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) Utilities & Telecommunications Committee	12 Y, 1 N, w/CS	Cater	Holt
2) Criminal Justice Committee		Ferguson	Kramer
3) Criminal Justice Appropriations Committee			
4) Commerce Council			
5)			

SUMMARY ANALYSIS

HB 45 amends the Electronic Mail Communications Act (Act) and creates criminal penalties for sending unsolicited false or misleading commercial electronic mail messages. HB 45 does the following:

- Amends section 668.606, F.S., to provide immunity from criminal prosecution to an interactive computer service, customer premises equipment provider, communications services provider, or cable provider whose equipment is used to transport, handle, or retransmit a commercial electronic mail message.
- Amends section 668.6075, F.S., to provide that remedies and criminal penalties under the Act are in addition to remedies and criminal penalties otherwise available under federal or state law.
- Creates section 668.608, F.S., to provide that it is a misdemeanor of the first degree or a felony in the third degree under certain circumstances to send an unsolicited false or misleading commercial electronic mail.

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:

Promote personal responsibility- HB 45 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."[1] The 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, as defined in section 1030(e)(2)(B) of Title 18, without authorization, and intentionally initiate the transmission of multiple commercial electronic mail messages from or through the computer.
- Use a protected computer, as defined in section 1030(e)(2)(B) of Title 18, 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] Section 668.603, F.S., of the Act 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:
    - 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

[1] 15 U.S.C. ss. 7701-13.
[2] Section 668.60, F.S.

    - Contains false or misleading information in the subject line.
    - Contains false or misleading information in the body of the message.
- 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 within the meaning of part II of chapter 501;
- 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 for sending unsolicited false or misleading commercial electronic mail message.
    - Compensatory damages equal to actual damages to have resulted from the initiation of the unsolicited false or misleading commercial electronic mail message or liquidated damages of $500 for each unsolicited false or misleading commercial electronic mail message.
    - 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 sending an unsolicited false or misleading commercial electronic mail message 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

HB 45 amends section 668.606, F.S., to provide that the Act does not create a cause of action or provide for criminal charges against an interactive computer service, customer premises equipment provider, communications services provider, or cable provider whose equipment is used to transport, handle, or retransmit an unsolicited false or misleading commercial electronic mail message.

- Currently, there are only civil remedies for sending an unsolicited false or misleading electronic mail message.[3] HB 45 creates section 668.608, F.S., which provides it is a misdemeanor in the first degree to send an unsolicited false or misleading commercial electronic mail message, which is punishable by a fine of up to $1,000[4] or imprisonment of up to one year.[5] It 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 section 668.603. F.S.;
    - The person commits a violation within 5 years of a previous conviction under this section.

  A felony in the third degree is punishable by a fine of up to $5,000,[6] or imprisonment up to five years.[7] Felony violations may also be punishable under the provisions for habitual felony offenders contained in section 775.084, F.S.

  HB 45 provides that the remedies and criminal penalties are in addition to the remedies and criminal penalties otherwise available under federal or state law.

C. SECTION DIRECTORY:

Section 1: Amends s. 668.606 (2), F.S., providing an exemption from criminal liability for certain carriers and equipment providers whose equipment transmits commercial electronic mail messages.

Section 2: Amends s. 668.6075, relating to unfair and deceptive trade practices and renumbers s. 668.6075 (2), F.S., as s. 668.610, F.S., relating to cumulative remedies.

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

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. HB 45 provides for fines as a penalty for a criminal violation of the Act. It is not known how many cases may be brought under HB 45; thus, the revenue impact cannot be determined at this time.

[3] Section 668.606(1), F.S.
[4] Section 775.083(1)(d), F.S.
[5] Section 775.082(4)(a), F.S.
[6] Section 775.083(1)(c), F.S.
[7] Section 775.082(3)(d), F.S.

2. Expenditures:

The Criminal Justice Impact Conference has not met to consider the prison bed impact of this bill on the Department of Corrections. The bill creates a third degree felony offense. The offense is not ranked in the offense severity ranking chart. As such, it is expected that the conference will determine that the bill will have insignificant prison bed impact.

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:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

HB 45 creates section 668.608, F.S., to provide criminal penalties for sending unsolicited false or misleading commercial mail messages from a computer located in Florida or to an electronic mail address that is held by a resident of Florida. Constitutional challenges could be made based on the dormant commerce clause or the first amendment.

