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“Junk E-Mail”: An Overview of Issues and Legislation Concerning Unsolicited Commercial Electronic Mail (“Spam”)

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Summary

Unsolicited commercial e-mail (UCE), also called “spam” or “junk e-mail,” aggravates many computer users. Not only can spam be a nuisance, but its cost may be passed on to consumers through higher charges from Internet service providers who must upgrade their systems to handle the traffic. Also, some spam involves fraud, or includes adult-oriented material that offends recipients or that parents want to protect their children from seeing. Proponents of UCE insist it is a legitimate marketing technique that is protected by the First Amendment. While 36 states have anti-spam laws, there is no federal law specifically concerning spam. Nine “anti-spam” bills are pending in the 108th Congress: H.R. 1933 (Lofgren), H.R. 2214 (Burr-Tauzin-Sensenbrenner), H.R. 2515 (Wilson-Green), S. 563 (Dayton), S. 877 (Burns-Wyden), S. 1052 (Nelson-FL), S. 1231 (Schumer), S. 1293 (Hatch), and S. 1327 (Corzine). Two (S. 877 and S. 1293) have been reported from committee. Tables providing brief “side-by-side” comparisons of the bills are included at the end of this report.

Publicity about the National Do Not Call registry through which consumers can indicate that they do not want to receive telemarketing phone calls is raising questions about whether a parallel “do not spam” registry should be created. Two of the pending bills (S. 563 and S. 1231) would require the Federal Trade Commission (FTC) to create such a registry. However, FTC Chairman Timothy Muris has cautioned in congressional testimony and elsewhere that consumers should not expect any legislation to be a “silver bullet” for solving the spam problem. In an August 2003 speech to the Aspen Institute, he specifically warned that he does not believe a “do not spam” registry would be enforceable or noticeably reduce spam. Though he sees a role for legislation (to enhance the ability to track down spammers, establish penalties, and determine standards for non-deceptive UCE), he insists that a combination of consumer education, technological advancements, and legislation is needed to address the problem.

Spam on wireless devices such as cell phones is discussed in CRS Report RL31636, *Wireless Privacy: Availability of Location Information for Telemarketing*. State spam laws, and an existing federal law (the Computer Fraud and Abuse statute) that currently is being used to bring suit against spammers, are discussed in CRS Report RL31488, *Regulation of Unsolicited Commercial E-Mail*.

This report will be updated as events warrant.

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“Junk E-Mail”: An Overview of Issues and Legislation Concerning Unsolicited Commercial Electronic Mail (“Spam”)

Overview

One aspect of increased use of the Internet for electronic mail (e-mail) has been the advent of unsolicited advertising, also called “unsolicited commercial e-mail (UCE),” “unsolicited bulk e-mail,” “junk e-mail,” or “spam.”¹ Complaints focus on the fact that some spam contains, or has links to, pornography, that much of it is fraudulent, and the volume of spam is steadily increasing. In April 2003, the Federal Trade Commission (FTC) reported that of a random survey of 1,000 pieces of spam, 18% concerned “adult” offers (pornography, dating services, etc.) and 66% contained indications of falsity in “from” lines, “subject” lines, or message text.² According to Brightmail [<http://www.brightmail.com>], a company that sells anti-spam software, the volume of spam rose from 8% of all e-mail in January 2001 to 45% in January 2003. Brightmail forecasts that it will reach 50% by September 2003.

Opponents of junk e-mail argue that not only is it annoying and an invasion of privacy (see CRS Report RL31408 for more on Internet privacy), but that its cost is borne by recipients and Internet Service Providers (ISPs), not the marketers. Consumers reportedly are charged higher fees by ISPs that must invest resources to upgrade equipment to manage the high volume of e-mail, deal with customer complaints, and mount legal challenges to junk e-mailers. Businesses may incur costs due to lost productivity, or investing in upgraded equipment or anti-spam software. The Ferris Research Group [<http://www.ferris.com>], which offers consulting services on managing spam, estimates that spam will cost U.S. organizations over \$10 billion in 2003.

Proponents of UCE argue that it is a valid method of advertising, and is protected by the First Amendment. The Direct Marketing Association (DMA) released figures in May 2003 showing that commercial e-mail generates more than \$7.1 billion in annual sales and \$1.5 billion in potential savings to American

¹ The origin of the term spam for unsolicited commercial e-mail was recounted in *Computerworld*, April 5, 1999, p. 70: “It all started in early Internet chat rooms and interactive fantasy games where someone repeating the same sentence or comment was said to be making a ‘spam.’ The term referred to a Monty Python’s Flying Circus scene in which actors keep saying ‘Spam, Spam, Spam and Spam’ when reading options from a menu.”

