce Clause of the United States Constitution.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 10, 2006, the Utilities & Telecommunications adopted an amendment to create a committee substitute. The amendment provides that a customer premise equipment provider immune from criminal penalties. Also in the service provider immunity section, the amendment changed "telephone company" to "communications services provider" in order to be consistent with other sections of statute.