

In the Senate of the United States,

November 25, 2003.

Resolved, That the Senate agree to the amendment of the House of Representatives to the bill (S. 877) entitled “An Act to regulate interstate commerce by imposing limitations and penalties on the transmission of unsolicited commercial electronic mail via the Internet.” with the following

SENATE AMENDMENT TO HOUSE AMENDMENT:

In lieu of the matter proposed to be inserted by the House amendment to the text of the bill, insert:

1 ***SECTION 1. SHORT TITLE.***

2 *This Act may be cited as the “Controlling the Assault*
3 *of Non-Solicited Pornography and Marketing Act of 2003”,*
4 *or the “CAN-SPAM Act of 2003”.*

1 **SEC. 2. CONGRESSIONAL FINDINGS AND POLICY.**

2 (a) *FINDINGS.*—*The Congress finds the following:*

3 (1) *Electronic mail has become an extremely im-*
4 *portant and popular means of communication, relied*
5 *on by millions of Americans on a daily basis for per-*
6 *sonal and commercial purposes. Its low cost and glob-*
7 *al reach make it extremely convenient and efficient,*
8 *and offer unique opportunities for the development*
9 *and growth of frictionless commerce.*

10 (2) *The convenience and efficiency of electronic*
11 *mail are threatened by the extremely rapid growth in*
12 *the volume of unsolicited commercial electronic mail.*
13 *Unsolicited commercial electronic mail is currently*
14 *estimated to account for over half of all electronic*
15 *mail traffic, up from an estimated 7 percent in 2001,*
16 *and the volume continues to rise. Most of these mes-*
17 *sages are fraudulent or deceptive in one or more re-*
18 *spects.*

19 (3) *The receipt of unsolicited commercial elec-*
20 *tronic mail may result in costs to recipients who can-*
21 *not refuse to accept such mail and who incur costs for*
22 *the storage of such mail, or for the time spent access-*
23 *ing, reviewing, and discarding such mail, or for both.*

24 (4) *The receipt of a large number of unwanted*
25 *messages also decreases the convenience of electronic*
26 *mail and creates a risk that wanted electronic mail*

1 *messages, both commercial and noncommercial, will*
2 *be lost, overlooked, or discarded amidst the larger vol-*
3 *ume of unwanted messages, thus reducing the reli-*
4 *ability and usefulness of electronic mail to the recipi-*
5 *ent.*

6 (5) *Some commercial electronic mail contains*
7 *material that many recipients may consider vulgar or*
8 *pornographic in nature.*

9 (6) *The growth in unsolicited commercial elec-*
10 *tronic mail imposes significant monetary costs on*
11 *providers of Internet access services, businesses, and*
12 *educational and nonprofit institutions that carry and*
13 *receive such mail, as there is a finite volume of mail*
14 *that such providers, businesses, and institutions can*
15 *handle without further investment in infrastructure.*

16 (7) *Many senders of unsolicited commercial elec-*
17 *tronic mail purposefully disguise the source of such*
18 *mail.*

19 (8) *Many senders of unsolicited commercial elec-*
20 *tronic mail purposefully include misleading informa-*
21 *tion in the messages' subject lines in order to induce*
22 *the recipients to view the messages.*

23 (9) *While some senders of commercial electronic*
24 *mail messages provide simple and reliable ways for*
25 *recipients to reject (or "opt-out" of) receipt of com-*

1 *mercial electronic mail from such senders in the fu-*
2 *ture, other senders provide no such “opt-out” mecha-*
3 *nism, or refuse to honor the requests of recipients not*
4 *to receive electronic mail from such senders in the fu-*
5 *ture, or both.*

6 (10) *Many senders of bulk unsolicited commer-*
7 *cial electronic mail use computer programs to gather*
8 *large numbers of electronic mail addresses on an*
9 *automated basis from Internet websites or online serv-*
10 *ices where users must post their addresses in order to*
11 *make full use of the website or service.*

12 (11) *Many States have enacted legislation in-*
13 *tended to regulate or reduce unsolicited commercial*
14 *electronic mail, but these statutes impose different*
15 *standards and requirements. As a result, they do not*
16 *appear to have been successful in addressing the prob-*
17 *lems associated with unsolicited commercial electronic*
18 *mail, in part because, since an electronic mail ad-*
19 *dress does not specify a geographic location, it can be*
20 *extremely difficult for law-abiding businesses to know*
21 *with which of these disparate statutes they are re-*
22 *quired to comply.*

23 (12) *The problems associated with the rapid*
24 *growth and abuse of unsolicited commercial electronic*
25 *mail cannot be solved by Federal legislation alone.*

1 *The development and adoption of technological ap-*
2 *proaches and the pursuit of cooperative efforts with*
3 *other countries will be necessary as well.*

4 *(b) CONGRESSIONAL DETERMINATION OF PUBLIC POL-*
5 *ICY.—On the basis of the findings in subsection (a), the*
6 *Congress determines that—*

7 *(1) there is a substantial government interest in*
8 *regulation of commercial electronic mail on a nation-*
9 *wide basis;*

10 *(2) senders of commercial electronic mail should*
11 *not mislead recipients as to the source or content of*
12 *such mail; and*

13 *(3) recipients of commercial electronic mail have*
14 *a right to decline to receive additional commercial*
15 *electronic mail from the same source.*

16 **SEC. 3. DEFINITIONS.**

17 *In this Act:*

18 *(1) AFFIRMATIVE CONSENT.—The term “affirma-*
19 *tive consent”, when used with respect to a commercial*
20 *electronic mail message, means that—*

21 *(A) the recipient expressly consented to re-*
22 *ceive the message, either in response to a clear*
23 *and conspicuous request for such consent or at*
24 *the recipient’s own initiative; and*

1 (B) if the message is from a party other
 2 than the party to which the recipient commu-
 3 nicated such consent, the recipient was given
 4 clear and conspicuous notice at the time the con-
 5 sent was communicated that the recipient's elec-
 6 tronic mail address could be transferred to such
 7 other party for the purpose of initiating commer-
 8 cial electronic mail messages.

9 (2) *COMMERCIAL ELECTRONIC MAIL MESSAGE.*—

10 (A) *IN GENERAL.*—The term “commercial
 11 electronic mail message” means any electronic
 12 mail message the primary purpose of which is
 13 the commercial advertisement or promotion of a
 14 commercial product or service (including content
 15 on an Internet website operated for a commercial
 16 purpose).

17 (B) *TRANSACTIONAL OR RELATIONSHIP*
 18 *MESSAGES.*—The term “commercial electronic
 19 mail message” does not include a transactional
 20 or relationship message.