² Federal Trade Commission. False Claims in Spam: A Report by the FTC’s Division of Marketing Practices. April 30, 2003. P. 10. Available at the FTC’s spam Web site: [<http://www.ftc.gov/bcp/conline/edcams/spam/index.html>]

consumers.³ DMA argued for several years that instead of banning UCE, individuals should be given the opportunity to “opt-out” by notifying the sender that they want to be removed from the mailing list. (The concepts of opt-out and opt-in are discussed below.) Hoping to demonstrate that self regulation could work, in January 2000, the DMA launched the E-mail Preference Service where consumers who wish to opt-out can register themselves at a DMA Web site [<http://www.e-mps.org>]. DMA members sending UCE must check their lists of recipients and delete those who have opted out. Critics argued that most spam does not come from DMA members, so the plan is insufficient, and on October 20, 2002, the DMA agreed. Concerned that the volume of unwanted and fraudulent spam is undermining the use of e-mail as a marketing tool, the DMA announced that it now would pursue legislation to battle the rising volume of spam.

One challenge of controlling spam is that some of it originates outside the United States and thus is not subject to U.S. laws or regulations. Spam is a global problem, and the European Commission estimates that Internet subscribers globally pay 10 billion Euros a year in connection costs to download spam [http://europa.eu.int/comm/internal_market/privacy/studies/spam_en.htm]. The European Union has adopted an “opt-in” requirement for e-mail that will become effective October 31, 2003 whereby prior affirmative consent of the recipient must be obtained before sending commercial e-mail. Opt-in is not required where there is an existing customer relationship, but in that case, the sender must provide an opt-out opportunity. (See [<http://www.europa.eu.int/scadplus/leg/en/lvb/l24120.htm>]. The EU directive sets the broad policy, but each member nation must pass its own law as to how to implement it.) The FTC and other U.S. and foreign agencies have called on organizations in 59 countries to close “open relays” that allow spam to be routed through third-party computers, permitting spammers to avoid detection [<http://www.ftc.gov/opa/2003/05/swnetforce.htm>].

What Is Spam?

One challenge in debating the issue of spam is defining it. To some, it is any commercial e-mail to which the recipient did not “opt-in” by giving prior *affirmative consent* to receiving it. To others, it is commercial e-mail to which *affirmative* or *implied consent* was not given, where implied consent can be defined in various ways (such as whether there is a pre-existing business relationship). Still others view spam as “unwanted” commercial e-mail. Whether or not a particular e-mail is unwanted, of course, varies per recipient. Since senders of UCE do find buyers for some of their products, it can be argued that at least some UCE is reaching interested consumers, and therefore is wanted, and thus is not spam. Consequently, some argue that marketers should be able to send commercial e-mail messages as long as they allow each recipient an opportunity to indicate that future such e-mails are not desired (called “opt-out”). Another group considers spam to be only fraudulent commercial e-mail, and believe that commercial e-mail messages from “legitimate” senders should be permitted. The DMA, for example, considers spam to be only fraudulent UCE. The differences in defining spam add to the complexity of devising legislative or regulatory remedies for it. The spam bills pending before the 108th

³ Quoted in: Digits. Wall Street Journal, May 22, 2003, p. B3.

Congress (see tables at end of this report) define spam in various ways, or do not define it at all.

Avoiding and Reporting Spam

Tips on avoiding spam are available on the FTC Web site [<http://www.ftc.gov/bcp/menu-internet.htm>], and from [<http://home.cnet.com/internet/0-3793-8-5181225-1.html>], a non-government site. Consumers may file a complaint about spam with the FTC by visiting the FTC Web site [<http://www.ftc.gov>] and choosing “File a Complaint” at the bottom of the page. The offending spam also may be forwarded to the FTC (UCE@ftc.gov) to assist the FTC in monitoring UCE trends and developments.

Restraining Spam

To date, the objective of restraining junk e-mail has been fought primarily over the Internet or in the courts. Some groups opposed to junk e-mail will send blasts of e-mail to a mass e-mail company, disrupting the company’s computer systems. The FTC has taken action against spam involving fraud under its existing authority, and is requesting expanded legislative authority to track, investigate, and sue spammers.⁴ In addition, three major ISPs—America OnLine (AOL), Earthlink, and Microsoft Network—all have brought lawsuits under existing laws to stop spammers.⁵

Another approach is to pass laws placing restrictions on UCE. As discussed below, 34 states have passed anti-spam laws. No federal law has been passed, but nine bills are currently pending before the 108th Congress (three in the House, six in the Senate), which are summarized in the table of the end of this report. Although there appears to be widespread agreement that “something” must be done about spam, there are many different suggestions regarding precisely what to do. Some of the proposals are outlined next.

