



Fiscal Impact Statement for Proposed Legislation

Virginia Criminal Sentencing Commission

House Bill No. 1796

(Patron – Loupassi)

LD#: 09-5807606

Date: 1/5/2009

Topic: Transmission of unsolicited commercial electronic messages (spam)

Fiscal Impact Summary:

- **State Adult Correctional Facilities:**
Cannot be determined
- **Local Adult Correctional Facilities:**
Cannot be determined
- **Adult Community Corrections Programs:**
Cannot be determined

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

Summary of Proposed Legislation:

The proposal creates § 18.2-152.3:2, relating to the transmission of unsolicited commercial electronic messages. Under the proposed § 18.2-152.3:2, a person would be guilty of a Class 1 misdemeanor if he (1) falsifies or forges electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited commercial electronic mail (“spam”) through or into the computer network of an electronic mail service provider or its subscribers, or (2) knowingly sells, gives, distributes, or possesses with the intent to sell, etc., software primarily designed to enable the falsification of electronic mail transmission information or other routing information of spam. An individual may also be prosecuted under this subsection if the software only has a limited commercially significant purpose or use other than to facilitate or enable the falsification of the transmission information of spam, or is marketed by the person for use in facilitating or enabling the falsification of the information. These offenses would be punishable as Class 1 misdemeanors.

If a violation of the proposed § 18.2-152.3:2 includes any of the following factors, the offender would be guilty of a Class 6 felony; (1) the volume of spam transmitted exceeded 10,000 attempted recipients in any 24-hour period, 100,000 attempted recipients in any 30-day time period, or one million attempted recipients in any one-year time period, or (2) the revenue generated from a specific transmission of spam exceeded \$1,000 or the total revenue generated from all spam transmitted to any electronic mail service provider exceeded \$50,000. Anyone who knowingly hires or permits any minor to assist in the transmission of spam in violation of the two subsections listed above would also be guilty of a Class 6 felony.

The proposal also amends § 18.2-152.2 to define ‘spam’ as unsolicited commercial electronic mail, which is electronic mail that is a commercial advertisement or promotion of a commercial product or service. The definition of commercial electronic mail would not include electronic mail that only involves an interactive computer service provider that has attached an advertisement in exchange for free use of an electronic mail account, when the sender has agreed to such an arrangement.

The proposed § 18.2-152.3:2 mirrors the existing § 18.2-152.3:1, with the exception that the proposed statute is limited to only commercial electronic mail. On September 12, 2008, the Supreme Court of

Virginia ruled that § 18.2-152.3:1, enacted in 2003, violates the First Amendment right to freedom of speech because it is unconstitutionally overbroad (*Jaynes v. Commonwealth*). More specifically, the Court found that the current law prohibits the anonymous transmission of all unsolicited bulk e-mails and, therefore, is unconstitutionally overbroad on its face. Virginia's Attorney General's Office has filed a petition for certiorari with the United States Supreme Court in this case.

According to the National Conference of State Legislatures, as of September 14, 2008, 37 states have enacted laws regulating unsolicited electronic mail advertising. While most of these states focus upon commercial or fraudulent electronic mail, a few states' laws apply to a broader spectrum of e-mails. In *Jaynes v. Commonwealth*, the Supreme Court of Virginia noted that many other states that have regulated unsolicited bulk e-mail have restricted these regulations to commercial e-mails. The federal CAN-SPAM Act of 2003 prohibits fraudulent and deceptive commercial e-mails and requires that senders include information that allows recipients to opt-out of receiving further messages. The CAN-SPAM Act preempts any state law that "expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto" (15 USC 7707).

Analysis:

The calendar year (CY) 2006 and CY2007 General District Court Automated Information System (CAIS) data indicates that there were no misdemeanor convictions under § 18.2-152.3:1 during this time period.

The fiscal year (FY) 2006 and FY2007 Pre/Post-Sentence Investigation (PSI) database indicates that there were no felony convictions under § 18.2-152.3:1 during this time period.

Impact of Proposed Legislation:

State adult correctional facilities. The number of felony convictions that may result from the proposal cannot be estimated; therefore, the impact of the proposal on prison beds cannot be determined.

Local adult correctional facilities. The proposal's impact on local-responsible (jail) bed space needs cannot be determined.

Adult community corrections resources. The proposal's impact on community corrections resources cannot be determined.

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, the proposal is not expected to increase juvenile correctional center bed space needs.

Juvenile detention facilities. The Department of Juvenile Justice reports that 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 and is \$0 for periods of commitment to the custody of the Department of Juvenile Justice.

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