21 (C) *REGULATIONS REGARDING PRIMARY*
 22 *PURPOSE.*—Not later than 12 months after the
 23 date of the enactment of this Act, the Commis-
 24 sion shall issue regulations pursuant to section
 25 13 defining the relevant criteria to facilitate the

1 *determination of the primary purpose of an elec-*
2 *tronic mail message.*

3 (D) *REFERENCE TO COMPANY OR*
4 *WEBSITE.—The inclusion of a reference to a*
5 *commercial entity or a link to the website of a*
6 *commercial entity in an electronic mail message*
7 *does not, by itself, cause such message to be treat-*
8 *ed as a commercial electronic mail message for*
9 *purposes of this Act if the contents or cir-*
10 *cumstances of the message indicate a primary*
11 *purpose other than commercial advertisement or*
12 *promotion of a commercial product or service.*

13 (3) *COMMISSION.—The term “Commission”*
14 *means the Federal Trade Commission.*

15 (4) *DOMAIN NAME.—The term “domain name”*
16 *means any alphanumeric designation which is reg-*
17 *istered with or assigned by any domain name reg-*
18 *istrar, domain name registry, or other domain name*
19 *registration authority as part of an electronic address*
20 *on the Internet.*

21 (5) *ELECTRONIC MAIL ADDRESS.—The term*
22 *“electronic mail address” means a destination, com-*
23 *monly expressed as a string of characters, consisting*
24 *of a unique user name or mailbox (commonly referred*
25 *to as the “local part”) and a reference to an Internet*

1 *domain (commonly referred to as the “domain part”),*
2 *whether or not displayed, to which an electronic mail*
3 *message can be sent or delivered.*

4 (6) *ELECTRONIC MAIL MESSAGE.*—*The term*
5 *“electronic mail message” means a message sent to a*
6 *unique electronic mail address.*

7 (7) *FTC ACT.*—*The term “FTC Act” means the*
8 *Federal Trade Commission Act (15 U.S.C. 41 et seq.).*

9 (8) *HEADER INFORMATION.*—*The term “header*
10 *information” means the source, destination, and rout-*
11 *ing information attached to an electronic mail mes-*
12 *sage, including the originating domain name and*
13 *originating electronic mail address, and any other in-*
14 *formation that appears in the line identifying, or*
15 *purporting to identify, a person initiating the mes-*
16 *sage.*

17 (9) *INITIATE.*—*The term “initiate”, when used*
18 *with respect to a commercial electronic mail message,*
19 *means to originate or transmit such message or to*
20 *procure the origination or transmission of such mes-*
21 *sage, but shall not include actions that constitute rou-*
22 *tine conveyance of such message. For purposes of this*
23 *paragraph, more than one person may be considered*
24 *to have initiated a message.*

1 (10) *INTERNET*.—The term “Internet” has the
2 meaning given that term in the Internet Tax Freedom
3 Act (47 U.S.C. 151 nt).

4 (11) *INTERNET ACCESS SERVICE*.—The term
5 “Internet access service” has the meaning given that
6 term in section 231(e)(4) of the Communications Act
7 of 1934 (47 U.S.C. 231(e)(4)).

8 (12) *PROCURE*.—The term “procure”, when used
9 with respect to the initiation of a commercial elec-
10 tronic mail message, means intentionally to pay or
11 provide other consideration to, or induce, another per-
12 son to initiate such a message on one’s behalf.

13 (13) *PROTECTED COMPUTER*.—The term “pro-
14 tected computer” has the meaning given that term in
15 section 1030(e)(2)(B) of title 18, United States Code.

16 (14) *RECIPIENT*.—The term “recipient”, when
17 used with respect to a commercial electronic mail
18 message, means an authorized user of the electronic
19 mail address to which the message was sent or deliv-
20 ered. If a recipient of a commercial electronic mail
21 message has one or more electronic mail addresses in
22 addition to the address to which the message was sent
23 or delivered, the recipient shall be treated as a sepa-
24 rate recipient with respect to each such address. If an
25 electronic mail address is reassigned to a new user,

1 *the new user shall not be treated as a recipient of any*
2 *commercial electronic mail message sent or delivered*
3 *to that address before it was reassigned.*

4 (15) *ROUTINE CONVEYANCE.*—*The term “routine*
5 *conveyance” means the transmission, routing, relay-*
6 *ing, handling, or storing, through an automatic tech-*
7 *nical process, of an electronic mail message for which*
8 *another person has identified the recipients or pro-*
9 *vided the recipient addresses.*

10 (16) *SENDER.*—

11 (A) *IN GENERAL.*—*Except as provided in*
12 *subparagraph (B), the term “sender”, when used*
13 *with respect to a commercial electronic mail*
14 *message, means a person who initiates such a*
15 *message and whose product, service, or Internet*
16 *web site is advertised or promoted by the mes-*
17 *sage.*

18 (B) *SEPARATE LINES OF BUSINESS OR DIVI-*
19 *SIONS.*—*If an entity operates through separate*
20 *lines of business or divisions and holds itself out*
21 *to the recipient throughout the message as that*
22 *particular line of business or division rather*
23 *than as the entity of which such line of business*
24 *or division is a part, then the line of business or*

1 *the division shall be treated as the sender of such*
2 *message for purposes of this Act.*

3 (17) *TRANSACTIONAL OR RELATIONSHIP MES-*
4 *SAGE.—*

5 (A) *IN GENERAL.—The term “transactional*
6 *or relationship message” means an electronic*
7 *mail message the primary purpose of which is—*

8 (i) *to facilitate, complete, or confirm a*
9 *commercial transaction that the recipient*
10 *has previously agreed to enter into with the*
11 *sender;*

12 (ii) *to provide warranty information,*
13 *product recall information, or safety or se-*
14 *curity information with respect to a com-*
15 *mercial product or service used or pur-*
16 *chased by the recipient;*

17 (iii) *to provide—*

18 (I) *notification concerning a*
19 *change in the terms or features of;*

20 (II) *notification of a change in*
21 *the recipient’s standing or status with*
22 *respect to; or*

23 (III) *at regular periodic intervals,*
24 *account balance information or other*

1 *type of account statement with respect*
2 *to,*
3 *a subscription, membership, account, loan,*
4 *or comparable ongoing commercial relation-*
5 *ship involving the ongoing purchase or use*
6 *by the recipient of products or services of-*
7 *fered by the sender;*

8 *(iv) to provide information directly re-*
9 *lated to an employment relationship or re-*
10 *lated benefit plan in which the recipient is*
11 *currently involved, participating, or en-*
12 *rolled; or*

13 *(v) to deliver goods or services, includ-*
14 *ing product updates or upgrades, that the*
15 *recipient is entitled to receive under the*
16 *terms of a transaction that the recipient has*
17 *previously agreed to enter into with the*
18 *sender.*

19 *(B) MODIFICATION OF DEFINITION.—The*
20 *Commission by regulation pursuant to section 13*
21 *may modify the definition in subparagraph (A)*
22 *to expand or contract the categories of messages*
23 *that are treated as transactional or relationship*
24 *messages for purposes of this Act to the extent*
25 *that such modification is necessary to accommo-*