Opt-In and Opt-Out. As discussed earlier, much of the spam debate focuses on whether consumers should be given the opportunity to opt-in (where affirmative prior consent is required) or opt-out (where consent is assumed unless the consumer notifies the sender that such e-mails are not desired) of receiving UCE.⁶ The details

⁴ The FTC proposal for increased authority was detailed at hearings on reauthorization of the FTC on June 11, 2003 before the Senate Commerce Committee and the House Energy and Commerce Committee. A copy of the FTC statement is available at [<http://commerce.senate.gov>] and [<http://energycommerce.house.gov>] under hearings for that day.

⁵ CRS Report RL31488, Regulation of Unsolicited Commercial E-Mail, summarizes existing laws and FTC actions.

⁶ Some spam already contains instructions, usually to send a message to an e-mail address, for how a recipient can opt-out. However, in many cases this is a ruse by the sender to trick a recipient into confirming that the e-mail has reached a valid e-mail address. The sender then sends more spam to that address and/or includes the e-mail address on lists of e-mail addresses that are sold to bulk e-mailers. It is virtually impossible for a recipient to discern
(continued...)

vary, but seven of the pending nine bills (H.R. 1933, H.R. 2214, H.R. 2515, S. 877, S. 1052, S. 1231, and S. 1327) would require senders of UCE to provide a legitimate opt-out opportunity to recipients, and some would require opt-out for all commercial e-mail. One of those bills (S. 1231) and another bill (S. 563) would create a “do not e-mail” list similar to the “do not call” list for telemarketers, where individuals could place their names on a centralized list to opt-out of UCE instead of being required to respond to each e-mail or each organization sending UCE. In both bills, the Federal Trade Commission (FTC) would be responsible for maintaining the list. S. 877 would require the FTC to submit recommendations about creating such a registry. In testimony to Congress on June 11, 2003, FTC Chairman Timothy Muris commented that there is no single solution to the spam problem, saying that “a balanced blend of technological fixes, business and consumer education, legislation, and enforcement will be required.”⁷ Although there appears to be widespread public support for a “do not e-mail” (or “do not spam”) list,⁸ some worry that the database containing the e-mail addresses of all those who do not want spam would be vulnerable to hackers, potentially exacerbating rather than solving the problem. Others, including Mr. Muris, argue that such a registry would not be enforceable (for more on the FTC’s position, see that section below).

Several anti-spam groups argue, however, that legislation should go further, prohibiting commercial e-mail from being sent to recipients unless they have opted-in. As noted earlier, the European Union has adopted an opt-in approach. Eight U.S. groups, including Junkbusters, the Coalition Against Unsolicited Commercial Email (CAUCE), and the Consumer Federation of America, wrote a letter to several Members of Congress expressing their view that the opt-out approach advanced in several of the pending bills would “undercut those businesses who respect consumer preferences and give legal protection to those who do not.”⁹ The founder of the Spamhaus Project [<http://www.spamhaus.org/>], Steve Linford, asserts that “Spammers are cheering the [U.S.] opt-out legislation. It legalizes the status quo.”¹⁰ He also states that 90% of the world’s spam originates in the United States.

Prior Business Relationship. One variation is to allow UCE to be sent to recipients with whom the sender has a prior business relationship, an approach similar to that for junk fax (see CRS Report RL30763 for information on the law pertaining to junk fax). H.R. 1933, S. 877, and S. 1231 include a prior business

⁶ (...continued)

whether the proffered opt-out instructions are genuine or duplicitous.

⁷ Timothy Muris, Chairman, Federal Trade Commission. Prepared statement to Senate Commerce Committee, June 11, 2003, p. 13; [<http://www.commerce.senate.gov/>]. Mr. Muris gave the same statement to the House Energy and Commerce Committee the same day. See [<http://www.energycommerce.house.gov/>].

⁸ A survey by the ePrivacy Group found that 74% of consumers want such a list. Lisa Bowman, Study: Do-Not-Spam Plan Winning Support, *c|net news.com*, July 23, 2003, 12:28 PM PT.

⁹ [<http://www.cauce.org/pressreleases/20030522.shtml>].

¹⁰ Declaring a World War on Spam. *Wired News*, July 1, 2003, 09:31 AM. [<http://www.wired.com/news/politics/0,1283,59459,00.html>]

relationship as part of the definition of implied consent; the specifics are different (see tables below under “Definition of Unsolicited Commercial E-mail”).

Labels. Another possibility is requiring that senders of UCE use a label, such as “ADV” in the subject line of the message, so the recipient will know before opening an e-mail message that it is an advertisement. That would also make it easier for spam filtering software to identify UCE and eliminate it. Some propose that adult-oriented spam have a special label, such as ADV-ADLT, to highlight that the e-mail may contain material or links that are inappropriate for children, such as pornography. H.R. 1933, S. 1231, and S. 1327 require ADV or ADV-ADLT in subject lines (with exceptions—see table below for details). H.R. 2214, H.R. 2515 and S. 877 require that the message provide clear and conspicuous identification that it is an advertisement, but do not specify where or how that must appear. H.R. 2214 and H.R. 2515 require that sexually-oriented e-mails have an FTC-prescribed “warning label.”

