



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

House Bill No. 1

Amendment in the Nature of a Substitute (Patron Prior to Substitute – Loupassi)

LD #: 10100741

Date: 2/11/2010

Topic: Transmission of unsolicited commercial electronic mail (spam)

Fiscal Impact Summary:

- **State Adult Correctional Facilities:**
\$50,000 *
- **Local Adult Correctional Facilities:**
Cannot be determined, likely to be small
- **Adult Community Corrections Programs:**
Cannot be determined, likely to be small

- **Juvenile Correctional Centers:**
None (\$0)
- **Juvenile Detention Facilities:**
None (\$0)

* The estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 781 of the 2009 Acts of Assembly requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000.

Summary of Proposed Legislation:

The proposal amends § 18.2-152.2 to define commercial electronic mail (electronic mail that advertises or promotes a commercial product or service) and “spam” (unsolicited commercial electronic mail).

The proposal amends § 18.2-152.3:1 to expressly limit the applicability of the statute to transmissions of unsolicited commercial electronic mail. Under this provision, transmission of spam, or distribution of software to enable the transmission of spam, is a Class 1 misdemeanor. The offense is elevated to a Class 6 felony if the transmission involved a large number of recipients (10,000 or more in a 24-hour period, 100,000 or more in a 30-day period, or one million or more in a one-year period) or if the offender used a minor to assist in the transmission of high-volume spam. The proposal also amends § 18.2-152.12 (provisions for civil relief under the Virginia Computer Crimes Act) to replace all references to “unsolicited bulk electronic mail” with references to “spam”.

Analysis:

On September 12, 2008, the Virginia Supreme Court declared that § 18.2-152.3:1 “is unconstitutionally overbroad on its face because it prohibits the anonymous transmission of all unsolicited bulk e-mails including those containing political, religious or other speech protected by the First Amendment to the United States Constitution” (*Jaynes v. Commonwealth*). The Commonwealth petitioned the Supreme Court of the United States, but the Court refused to hear the case (March 30, 2009).

According to the Court Automated Information System database for circuit courts, there were two persons convicted under § 18.2-152.3:1 since its enactment in 2003. The first individual, Jaynes (of *Jaynes v. Commonwealth*), was convicted of three felony counts that were eventually overturned on appeal. The second individual was charged with five felony counts but convicted of five misdemeanor counts and sentenced to 12 months, with the entire term suspended. There were three other persons

charged with multiple felony counts under § 18.2-152.3:1; all of those charges were nolle prossed or resulted in findings of not guilty.

Impact of Proposed Legislation:

State adult correctional facilities. While the proposed legislation restricts the applicability of § 18.2-152.3:1 to spam generated for commercial purposes, it is intended to modify a statute that was found to be unconstitutional and make it a viable and enforceable provision. In this way, the proposed legislation may increase the future state-responsible (prison) bed space needs of the Commonwealth. The number of individuals who may be convicted under § 18.2-152.3:1 in the future, however, is unknown. While the magnitude of the impact cannot be quantified, it is expected to be small.

Local adult correctional facilities. The proposal could also increase local-responsible (jail) bed space needs of the Commonwealth. While the size of the impact cannot be determined, it is expected to be small.

Adult community corrections programs. Because the proposal could result in convictions and subsequent supervision requirements for an additional number of offenders, the proposal may increase the need for adult community corrections resources. Since the number of cases that may be affected cannot be determined, the potential impact on community corrections resources cannot be quantified.

Virginia's sentencing guidelines. The offenses listed under the Virginia Computer Crimes Act are not covered by the guidelines as the primary offense but may augment the guidelines recommendation if a covered offense is the most serious at conviction. No adjustment to the guidelines would be necessary under the proposal.

Juvenile correctional centers. According to the Department of Juvenile Justice (DJJ), the proposal is not expected to increase juvenile correctional center (JCC) bed space needs.

Juvenile detention facilities. According to the Department of Juvenile Justice (DJJ), the proposal is not expected to increase the bed space needs of juvenile detention facilities.

Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 781 of the 2009 Acts of Assembly requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000.

Pursuant to § 30-19.1:4, the estimated amount of the necessary appropriation is \$0 for periods of commitment to the custody of the Department of Juvenile Justice.