1 *date changes in electronic mail technology or*
 2 *practices and accomplish the purposes of this*
 3 *Act.*

4 **SEC. 4. PROHIBITION AGAINST PREDATORY AND ABUSIVE**
 5 **COMMERCIAL E-MAIL.**

6 (a) *OFFENSE.*—

7 (1) *IN GENERAL.*—Chapter 47 of title 18, United
 8 States Code, is amended by adding at the end the fol-
 9 lowing new section:

10 **“§ 1037. Fraud and related activity in connection with**
 11 ***electronic mail***

12 “(a) *IN GENERAL.*—Whoever, in or affecting interstate
 13 *or foreign commerce, knowingly—*

14 “(1) *accesses a protected computer without au-*
 15 *thorization, and intentionally initiates the trans-*
 16 *mission of multiple commercial electronic mail mes-*
 17 *sages from or through such computer,*

18 “(2) *uses a protected computer to relay or re-*
 19 *transmit multiple commercial electronic mail mes-*
 20 *sages, with the intent to deceive or mislead recipients,*
 21 *or any Internet access service, as to the origin of such*
 22 *messages,*

23 “(3) *materially falsifies header information in*
 24 *multiple commercial electronic mail messages and in-*

1 *entionally initiates the transmission of such mes-*
2 *sages,*

3 “(4) registers, using information that materially
4 *falsifies the identity of the actual registrant, for five*
5 *or more electronic mail accounts or online user ac-*
6 *counts or two or more domain names, and inten-*
7 *tionally initiates the transmission of multiple com-*
8 *mercial electronic mail messages from any combina-*
9 *tion of such accounts or domain names, or*

10 “(5) falsely represents oneself to be the registrant
11 *or the legitimate successor in interest to the registrant*
12 *of 5 or more Internet Protocol addresses, and inten-*
13 *tionally initiates the transmission of multiple com-*
14 *mercial electronic mail messages from such addresses,*
15 *or conspires to do so, shall be punished as provided in sub-*
16 *section (b).*

17 “(b) *PENALTIES.*—*The punishment for an offense*
18 *under subsection (a) is—*

19 “(1) *a fine under this title, imprisonment for not*
20 *more than 5 years, or both, if—*

21 “(A) *the offense is committed in furtherance*
22 *of any felony under the laws of the United States*
23 *or of any State; or*

24 “(B) *the defendant has previously been con-*
25 *victed under this section or section 1030, or*

1 *under the law of any State for conduct involving*
2 *the transmission of multiple commercial elec-*
3 *tronic mail messages or unauthorized access to a*
4 *computer system;*

5 “(2) *a fine under this title, imprisonment for not*
6 *more than 3 years, or both, if—*

7 “(A) *the offense is an offense under sub-*
8 *section (a)(1);*

9 “(B) *the offense is an offense under sub-*
10 *section (a)(4) and involved 20 or more falsified*
11 *electronic mail or online user account registra-*
12 *tions, or 10 or more falsified domain name reg-*
13 *istrations;*

14 “(C) *the volume of electronic mail messages*
15 *transmitted in furtherance of the offense exceeded*
16 *2,500 during any 24-hour period, 25,000 during*
17 *any 30-day period, or 250,000 during any 1-*
18 *year period;*

19 “(D) *the offense caused loss to one or more*
20 *persons aggregating \$5,000 or more in value*
21 *during any 1-year period;*

22 “(E) *as a result of the offense any indi-*
23 *vidual committing the offense obtained anything*
24 *of value aggregating \$5,000 or more during any*
25 *1-year period; or*

1 “(F) the offense was undertaken by the de-
2 fendant in concert with 3 or more other persons
3 with respect to whom the defendant occupied a
4 position of organizer or leader; and

5 “(3) a fine under this title or imprisonment for
6 not more than 1 year, or both, in any other case.

7 “(c) FORFEITURE.—

8 “(1) IN GENERAL.—The court, in imposing sen-
9 tence on a person who is convicted of an offense under
10 this section, shall order that the defendant forfeit to
11 the United States—

12 “(A) any property, real or personal, consti-
13 tuting or traceable to gross proceeds obtained
14 from such offense; and

15 “(B) any equipment, software, or other tech-
16 nology used or intended to be used to commit or
17 to facilitate the commission of such offense.

18 “(2) PROCEDURES.—The procedures set forth in
19 section 413 of the Controlled Substances Act (21
20 U.S.C. 853), other than subsection (d) of that section,
21 and in Rule 32.2 of the Federal Rules of Criminal
22 Procedure, shall apply to all stages of a criminal for-
23 feiture proceeding under this section.

24 “(d) DEFINITIONS.—In this section:

1 “(1) *LOSS*.—The term ‘loss’ has the meaning
2 given that term in section 1030(e) of this title.

3 “(2) *MATERIALLY*.—For purposes of paragraphs
4 (3) and (4) of subsection (a), header information or
5 registration information is materially falsified if it is
6 altered or concealed in a manner that would impair
7 the ability of a recipient of the message, an Internet
8 access service processing the message on behalf of a re-
9 cipient, a person alleging a violation of this section,
10 or a law enforcement agency to identify, locate, or re-
11 spond to a person who initiated the electronic mail
12 message or to investigate the alleged violation.

13 “(3) *MULTIPLE*.—The term ‘multiple’ means
14 more than 100 electronic mail messages during a 24-
15 hour period, more than 1,000 electronic mail messages
16 during a 30-day period, or more than 10,000 elec-
17 tronic mail messages during a 1-year period.

18 “(4) *OTHER TERMS*.—Any other term has the
19 meaning given that term by section 3 of the CAN-
20 SPAM Act of 2003.”.

21 (2) *CONFORMING AMENDMENT*.—The chapter
22 analysis for chapter 47 of title 18, United States
23 Code, is amended by adding at the end the following:

“Sec.

“1037. *Fraud and related activity in connection with electronic mail*.”.

24 (b) *UNITED STATES SENTENCING COMMISSION*.—

1 (1) *DIRECTIVE.*—Pursuant to its authority
2 under section 994(p) of title 28, United States Code,
3 and in accordance with this section, the United States
4 Sentencing Commission shall review and, as appro-
5 priate, amend the sentencing guidelines and policy
6 statements to provide appropriate penalties for viola-
7 tions of section 1037 of title 18, United States Code,
8 as added by this section, and other offenses that may
9 be facilitated by the sending of large quantities of un-
10 solicited electronic mail.