Non-Legislative Approaches. The fact that the amount of spam is rising despite the number of state laws restraining it suggests that legislation is not a sure solution to the spam problem. Some spam originates outside the United States or is routed through non-U.S. computers, or legislation may include so many “loopholes” that it is ineffective. Senator McCain was quoted in Time magazine as saying that he supports legislation, but is not optimistic about its effect: “I’ll support it, report it, vote for it, take credit for it, but will it make much difference? I don’t think so.”

One proposed non-legislative alternative is trying to make spam less attractive economically by increasing the cost of sending spam, perhaps by establishing systems whereby recipients could charge spammers “postage” for UCE.

Another alternative is using “challenge-response” software that requires the sender to respond to an action requested in an automatically generated return e-mail before the original e-mail reaches the intended recipient. Earthlink offers this option to its subscribers. Challenge-response is based on the concept that spammers are sending e-mail with automated systems that cannot read a return e-mail and respond to a question (such as “how many kittens are in this picture”), but a person can, so if the e-mail was sent by an individual rather than a bulk e-mail system, the person will answer the question or perform a requested action and the e-mail will be delivered. It is not clear to what extent such software may become popular. *Business Week* outlined some of the potential unintended consequences, including recipients not receiving confirmation of orders placed over the Internet (which often are generated by automated systems), and difficulty if the sender is using an Internet-access device that does not display graphics (e.g., a Blackberry) or is visually impaired.¹¹

Still another non-legislative option is leaving the issue of controlling spam to the ISPs, since they have the economic incentive to do so in terms of retaining subscribers who might weary of spam and abandon e-mail entirely, avoiding the costs

¹¹ Stephen H. Wildstrom. A Spam-Fighter More Noxious Than Spam. *Business Week*, July 7, 2003, p. 21.

associated with litigation, and reducing the need to upgrade server capacity to cope with the traffic. Many ISPs (and consumers) already use spam filtering software, but with the increase in the amount of spam, a large number of such messages still get through. On June 5, 2003, the Associated Press reported that Earthlink's spam filter blocks up to 80% of spam, and AOL blocks 80% of incoming e-mail traffic.¹² In June 2003, Microsoft announced the creation of a special team of researchers and programmers to develop new technological tools to fight spam.

Bush Administration Position

In testimony to the House Judiciary Committee regarding H.R. 2214 (the Burr-Tauzin-Sensenbrenner bill), a witness from the Department of Justice¹³ generally supported the bill (with some suggested modifications) and discussed the Justice Department's view that although some measures are needed to combat the rising tide of spam, Congress should be careful not to over-regulate. He supported efforts to target spam that facilitates fraud or the unwanted transmission of pornography, but not legitimate marketers.¹⁴ He added that while the Justice Department can play a supporting role, the spam issue cannot be solved by one agency alone and, indeed, the government cannot solve the problem by itself.

Federal Trade Commission Position

As noted earlier, FTC Chairman Muris told both the Senate Commerce Committee and the House Energy and Commerce Committee on June 11, 2003, that there is no single solution to the spam problem. He argues that a combination of legislation, technological advancements, and consumer education is needed.

Mr. Muris expanded on those comments in an August 19, 2003 speech to the Aspen Institute [<http://www.ftc.gov/speeches/muris/030819aspen.htm>]. Drawing attention to the significant differences between telemarketing and spam, he specifically cautioned against expectations that a "do not spam" registry would be enforceable or noticeably reduce spam. Calling spam "one of the most daunting consumer protection problems that the Commission has ever faced," he noted that "Despite the concerted efforts of government regulators, Internet service providers, and other interested parties, the problem continues to worsen."

He cited two significant differences between spam and other types of marketing. First, spammers can easily hide their identities and cross international borders. Second, sending additional spam "is essentially costless" to the spammer; the cost is borne by ISPs and recipients instead. This "cost shifting" means there is no incentive to the spammer to reduce the volume of messages being sent, and a bulk

¹² Anick Jesdanun, Technology for Challenging Spam is Challenged, AP, June 5, 2003, 23:59.

¹³ Statement of Assistant Attorney General William Moschella. Available at the committee's Web site: [<http://www.house.gov/judiciary/moschella070803.htm>].

¹⁴ Transcript of hearing, provided by Federal Document Clearing House.

emailer testified at an FTC forum on spam that he could profit even if his response rate was less than 0.0001%.

Concluding that spam is a problem that market forces will not solve, Mr. Muris agreed that it appeared to be a “prime candidate for governmental intervention.” He added, however, that the very technology that makes e-mail such a powerful tool also makes spam a problem that cannot be solved through the FTC’s law enforcement and regulatory efforts. “Rather, solutions must be pursued from many directions — technological, legal, and consumer action.”