Dormant Commerce Clause

The Commerce Clause empowers Congress to regulate commerce among the several states.[8] "This affirmative grant of authority to Congress also encompasses an implicit or dormant limitation on the authority of the Sates to enact legislation affecting interstate commerce."[9] The aspect of the Commerce Clause which operates as an implied limitation upon state and local government authority is often referred to as the dormant commerce clause.[10]

In Pike v. Bruce Church Inc.,[11] a two prong test was announced to determine if a state statute violates the dormant Commerce Clause:

[8] *See* U.S. Const., art. I, § 8, cl. 3.
[9] Healy v. The Beer Insitiute, 491 U.S. 324 (1989).
[10] MaryCle, LLC. v. First Choice Internet, Inc., 2006 WL 173659 (Md. App. 2006); citing Bd. of Trs. of the Employees' Ret. Sys. of Baltimore City v. Mayor and City Council of Baltimore, 317 Md. 72 at 131 (1989).
[11] 397 U.S. 137 (1970).

> Where the statute regulates even-handedly 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.

The Supreme Court held that the critical consideration is the overall effect of the statute on both local and interstate activity with respect to both parts of the Pike test.[12] The Supreme Court has invalidated statutes under the Pike test on the grounds that their extraterritorial effect renders them unconstitutional.

> [T]he extraterritorial effects of state economic regulation stand at a minimum for the following proposition:
>
> > First, the "commerce clause . . . preludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State" . . . . Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other Sates and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another state.[13]

"The Healy Court explained that the extraterritoriality principles detailed above are not a separated or distinct Commerce Clause analysis. Rather, they are simply a more detailed way of explaining the two-part test established in Pike and clarified in Brown-Forman."[14]

Under the first prong of Pike , section 668.603, F.S., appears to apply evenhandedly to in-state and out-of-state transmitters of unsolicited false or misleading commercial electronic mail. "A *person* may not . . . transmi[t] . . . 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. . . ."[15] Thus, section 668.603 applies to residents of Florida as well as residents of other states.

Under the second prong of Pike, the local benefit of section 668.603 is balanced against the alleged burden on interstate commerce.

Virtually identical statutes to section 668.608, F.S., pertaining to unsolicited false or misleading commercial electronic mail, have been examined by other courts under the dormant commerce clause and found to be constitutional.[16]

In Heckel, the court held that there was no sweeping extraterritorial effect that would outweigh the local benefits of the Act because the statute regulates only those emails directed to a Washington resident or sent from a computer located within Washington.[17]

---

[12] *See* Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority, 476 U.S. 573 at 579 (1986).
[13] Healy at 336-37; *see also* MaryCle, at 15.
[14] Id.
[15] Section 668.603 (1), F.S.
[16] *See* State v. Heckel, 24 P.3d 404 (Wash 2001); MaryCle, LLC. v. First Choice Internet, Inc., 2006 WL 173659 (Md. App. 2006); Ferguson v. Friendfinders, Inc., 94 Cal.App.4th 1255 (1st Dist. 2002).

In MaryCle, the court held that a Maryland statute was facially neutral because it applies to all email advertisers, regardless of their geographic location. It does not discriminate against out-of-state senders.[18]

In Ferguson, the court held that a California statute did not violate the commerce clause because the only burden on interstate commerce is that the email be truthful and non-deceptive email.[19]

Similarly, the local benefit of section 668.603 is to protect the public and legitimate business from deceptive and unsolicited commercial electronic mail[20], and the only burden imposed is sending truthful and non-deceptive email.

First Amendment

In Central Hudson Gas & Electric Corp. v. Public Service Comm. of New York,[21] the Supreme Court articulated a four part test for evaluating the constitutionality of a content-neutral regulation of commercial speech:

> First, the court must determine whether the speech is lawful and not misleading, otherwise it is outside the First Amendment's protection. If the speech is neither misleading or unlawful, then the court must ascertain whether the government has asserted a substantial interest. If the government has asserted a substantial interest, then a court must evaluated whether the regulation directly advances the asserted governmental interest and whether it is more extensive than necessary to serve that interest.[22]

Here, if the content of the electronic mail communication is unlawful or misleading, then under Central Hudson it is outside the protection of the first amendment. However, if the content of the electronic mail communication is not unlawful or misleading, then the state could assert its substantial interest is protecting the public from deceptive and unsolicited commercial electronic mail.[23] A court would then evaluate whether section 668.608, F.S., is the least restrictive means in advancing Florida's interest in protecting its citizens.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 10, 2006, the Utilities & Telecommunications passed HB 45 with one amendment. The amendment provides that a customer premise equipment provider is immune from criminal penalties. Additionally, the amendment changed "telephone company" to "communications services provider" to ensure consistency.

---

17 Heckel ,at 412-13.
18 MaryCle, at 19.
19 Feruson, at 1265.
20 *See* section 668.601, F.S.
21 447 U.S. 557 (1980).
22 White Buffalo Ventures, LLC. v. The University of Texas, 2004 WL 1854168 (W.D. Tex. 2004).
23 *See* section 668.601, F.S.