11 (2) *REQUIREMENTS.*—In carrying out this sub-
12 section, the Sentencing Commission shall consider
13 providing sentencing enhancements for—

14 (A) those convicted under section 1037 of
15 title 18, United States Code, who—

16 (i) obtained electronic mail addresses
17 through improper means, including—

18 (I) harvesting electronic mail ad-
19 dresses of the users of a website, pro-
20 prietary service, or other online public
21 forum operated by another person,
22 without the authorization of such per-
23 son; and

24 (II) randomly generating elec-
25 tronic mail addresses by computer; or

1 (ii) knew that the commercial elec-
 2 tronic mail messages involved in the offense
 3 contained or advertised an Internet domain
 4 for which the registrant of the domain had
 5 provided false registration information; and
 6 (B) those convicted of other offenses, includ-
 7 ing offenses involving fraud, identity theft, ob-
 8 scenity, child pornography, and the sexual ex-
 9 ploitation of children, if such offenses involved
 10 the sending of large quantities of electronic mail.

11 (c) *SENSE OF CONGRESS.*—It is the sense of Congress
 12 that—

13 (1) Spam has become the method of choice for
 14 those who distribute pornography, perpetrate fraudu-
 15 lent schemes, and introduce viruses, worms, and Tro-
 16 jan horses into personal and business computer sys-
 17 tems; and

18 (2) the Department of Justice should use all ex-
 19 isting law enforcement tools to investigate and pros-
 20 ecute those who send bulk commercial e-mail to facili-
 21 tate the commission of Federal crimes, including the
 22 tools contained in chapters 47 and 63 of title 18,
 23 United States Code (relating to fraud and false state-
 24 ments); chapter 71 of title 18, United States Code (re-
 25 lating to obscenity); chapter 110 of title 18, United

1 *States Code (relating to the sexual exploitation of*
 2 *children); and chapter 95 of title 18, United States*
 3 *Code (relating to racketeering), as appropriate.*

4 **SEC. 5. OTHER PROTECTIONS FOR USERS OF COMMERCIAL**
 5 **ELECTRONIC MAIL.**

6 (a) *REQUIREMENTS FOR TRANSMISSION OF MES-*
 7 *SAGES.—*

8 (1) *PROHIBITION OF FALSE OR MISLEADING*
 9 *TRANSMISSION INFORMATION.—It is unlawful for any*
 10 *person to initiate the transmission, to a protected*
 11 *computer, of a commercial electronic mail message, or*
 12 *a transactional or relationship message, that con-*
 13 *tains, or is accompanied by, header information that*
 14 *is materially false or materially misleading. For pur-*
 15 *poses of this paragraph—*

16 (A) *header information that is technically*
 17 *accurate but includes an originating electronic*
 18 *mail address, domain name, or Internet Protocol*
 19 *address the access to which for purposes of initi-*
 20 *ating the message was obtained by means of false*
 21 *or fraudulent pretenses or representations shall*
 22 *be considered materially misleading;*

23 (B) *a “from” line (the line identifying or*
 24 *purporting to identify a person initiating the*
 25 *message) that accurately identifies any person*

1 *who initiated the message shall not be considered*
2 *materially false or materially misleading; and*

3 (C) *header information shall be considered*
4 *materially misleading if it fails to identify accu-*
5 *rately a protected computer used to initiate the*
6 *message because the person initiating the mes-*
7 *sage knowingly uses another protected computer*
8 *to relay or retransmit the message for purposes*
9 *of disguising its origin.*

10 (2) *PROHIBITION OF DECEPTIVE SUBJECT HEAD-*
11 *INGS.—It is unlawful for any person to initiate the*
12 *transmission to a protected computer of a commercial*
13 *electronic mail message if such person has actual*
14 *knowledge, or knowledge fairly implied on the basis of*
15 *objective circumstances, that a subject heading of the*
16 *message would be likely to mislead a recipient, acting*
17 *reasonably under the circumstances, about a material*
18 *fact regarding the contents or subject matter of the*
19 *message (consistent with the criteria used in enforce-*
20 *ment of section 5 of the Federal Trade Commission*
21 *Act (15 U.S.C. 45)).*

22 (3) *INCLUSION OF RETURN ADDRESS OR COM-*
23 *PARABLE MECHANISM IN COMMERCIAL ELECTRONIC*
24 *MAIL.—*

1 (A) *IN GENERAL.*—*It is unlawful for any*
2 *person to initiate the transmission to a protected*
3 *computer of a commercial electronic mail mes-*
4 *sage that does not contain a functioning return*
5 *electronic mail address or other Internet-based*
6 *mechanism, clearly and conspicuously displayed,*
7 *that—*

8 *(i) a recipient may use to submit, in*
9 *a manner specified in the message, a reply*
10 *electronic mail message or other form of*
11 *Internet-based communication requesting*
12 *not to receive future commercial electronic*
13 *mail messages from that sender at the elec-*
14 *tronic mail address where the message was*
15 *received; and*

16 *(ii) remains capable of receiving such*
17 *messages or communications for no less*
18 *than 30 days after the transmission of the*
19 *original message.*

20 (B) *MORE DETAILED OPTIONS POSSIBLE.*—
21 *The person initiating a commercial electronic*
22 *mail message may comply with subparagraph*
23 *(A)(i) by providing the recipient a list or menu*
24 *from which the recipient may choose the specific*
25 *types of commercial electronic mail messages the*

1 *recipient wants to receive or does not want to re-*
2 *ceive from the sender, if the list or menu includes*
3 *an option under which the recipient may choose*
4 *not to receive any commercial electronic mail*
5 *messages from the sender.*

6 (C) *TEMPORARY INABILITY TO RECEIVE*
7 *MESSAGES OR PROCESS REQUESTS.—A return*
8 *electronic mail address or other mechanism does*
9 *not fail to satisfy the requirements of subpara-*
10 *graph (A) if it is unexpectedly and temporarily*
11 *unable to receive messages or process requests due*
12 *to a technical problem beyond the control of the*
13 *sender if the problem is corrected within a rea-*
14 *sonable time period.*

15 (4) *PROHIBITION OF TRANSMISSION OF COMMER-*
16 *CIAL ELECTRONIC MAIL AFTER OBJECTION.—*

17 (A) *IN GENERAL.—If a recipient makes a*
18 *request using a mechanism provided pursuant to*
19 *paragraph (3) not to receive some or any com-*
20 *mercial electronic mail messages from such send-*
21 *er, then it is unlawful—*

22 (i) *for the sender to initiate the trans-*
23 *mission to the recipient, more than 10 busi-*
24 *ness days after the receipt of such request,*

1 of a commercial electronic mail message
2 that falls within the scope of the request;

3 (ii) for any person acting on behalf of
4 the sender to initiate the transmission to the
5 recipient, more than 10 business days after
6 the receipt of such request, of a commercial
7 electronic mail message with actual knowl-
8 edge, or knowledge fairly implied on the
9 basis of objective circumstances, that such
10 message falls within the scope of the request;