Regarding the current debate in Congress, Mr. Muris commented that “Unfortunately, the legislative debate seems to be veering off on the wrong track, exploring largely ineffective solutions.” Specifically, he called the “do not spam” list concept interesting, “but it is unclear how we can make it work” because it would not be enforceable. “If it were established, my advice to consumers would be: Don’t waste the time and effort to sign up.” He cautioned that legislation can only make a limited contribution to solving the fundamental issues of anonymity and cost shifting, and warned that some of the pending legislative proposals “could be harmful or, at best, useless.”

He noted three areas in which legislation would be helpful. He reiterated the need for five procedural changes that he said would assist in tracking down spammers (which he had raised in previous congressional testimony); for additional penalties for spammers; and for standards for non-deceptive UCE. He called the latter the “least important issue” even though it is the subject of most of the pending legislation.

State Action

According to the SpamLaws Web site [<http://www.spamlaws.com>], 36 states have passed laws regulating spam: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. The specifics of each law varies. Summaries of and links to each law are provided on that Web site. CRS Report RL31488, *Regulation of Unsolicited Commercial E-Mail*, provides a brief review of the state laws and challenges to them.

Congressional Action: 105th-107th Congresses

In the 105th Congress, the House and Senate each passed legislation (H.R. 3888, and S. 1618), but no bill ultimately cleared Congress. In the 106th Congress, several UCE bills were introduced. One, H.R. 3113 (Wilson-Green), passed the House. There was no further action. Several spam bills were introduced in the 107th Congress, but none passed. One, H.R. 718 (Wilson-Green), was reported from the House Energy and Commerce Committee (H.Rept. 107-41, Part I), and the House Judiciary Committee (H.Rept. 107-41, Part II). The two versions were substantially different.

A Senate bill, S. 630 (Burns), was reported (S.Rept. 107-318) from the Senate Commerce Committee. There was no further action.

Congressional Action: 108th Congress

As discussed above, nine bills are currently pending: H.R. 1933 (Lofgren), H.R. 2214 (Burr-Tauzin-Sensenbrenner), H.R. 2515 (Wilson-Green), S. 877 (Burns-Wyden), S. 1052 (Nelson-FL), and S. 1327 (Corzine) are “opt-out” bills. (H.R. 1933 and S. 1327 have the same title and are similar, but not identical.) S. 563 (Dayton) is a “do not e-mail” bill. S. 1231 (Schumer) combines elements of both approaches. S. 1293 (Hatch) creates criminal penalties for fraudulent e-mail.

The provisions of these bills are summarized in the following two tables — one for House bills and one for Senate bills. Some of the provisions affect all commercial e-mail, while others affect only *unsolicited* commercial e-mail (spam). S. 877 was reported, amended, by the Senate Commerce Committee on July 16, 2003 (S.Rept. 108-102). S. 1293 was reported from the Senate Judiciary Committee, without written report, on September 25. Table 2 shows the provisions in those bills as reported.

Table 1: Brief Comparison of Pending Spam Legislation in the House

Provision	H.R. 1933 (Lofgren)*	H.R. 2214 (Burr-Tauzin-Sensenbrenner)	H.R. 2515 (Wilson-Green)
Title	REDUCE Spam Act	Reduction in Distribution of Spam Act	Anti-Spam Act
Definition of Commercial E-Mail	E-mail whose primary purpose is commercial advertisement or promotion of commercial product or service, unless the sender has a personal relationship with the recipient.	E-mail whose primary purpose is commercial advertisement or promotion of commercial product or service, with exceptions.	E-mail that contains a commercial advertisement or promotion of a product or service, but is not a commercial transactional e-mail message (as defined in the Act).
Definition of Unsolicited Commercial E-mail (UCE)	Commercial e-mail sent to a recipient with whom the sender does not have a pre-existing business relationship, and is not sent at the request of, or with the express consent of, the recipient. Pre-existing business relationship means that there has been a business transaction between the sender and recipient within the past 5 years and the recipient was provided at that time with an opt-out opportunity and did not exercise it, or the recipient opted-in and has not revoked that permission.	Commercial e-mail transmitted without prior consent. Consent means the recipient has expressly consented to receive the message, and it includes consent to receipt of a message from a third party pursuant to transfer of the recipient's e-mail address if the recipient was notified that such transfer could occur. If commercial e-mail is delivered to a recipient at an e-mail address that was reassigned from a previous user, the recipient is considered to have consented to the same extent as the previous address user unless the sender knows that the address has been reassigned or the new user has opted-out.	Not defined.
Prohibits false or misleading header information	Yes, in UCE.	Yes, in all commercial e-mail.	Yes, in all commercial e-mail.
Prohibits deceptive subject headings	Yes, in UCE.	No	Yes, in all commercial e-mail.
Prohibits false, misleading, or deceptive information in body of message	No	No	No

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Provision	H.R. 1933 (Lofgren)*	H.R. 2214 (Burr-Tauzin-Sensenbrenner)	H.R. 2515 (Wilson-Green)
Prohibits transmission of e-mail from improperly or illegally harvested e-mail addresses	No	Yes, for all commercial e-mail.	Yes, in commercial e-mail prohibited under other sections of the Act. Also prohibits dictionary attacks.
Prohibits sending e-mails through computers accessed without authorization	NA	NA	NA
Creates “do not e-mail” registry at FTC	No	No	No
Penalties for falsifying sender’s identity	No	Yes	Yes
Requires FTC-prescribed “warning labels” on sexually oriented material	No, but see requirements for subject line labels (next).	Yes	Yes
Requires specific characters in subject line of UCE to indicate the message is an advertisement	Yes, “ADV:” for advertisement; “ADV-ADLT:” for adult-oriented advertisements. Or identification may comply with standards set by Internet Engineering Task Force.	No, but message must provide clear and conspicuous identification that it is an advertisement.	No, but message must contain clear and conspicuous identification that it is a commercial e-mail message.
Requires opt-out mechanism	UCE must contain valid sender-operated return e-mail address to which recipient may opt-out.	Commercial e-mail must contain functioning return e-mail address or other Internet-based mechanism to which the recipient may opt-out.	Commercial e-mail must contain functioning return e-mail address or other Internet-based mechanism to which the recipient may opt-out.
Damages or Penalties	Civil penalties to be set by FTC, except that under private right of action, court may impose penalties up to \$10 per violation.	Varies per section of Act.	Varies per section of Act. Also creates criminal penalties for falsifying sender’s identity, failing to placing warning labels on sexually oriented material, illicit e-mail address harvesting, and other sections of the act.

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Provision	H.R. 1933 (Lofgren)*	H.R. 2214 (Burr-Tauzin-Sensenbrenner)	H.R. 2515 (Wilson-Green)
Penalties for persons who promote their trade, business, goods, products, etc. in e-mail that violates Act, under specific circumstances	NA	NA	NA
Reward for first person identifying a violator and supplying information leading to the collection of a civil penalty	Yes, not less than 20% of the penalty.	No	No
Private Right of Action	Yes. Recipient of UCE or ISP may bring civil action in a U.S. district court to enjoin further violations and recover damages.	Yes, but for ISPs only.	Yes, but for ISPs only.
Affirmative Defense/Safe Harbor	Person is not liable if the person has established and implemented, with due care, reasonable practices and procedures to prevent violations, and violation occurred despite good faith efforts to comply, or if, within 2-days ending upon the initiation of the transmission that is in violation, such person initiated the transmission of such message, or one substantially similar to it, to less than 1,000 e-mail addresses.	It is an affirmative defense against charges that a commercial e-mail message falsifies the sender's identity if the defendant sent fewer than 100 such messages during any 30-day period.	NA
Enforcement	By FTC	By FTC and U.S. Attorney General.	By FTC and U.S. Attorney General.
State action allowed	NA	Yes, but not if FTC or Attorney General already has commenced an action. FTC must be notified in all cases, and may intervene.	Yes, but U.S. district courts, the U.S. courts of any territory, and the D.C. court have exclusive jurisdiction over all civil actions brought by states. State must notify FTC, and FTC may intervene.

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Provision	H.R. 1933 (Lofgren)*	H.R. 2214 (Burr-Tauzin-Sensenbrenner)	H.R. 2515 (Wilson-Green)
Class action suits allowed	NA	No	NA
Effect on ISPs	<p>ISPs may bring civil action in U.S. district court.</p> <p>Does not change law regarding when ISP may disclose customer communications or records; does not require ISP to block, transmit, route, relay, handle or store certain types of e-mail; does not prevent or limit ISP from adopting a policy regarding commercial e-mail including declining to transmit certain commercial e-mail; and does not render lawful any such policy that is unlawful under any other provision of law.</p>	<p>ISPs may bring civil action in U.S. district court.</p> <p>Does not affect the lawfulness or unlawfulness under other laws of ISP policies declining to transmit, route, relay, handle, or store certain types of e-mail.</p>	<p>ISPs may bring civil action in U.S. district court.</p> <p>Does not affect the lawfulness or unlawfulness under other laws of ISP policies declining to transmit, route, relay, handle, receive or store certain types of e-mail.</p>
Supersedes state and local laws and regulations	State and local governments may not impose civil liabilities inconsistent with Act. The Act does not preempt certain remedies available under certain other federal, state, or local laws.	Yes, with exceptions.	Yes, with exceptions.