11 (iii) for any person acting on behalf of
12 the sender to assist in initiating the trans-
13 mission to the recipient, through the provi-
14 sion or selection of addresses to which the
15 message will be sent, of a commercial elec-
16 tronic mail message with actual knowledge,
17 or knowledge fairly implied on the basis of
18 objective circumstances, that such message
19 would violate clause (i) or (ii); or

20 (iv) for the sender, or any other person
21 who knows that the recipient has made such
22 a request, to sell, lease, exchange, or other-
23 wise transfer or release the electronic mail
24 address of the recipient (including through
25 any transaction or other transfer involving

1 *mailing lists bearing the electronic mail ad-*
2 *dress of the recipient) for any purpose other*
3 *than compliance with this Act or other pro-*
4 *vision of law.*

5 *(B) SUBSEQUENT AFFIRMATIVE CONSENT.—*

6 *A prohibition in subparagraph (A) does not*
7 *apply if there is affirmative consent by the re-*
8 *ipient subsequent to the request under subpara-*
9 *graph (A).*

10 *(5) INCLUSION OF IDENTIFIER, OPT-OUT, AND*
11 *PHYSICAL ADDRESS IN COMMERCIAL ELECTRONIC*
12 *MAIL.—*

13 *(A) It is unlawful for any person to initiate*
14 *the transmission of any commercial electronic*
15 *mail message to a protected computer unless the*
16 *message provides—*

17 *(i) clear and conspicuous identification*
18 *that the message is an advertisement or so-*
19 *licitation;*

20 *(ii) clear and conspicuous notice of the*
21 *opportunity under paragraph (3) to decline*
22 *to receive further commercial electronic*
23 *mail messages from the sender; and*

24 *(iii) a valid physical postal address of*
25 *the sender.*

1 (B) Subparagraph (A)(i) does not apply to
2 the transmission of a commercial electronic mail
3 message if the recipient has given prior affirma-
4 tive consent to receipt of the message.

5 (6) *MATERIALLY*.—For purposes of paragraph
6 (1), the term “materially”, when used with respect to
7 false or misleading header information, includes the
8 alteration or concealment of header information in a
9 manner that would impair the ability of an Internet
10 access service processing the message on behalf of a re-
11 cipient, a person alleging a violation of this section,
12 or a law enforcement agency to identify, locate, or re-
13 spond to a person who initiated the electronic mail
14 message or to investigate the alleged violation, or the
15 ability of a recipient of the message to respond to a
16 person who initiated the electronic message.

17 (b) *AGGRAVATED VIOLATIONS RELATING TO COMMER-*
18 *CIAL ELECTRONIC MAIL*.—

19 (1) *ADDRESS HARVESTING AND DICTIONARY AT-*
20 *TACKS*.—

21 (A) *IN GENERAL*.—It is unlawful for any
22 person to initiate the transmission, to a pro-
23 tected computer, of a commercial electronic mail
24 message that is unlawful under subsection (a), or
25 to assist in the origination of such message

1 *through the provision or selection of addresses to*
2 *which the message will be transmitted, if such*
3 *person had actual knowledge, or knowledge fairly*
4 *implied on the basis of objective circumstances,*
5 *that—*

6 *(i) the electronic mail address of the*
7 *recipient was obtained using an automated*
8 *means from an Internet website or propri-*
9 *etary online service operated by another*
10 *person, and such website or online service*
11 *included, at the time the address was ob-*
12 *tained, a notice stating that the operator of*
13 *such website or online service will not give,*
14 *sell, or otherwise transfer addresses main-*
15 *tained by such website or online service to*
16 *any other party for the purposes of initi-*
17 *ating, or enabling others to initiate, elec-*
18 *tronic mail messages; or*

19 *(ii) the electronic mail address of the*
20 *recipient was obtained using an automated*
21 *means that generates possible electronic*
22 *mail addresses by combining names, letters,*
23 *or numbers into numerous permutations.*

1 (B) *DISCLAIMER.*—*Nothing in this para-*
2 graph creates an ownership or proprietary inter-
3 est in such electronic mail addresses.

4 (2) *AUTOMATED CREATION OF MULTIPLE ELEC-*
5 *TRONIC MAIL ACCOUNTS.*—*It is unlawful for any per-*
6 son to use scripts or other automated means to reg-
7 ister for multiple electronic mail accounts or online
8 user accounts from which to transmit to a protected
9 computer, or enable another person to transmit to a
10 protected computer, a commercial electronic mail
11 message that is unlawful under subsection (a).

12 (3) *RELAY OR RETRANSMISSION THROUGH UNAU-*
13 *THORIZED ACCESS.*—*It is unlawful for any person*
14 *knowingly to relay or retransmit a commercial elec-*
15 *tronic mail message that is unlawful under subsection*
16 *(a) from a protected computer or computer network*
17 *that such person has accessed without authorization.*

18 (c) *SUPPLEMENTARY RULEMAKING AUTHORITY.*—*The*
19 *Commission shall by regulation, pursuant to section 13—*

20 (1) *modify the 10-business-day period under sub-*
21 *section (a)(4)(A) or subsection (a)(4)(B), or both, if*
22 *the Commission determines that a different period*
23 *would be more reasonable after taking into account—*

24 (A) *the purposes of subsection (a);*

1 (B) the interests of recipients of commercial
2 electronic mail; and

3 (C) the burdens imposed on senders of law-
4 ful commercial electronic mail; and

5 (2) specify additional activities or practices to
6 which subsection (b) applies if the Commission deter-
7 mines that those activities or practices are contrib-
8 uting substantially to the proliferation of commercial
9 electronic mail messages that are unlawful under sub-
10 section (a).

11 (d) *REQUIREMENT TO PLACE WARNING LABELS ON*
12 *COMMERCIAL ELECTRONIC MAIL CONTAINING SEXUALLY*
13 *ORIENTED MATERIAL.—*

14 (1) *IN GENERAL.—*No person may initiate in or
15 affecting interstate commerce the transmission, to a
16 protected computer, of any commercial electronic mail
17 message that includes sexually oriented material
18 and—

19 (A) fail to include in subject heading for the
20 electronic mail message the marks or notices pre-
21 scribed by the Commission under this subsection;
22 or

23 (B) fail to provide that the matter in the
24 message that is initially viewable to the recipi-
25 ent, when the message is opened by any recipient

1 *and absent any further actions by the recipient,*
2 *includes only—*

3 *(i) to the extent required or authorized*
4 *pursuant to paragraph (2), any such marks*
5 *or notices;*

6 *(ii) the information required to be in-*
7 *cluded in the message pursuant to sub-*
8 *section (a)(5); and*

9 *(iii) instructions on how to access, or*
10 *a mechanism to access, the sexually oriented*
11 *material.*

12 (2) *PRIOR AFFIRMATIVE CONSENT.—Paragraph*
13 *(1) does not apply to the transmission of an electronic*
14 *mail message if the recipient has given prior affirma-*
15 *tive consent to receipt of the message.*