NA = Not Addressed

* S. 1327 (Corzine) has the same title as the Lofgren bill and is similar in many respects, but is not identical. See Table 2 for a summary of S. 1327.

Table 2: Brief Comparison of Pending Spam Legislation in the Senate

Provision	S. 563 (Dayton)	S. 877 (Burns-Wyden) (As reported)	S. 1052 (Nelson-FL)	S. 1231 (Schumer)	S. 1293 (Hatch) (As reported)	S. 1327 (Corzine)
Title	Computer Owners Bill of Rights Act	CAN SPAM Act	Ban on Deceptive Unsolicited Bulk Electronic Mail Act	SPAM Act	Criminal Spam Act	REDUCE Spam Act
Definition of Commercial E-Mail	None	E-mail whose primary purpose is commercial advertisement or promotion of commercial product or service, with exceptions.	None	E-mail whose primary purpose is to advertise or promote, for a commercial purpose, a commercial product or service.	E-mail whose primary purpose is commercial advertisement or promotion of a commercial product or service.	E-mail whose primary purpose is commercial advertisement or promotion of commercial product or service
Definition of Unsolicited Commercial E-mail (UCE)	None	Commercial e-mail sent without the recipient's prior affirmative or implied consent and that is not a transactional or relationship message (as defined in the Act). A visit to a Web site, if the recipient did not knowingly submit his e-mail address, is not a transaction. Affirmative consent means the recipient has expressly consented to receive the message. Implied consent means there has been a business transaction between the sender and	None	Commercial e-mail sent without prior affirmative consent or implied consent, or sent after the recipient has opted-out, with an exception. Affirmative consent means the message falls within the scope of an express and unambiguous invitation or permission granted by the recipient and not subsequently revoked; the recipient knew permission was being granted; and the recipient did not subsequently opt-out.	None	Commercial e-mail sent without the recipient's prior affirmative or implied consent and that is not a transactional or relationship message. (Affirmative and implied consent are not defined.)

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Provision	S. 563 (Dayton)	S. 877 (Burns-Wyden) (As reported)	S. 1052 (Nelson-FL)	S. 1231 (Schumer)	S. 1293 (Hatch) (As reported)	S. 1327 (Corzine)
		recipient within the past 3 years and the recipient was provided at that time with an opt-out opportunity and did not exercise it.		Implied consent means there has been a business transaction between the sender and recipient within the past 3 years and the recipient was provided at that time with an opt-out opportunity and did not exercise it.		
Prohibits false or misleading header information	No	Yes, in all commercial e-mail.	Illegal to falsify or forge certain header information.	Yes, in all commercial e-mail.	Yes	Yes, in UCE.
Prohibits deceptive subject headings	No	Yes, in all commercial e-mail.	No	Yes, in all commercial e-mail.	No	Yes, in UCE.
Prohibits false, misleading, or deceptive information in body of message	No	No, but does not affect FTC's authority to bring enforcement actions for materially false or deceptive representations in commercial e-mail.	No	Yes	No	No
Prohibits transmission of e-mail from improperly or illegally harvested e-mail addresses	No	Yes, for unlawful UCE. Also prohibits dictionary attacks and the automated creation of multiple e-mail or on-line accounts from which to transmit, or enable someone else to transmit, UCE.	Prohibits collecting e-mail addresses from public and private spaces for the purpose of transmitting UCE.	Yes, of all commercial e-mail to addresses obtained through illegal harvesting or automated means.	No	No

CRS-15

Provision	S. 563 (Dayton)	S. 877 (Burns-Wyden) (As reported)	S. 1052 (Nelson-FL)	S. 1231 (Schumer)	S. 1293 (Hatch) (As reported)	S. 1327 (Corzine)
Prohibits sending e-mails through computers accessed without authorization	NA	Prohibits accessing a computer without authorization and transmitting UCE from or through it.	NA	NA	Prohibits accessing a computer without authorization and transmitting multiple e-mails from or through it.	NA
Creates “do not e-mail” registry at FTC	Yes	No, but requires FTC to submit recommendations concerning creation of such a registry.	No	<p>Yes, but “safe harbor” provided if e-mail address has been or list for less than 30 days or person reasonably relied on registry and takes reasonable measures to comply with the Act.</p> <p>FTC to issue regulations for the list, and may create specific categories to protect minors, e.g. regarding e-mail that contains or advertises adult content or links to such content. Senders shall honor such categories without regard to actual or implied consent given by the minor.</p>	No	No
Penalties for falsifying sender’s identity	No	No	No	No	Yes	No

CRS-16

Provision	S. 563 (Dayton)	S. 877 (Burns-Wyden) (As reported)	S. 1052 (Nelson-FL)	S. 1231 (Schumer)	S. 1293 (Hatch) (As reported)	S. 1327 (Corzine)
Requires FTC-prescribed “warning labels” on sexually oriented material	No	No	No	No, but see provision regarding “do not e-mail” registry (above).	No	No, but see requirements for subject line labels (next).
Requires specific characters in subject line of UCE to indicate the message is an advertisement	No	No, but message must provide clear and conspicuous identification that it is an advertisement.	No	Yes, “ADV” must be in subject line, but “safe harbor” provided if the sender is a member of an FTC-approved self regulatory organization and complies with those requirements.	No	Yes, “ADV:” for advertisement; “ADV-ADLT:” for adult-oriented advertisements. Or identification may comply with standards set by Internet Engineering Task Force.
Requires opt-out mechanism	Creates opt-out mechanism through do not e-mail registry.	Commercial e-mail must contain functioning e-mail return address or other Internet-based mechanism to which the recipient may opt-out.	Person sending UCE must provide recipient clear and conspicuous opportunity to request to opt-out.	All commercial e-mail, including UCE, must have functioning e-mail address or other Internet-based mechanism to which the recipient may opt-out.	No	UCE must contain valid sender-operated return e-mail address to which recipient may opt-out.
Damages or Penalties	Up to \$10,000 per violation	Varies per violation.	Civil penalties and fines to be set in accordance with 18 U.S.C.	Varies per section of Act.	Establishes civil and criminal penalties which vary per specifics of the violation.	To be set by FTC, except that under private right of action, statutory damages of up to \$10 per violation.

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Provision	S. 563 (Dayton)	S. 877 (Burns-Wyden) (As reported)	S. 1052 (Nelson-FL)	S. 1231 (Schumer)	S. 1293 (Hatch) (As reported)	S. 1327 (Corzine)
Penalties for persons who promote their trade, business, goods, products, etc. in e-mail that violates Act, under specific circumstances	NA	Yes	NA	NA	NA	NA
Reward for first person identifying a violator and supplying information leading to the collection of a civil penalty	No	No	No	No	No	Yes, not less than 20% of the penalty.
Private Right of Action	No	No	No	Recipient adversely affected may, if otherwise permitted by laws or rules of State court, bring, in an appropriate court of the State, an action to enjoin further violation and recover damages.	ISPs may bring civil action in U.S. District Court.	Yes. Recipient of UCE or ISP may bring civil action in a U.S. district court to enjoin further violations and recover damages.
Affirmative Defense/Safe Harbor	NA	Person is not liable if the person has established and implemented, with due care, reasonable practices and procedures to prevent violations, and violation occurred despite good faith efforts to comply.	NA	Establishes “safe harbors” as noted above.	No	Person is not liable if the person has established and implemented, with due care, reasonable practices and procedures to prevent violations, and violation occurred

CRS-18

Provision	S. 563 (Dayton)	S. 877 (Burns-Wyden) (As reported)	S. 1052 (Nelson-FL)	S. 1231 (Schumer)	S. 1293 (Hatch) (As reported)	S. 1327 (Corzine)
						despite good faith efforts to comply, or if, within 2-days ending upon the initiation of the transmission that is in violation, such person initiated the transmission of such message, or one substantially similar to it, to less than 1,000 e-mail addresses.
Enforcement	By FTC.	By FTC, except for certain entities that are regulated by other agencies.	Violation considered a predicate offense under RICO and an unfair or deceptive practice under FTC Act.	By FTC, except for certain entities that are regulated by other agencies.	By the Attorney General.	By FTC.
State action allowed	NA	Yes, but must notify FTC or other appropriate regulator, which may intervene.	NA	Yes, but must notify FTC, which may intervene.	NA	NA
Class action suits allowed	NA	NA	NA	No	NA	NA
Effect on ISPs	NA	ISPs may bring civil action in U.S. district court. Does not affect the	NA	ISPs may bring civil action in U.S. district court.	ISPs may bring civil action in U.S. district court.	ISPs may bring civil action in U.S. district court.

Provision	S. 563 (Dayton)	S. 877 (Burns-Wyden) (As reported)	S. 1052 (Nelson-FL)	S. 1231 (Schumer)	S. 1293 (Hatch) (As reported)	S. 1327 (Corzine)
		lawfulness or unlawfulness under other laws of ISP policies declining to transmit, route, relay, handle, or store certain types of e-mail.		Senders of commercial e-mail including UCE must comply with ISP policies with respect to electronic mail, account registration and use, or other terms of service.		Does not change law regarding when ISP may disclose customer communications or records; does not require ISP to block, transmit, route, relay, handle or store certain types of e-mail; does not prevent or limit ISP from adopting a policy regarding commercial e-mail including declining to transmit certain commercial e-mail; and does not render lawful any such policy that is unlawful under any other provision of law.
Supersedes state and local laws and regulations	NA	Yes, with exceptions.	NA	NA	NA	NA

NA = Not addressed

RICO = Racketeer Influenced and Corrupt Organizations Act