16 (3) *PRESCRIPTION OF MARKS AND NOTICES.—*
17 *Not later than 120 days after the date of the enact-*
18 *ment of this Act, the Commission in consultation with*
19 *the Attorney General shall prescribe clearly identifi-*
20 *able marks or notices to be included in or associated*
21 *with commercial electronic mail that contains sexu-*
22 *ally oriented material, in order to inform the recipi-*
23 *ent of that fact and to facilitate filtering of such elec-*
24 *tronic mail. The Commission shall publish in the*

1 *Federal Register and provide notice to the public of*
 2 *the marks or notices prescribed under this paragraph.*

3 (4) *DEFINITION.*—*In this subsection, the term*
 4 *“sexually oriented material” means any material that*
 5 *depicts sexually explicit conduct (as that term is de-*
 6 *fin ed in section 2256 of title 18, United States Code),*
 7 *unless the depiction constitutes a small and insignifi-*
 8 *cant part of the whole, the remainder of which is not*
 9 *primarily devoted to sexual matters.*

10 (5) *PENALTY.*—*Whoever knowingly violates*
 11 *paragraph (1) shall be fined under title 18, United*
 12 *States Code, or imprisoned not more than 5 years, or*
 13 *both.*

14 **SEC. 6. BUSINESSES KNOWINGLY PROMOTED BY ELEC-**
 15 **TRONIC MAIL WITH FALSE OR MISLEADING**
 16 **TRANSMISSION INFORMATION.**

17 (a) *IN GENERAL.*—*It is unlawful for a person to pro-*
 18 *mote, or allow the promotion of, that person’s trade or busi-*
 19 *ness, or goods, products, property, or services sold, offered*
 20 *for sale, leased or offered for lease, or otherwise made avail-*
 21 *able through that trade or business, in a commercial elec-*
 22 *tronic mail message the transmission of which is in viola-*
 23 *tion of section 5(a)(1) if that person—*

24 (1) *knows, or should have known in the ordinary*
 25 *course of that person’s trade or business, that the*

1 goods, products, property, or services sold, offered for
 2 sale, leased or offered for lease, or otherwise made
 3 available through that trade or business were being
 4 promoted in such a message;

5 (2) received or expected to receive an economic
 6 benefit from such promotion; and

7 (3) took no reasonable action—

8 (A) to prevent the transmission; or

9 (B) to detect the transmission and report it
 10 to the Commission.

11 (b) *LIMITED ENFORCEMENT AGAINST THIRD PAR-*
 12 *TIES.*—

13 (1) *IN GENERAL.*—Except as provided in para-
 14 graph (2), a person (hereinafter referred to as the
 15 “third party”) that provides goods, products, prop-
 16 erty, or services to another person that violates sub-
 17 section (a) shall not be held liable for such violation.

18 (2) *EXCEPTION.*—Liability for a violation of
 19 subsection (a) shall be imputed to a third party that
 20 provides goods, products, property, or services to an-
 21 other person that violates subsection (a) if that third
 22 party—

23 (A) owns, or has a greater than 50 percent
 24 ownership or economic interest in, the trade or

1 *business of the person that violated subsection*
 2 *(a); or*

3 *(B)(i) has actual knowledge that goods,*
 4 *products, property, or services are promoted in a*
 5 *commercial electronic mail message the trans-*
 6 *mission of which is in violation of section*
 7 *5(a)(1); and*

8 *(ii) receives, or expects to receive, an eco-*
 9 *nomical benefit from such promotion.*

10 *(c) EXCLUSIVE ENFORCEMENT BY FTC.—Subsections*
 11 *(f) and (g) of section 7 do not apply to violations of this*
 12 *section.*

13 *(d) SAVINGS PROVISION.—Except as provided in sec-*
 14 *tion 7(f)(8), nothing in this section may be construed to*
 15 *limit or prevent any action that may be taken under this*
 16 *Act with respect to any violation of any other section of*
 17 *this Act.*

18 **SEC. 7. ENFORCEMENT GENERALLY.**

19 *(a) VIOLATION IS UNFAIR OR DECEPTIVE ACT OR*
 20 *PRACTICE.—Except as provided in subsection (b), this Act*
 21 *shall be enforced by the Commission as if the violation of*
 22 *this Act were an unfair or deceptive act or practice pro-*
 23 *scribed under section 18(a)(1)(B) of the Federal Trade*
 24 *Commission Act (15 U.S.C. 57a(a)(1)(B)).*

1 (b) *ENFORCEMENT BY CERTAIN OTHER AGENCIES.*—

2 *Compliance with this Act shall be enforced—*

3 (1) *under section 8 of the Federal Deposit Insur-*
4 *ance Act (12 U.S.C. 1818), in the case of—*

5 (A) *national banks, and Federal branches*
6 *and Federal agencies of foreign banks, by the Of-*
7 *fice of the Comptroller of the Currency;*

8 (B) *member banks of the Federal Reserve*
9 *System (other than national banks), branches*
10 *and agencies of foreign banks (other than Fed-*
11 *eral branches, Federal agencies, and insured*
12 *State branches of foreign banks), commercial*
13 *lending companies owned or controlled by for-*
14 *oreign banks, organizations operating under sec-*
15 *tion 25 or 25A of the Federal Reserve Act (12*
16 *U.S.C. 601 and 611), and bank holding compa-*
17 *nies, by the Board;*

18 (C) *banks insured by the Federal Deposit*
19 *Insurance Corporation (other than members of*
20 *the Federal Reserve System) insured State*
21 *branches of foreign banks, by the Board of Direc-*
22 *tors of the Federal Deposit Insurance Corpora-*
23 *tion; and*

24 (D) *savings associations the deposits of*
25 *which are insured by the Federal Deposit Insur-*

1 *ance Corporation, by the Director of the Office of*
2 *Thrift Supervision;*

3 *(2) under the Federal Credit Union Act (12*
4 *U.S.C. 1751 et seq.) by the Board of the National*
5 *Credit Union Administration with respect to any*
6 *Federally insured credit union;*

7 *(3) under the Securities Exchange Act of 1934*
8 *(15 U.S.C. 78a et seq.) by the Securities and Ex-*
9 *change Commission with respect to any broker or*
10 *dealer;*

11 *(4) under the Investment Company Act of 1940*
12 *(15 U.S.C. 80a-1 et seq.) by the Securities and Ex-*
13 *change Commission with respect to investment com-*
14 *panies;*

15 *(5) under the Investment Advisers Act of 1940*
16 *(15 U.S.C. 80b-1 et seq.) by the Securities and Ex-*
17 *change Commission with respect to investment advis-*
18 *ers registered under that Act;*

19 *(6) under State insurance law in the case of any*
20 *person engaged in providing insurance, by the appli-*
21 *cable State insurance authority of the State in which*
22 *the person is domiciled, subject to section 104 of the*
23 *Gramm-Bliley-Leach Act (15 U.S.C. 6701), except*
24 *that in any State in which the State insurance au-*
25 *thority elects not to exercise this power, the enforce-*

1 *ment authority pursuant to this Act shall be exercised*
2 *by the Commission in accordance with subsection (a);*

3 *(7) under part A of subtitle VII of title 49,*
4 *United States Code, by the Secretary of Transpor-*
5 *tation with respect to any air carrier or foreign air*
6 *carrier subject to that part;*

7 *(8) under the Packers and Stockyards Act, 1921*
8 *(7 U.S.C. 181 et seq.) (except as provided in section*
9 *406 of that Act (7 U.S.C. 226, 227)), by the Secretary*
10 *of Agriculture with respect to any activities subject to*
11 *that Act;*

12 *(9) under the Farm Credit Act of 1971 (12*
13 *U.S.C. 2001 et seq.) by the Farm Credit Administra-*
14 *tion with respect to any Federal land bank, Federal*
15 *land bank association, Federal intermediate credit*
16 *bank, or production credit association; and*

17 *(10) under the Communications Act of 1934 (47*
18 *U.S.C. 151 et seq.) by the Federal Communications*
19 *Commission with respect to any person subject to the*
20 *provisions of that Act.*

21 *(c) EXERCISE OF CERTAIN POWERS.—For the purpose*
22 *of the exercise by any agency referred to in subsection (b)*
23 *of its powers under any Act referred to in that subsection,*
24 *a violation of this Act is deemed to be a violation of a Fed-*
25 *eral Trade Commission trade regulation rule. In addition*

1 *to its powers under any provision of law specifically re-*
2 *ferred to in subsection (b), each of the agencies referred to*
3 *in that subsection may exercise, for the purpose of enforcing*
4 *compliance with any requirement imposed under this Act,*
5 *any other authority conferred on it by law.*

6 (d) *ACTIONS BY THE COMMISSION.—The Commission*
7 *shall prevent any person from violating this Act in the same*
8 *manner, by the same means, and with the same jurisdic-*
9 *tion, powers, and duties as though all applicable terms and*
10 *provisions of the Federal Trade Commission Act (15 U.S.C.*
11 *41 et seq.) were incorporated into and made a part of this*
12 *Act. Any entity that violates any provision of that subtitle*
13 *is subject to the penalties and entitled to the privileges and*
14 *immunities provided in the Federal Trade Commission Act*
15 *in the same manner, by the same means, and with the same*
16 *jurisdiction, power, and duties as though all applicable*
17 *terms and provisions of the Federal Trade Commission Act*
18 *were incorporated into and made a part of that subtitle.*

19 (e) *AVAILABILITY OF CEASE-AND-DESIST ORDERS AND*
20 *INJUNCTIVE RELIEF WITHOUT SHOWING OF KNOWL-*
21 *EDGE.—Notwithstanding any other provision of this Act,*
22 *in any proceeding or action pursuant to subsection (a), (b),*
23 *(c), or (d) of this section to enforce compliance, through an*
24 *order to cease and desist or an injunction, with section*
25 *5(a)(1)(C), section 5(a)(2), clause (ii), (iii), or (iv) of sec-*

1 *tion 5(a)(4)(A), section 5(b)(1)(A), or section 5(b)(3), nei-*
 2 *ther the Commission nor the Federal Communications Com-*
 3 *mission shall be required to allege or prove the state of mind*
 4 *required by such section or subparagraph.*

5 *(f) ENFORCEMENT BY STATES.—*

6 *(1) CIVIL ACTION.—In any case in which the at-*
 7 *torney general of a State, or an official or agency of*
 8 *a State, has reason to believe that an interest of the*
 9 *residents of that State has been or is threatened or*
 10 *adversely affected by any person who violates para-*
 11 *graph (1) or (2) of section 5(a), who violates section*
 12 *5(d), or who engages in a pattern or practice that*
 13 *violates paragraph (3), (4), or (5) of section 5(a), of*
 14 *this Act, the attorney general, official, or agency of*
 15 *the State, as parens patriae, may bring a civil action*
 16 *on behalf of the residents of the State in a district*
 17 *court of the United States of appropriate*
 18 *jurisdiction—*

19 *(A) to enjoin further violation of section 5*
 20 *of this Act by the defendant; or*

21 *(B) to obtain damages on behalf of residents*
 22 *of the State, in an amount equal to the greater*
 23 *of—*

24 *(i) the actual monetary loss suffered by*
 25 *such residents; or*

1 (ii) the amount determined under
2 paragraph (3).

3 (2) *AVAILABILITY OF INJUNCTIVE RELIEF WITH-*
4 *OUT SHOWING OF KNOWLEDGE.*—Notwithstanding
5 any other provision of this Act, in a civil action
6 under paragraph (1)(A) of this subsection, the attor-
7 ney general, official, or agency of the State shall not
8 be required to allege or prove the state of mind re-
9 quired by section 5(a)(1)(C), section 5(a)(2), clause
10 (ii), (iii), or (iv) of section 5(a)(4)(A), section
11 5(b)(1)(A), or section 5(b)(3).

12 (3) *STATUTORY DAMAGES.*—

13 (A) *IN GENERAL.*—For purposes of para-
14 graph (1)(B)(ii), the amount determined under
15 this paragraph is the amount calculated by mul-
16 tiplying the number of violations (with each sep-
17 arately addressed unlawful message received by
18 or addressed to such residents treated as a sepa-
19 rate violation) by up to \$250.

20 (B) *LIMITATION.*—For any violation of sec-
21 tion 5 (other than section 5(a)(1)), the amount
22 determined under subparagraph (A) may not ex-
23 ceed \$2,000,000.

24 (C) *AGGRAVATED DAMAGES.*—The court
25 may increase a damage award to an amount

1 *equal to not more than three times the amount*
2 *otherwise available under this paragraph if—*

3 *(i) the court determines that the de-*
4 *fendant committed the violation willfully*
5 *and knowingly; or*

6 *(ii) the defendant's unlawful activity*
7 *included one or more of the aggravating*
8 *violations set forth in section 5(b).*

9 *(D) REDUCTION OF DAMAGES.—In assessing*
10 *damages under subparagraph (A), the court may*
11 *consider whether—*

12 *(i) the defendant has established and*
13 *implemented, with due care, commercially*
14 *reasonable practices and procedures de-*
15 *signed to effectively prevent such violations;*
16 *or*

17 *(ii) the violation occurred despite com-*
18 *mercially reasonable efforts to maintain*
19 *compliance the practices and procedures to*
20 *which reference is made in clause (i).*

21 *(4) ATTORNEY FEES.—In the case of any success-*
22 *ful action under paragraph (1), the court, in its dis-*
23 *cretion, may award the costs of the action and rea-*
24 *sonable attorney fees to the State.*

1 (5) *RIGHTS OF FEDERAL REGULATORS.*—*The*
2 *State shall serve prior written notice of any action*
3 *under paragraph (1) upon the Federal Trade Com-*
4 *mission or the appropriate Federal regulator deter-*
5 *mined under subsection (b) and provide the Commis-*
6 *sion or appropriate Federal regulator with a copy of*
7 *its complaint, except in any case in which such prior*
8 *notice is not feasible, in which case the State shall*
9 *serve such notice immediately upon instituting such*
10 *action. The Federal Trade Commission or appro-*
11 *priate Federal regulator shall have the right—*

12 (A) *to intervene in the action;*

13 (B) *upon so intervening, to be heard on all*
14 *matters arising therein;*

15 (C) *to remove the action to the appropriate*
16 *United States district court; and*

17 (D) *to file petitions for appeal.*

18 (6) *CONSTRUCTION.*—*For purposes of bringing*
19 *any civil action under paragraph (1), nothing in this*
20 *Act shall be construed to prevent an attorney general*
21 *of a State from exercising the powers conferred on the*
22 *attorney general by the laws of that State to—*

23 (A) *conduct investigations;*

24 (B) *administer oaths or affirmations; or*

1 (C) *compel the attendance of witnesses or*
2 *the production of documentary and other evi-*
3 *dence.*

4 (7) *VENUE; SERVICE OF PROCESS.—*

5 (A) *VENUE.—Any action brought under*
6 *paragraph (1) may be brought in the district*
7 *court of the United States that meets applicable*
8 *requirements relating to venue under section*
9 *1391 of title 28, United States Code.*

10 (B) *SERVICE OF PROCESS.—In an action*
11 *brought under paragraph (1), process may be*
12 *served in any district in which the defendant—*

13 (i) *is an inhabitant; or*

14 (ii) *maintains a physical place of busi-*
15 *ness.*

16 (8) *LIMITATION ON STATE ACTION WHILE FED-*
17 *ERAL ACTION IS PENDING.—If the Commission, or*
18 *other appropriate Federal agency under subsection*
19 *(b), has instituted a civil action or an administrative*
20 *action for violation of this Act, no State attorney gen-*
21 *eral, or official or agency of a State, may bring an*
22 *action under this subsection during the pendency of*
23 *that action against any defendant named in the com-*
24 *plaint of the Commission or the other agency for any*
25 *violation of this Act alleged in the complaint.*

1 (9) *REQUISITE SCIENTER FOR CERTAIN CIVIL AC-*
 2 *TIONS.—Except as provided in section 5(a)(1)(C), sec-*
 3 *tion 5(a)(2), clause (ii), (iii), or (iv) of section*
 4 *5(a)(4)(A), section 5(b)(1)(A), or section 5(b)(3), in a*
 5 *civil action brought by a State attorney general, or*
 6 *an official or agency of a State, to recover monetary*
 7 *damages for a violation of this Act, the court shall not*
 8 *grant the relief sought unless the attorney general, of-*
 9 *ficial, or agency establishes that the defendant acted*
 10 *with actual knowledge, or knowledge fairly implied on*
 11 *the basis of objective circumstances, of the act or*
 12 *omission that constitutes the violation.*

13 (g) *ACTION BY PROVIDER OF INTERNET ACCESS SERV-*
 14 *ICE.—*

15 (1) *ACTION AUTHORIZED.—A provider of Inter-*
 16 *net access service adversely affected by a violation of*
 17 *section 5(a)(1), 5(b), or 5(d), or a pattern or practice*
 18 *that violates paragraph (2), (3), (4), or (5) of section*
 19 *5(a), may bring a civil action in any district court*
 20 *of the United States with jurisdiction over the*
 21 *defendant—*

22 (A) *to enjoin further violation by the de-*
 23 *fendant; or*

24 (B) *to recover damages in an amount equal*
 25 *to the greater of—*

1 (i) *actual monetary loss incurred by*
 2 *the provider of Internet access service as a*
 3 *result of such violation; or*

4 (ii) *the amount determined under*
 5 *paragraph (3).*

6 (2) *SPECIAL DEFINITION OF “PROCURE”.*—*In*
 7 *any action brought under paragraph (1), this Act*
 8 *shall be applied as if the definition of the term “pro-*
 9 *cure” in section 3(12) contained, after “behalf” the*
 10 *words “with actual knowledge, or by consciously*
 11 *avoiding knowing, whether such person is engaging,*
 12 *or will engage, in a pattern or practice that violates*
 13 *this Act”.*

14 (3) *STATUTORY DAMAGES.*—

15 (A) *IN GENERAL.*—*For purposes of para-*
 16 *graph (1)(B)(ii), the amount determined under*
 17 *this paragraph is the amount calculated by mul-*
 18 *tiplying the number of violations (with each sep-*
 19 *arately addressed unlawful message that is*
 20 *transmitted or attempted to be transmitted over*
 21 *the facilities of the provider of Internet access*
 22 *service, or that is transmitted or attempted to be*
 23 *transmitted to an electronic mail address ob-*
 24 *tained from the provider of Internet access serv-*

1 *ice in violation of section 5(b)(1)(A)(i), treated*
2 *as a separate violation) by—*

3 *(i) up to \$100, in the case of a viola-*
4 *tion of section 5(a)(1); or*

5 *(ii) up to \$25, in the case of any other*
6 *violation of section 5.*

7 *(B) LIMITATION.—For any violation of sec-*
8 *tion 5 (other than section 5(a)(1)), the amount*
9 *determined under subparagraph (A) may not ex-*
10 *ceed \$1,000,000.*

11 *(C) AGGRAVATED DAMAGES.—The court*
12 *may increase a damage award to an amount*
13 *equal to not more than three times the amount*
14 *otherwise available under this paragraph if—*

15 *(i) the court determines that the de-*
16 *fendant committed the violation willfully*
17 *and knowingly; or*

18 *(ii) the defendant's unlawful activity*
19 *included one or more of the aggravated vio-*
20 *lations set forth in section 5(b).*

21 *(D) REDUCTION OF DAMAGES.—In assessing*
22 *damages under subparagraph (A), the court may*
23 *consider whether—*

24 *(i) the defendant has established and*
25 *implemented, with due care, commercially*

1 *reasonable practices and procedures de-*
2 *signed to effectively prevent such violations;*
3 *or*

4 *(ii) the violation occurred despite com-*
5 *mercially reasonable efforts to maintain*
6 *compliance with the practices and proce-*
7 *dures to which reference is made in clause*
8 *(i).*

9 (4) *ATTORNEY FEES.*—*In any action brought*
10 *pursuant to paragraph (1), the court may, in its dis-*
11 *cretion, require an undertaking for the payment of*
12 *the costs of such action, and assess reasonable costs,*
13 *including reasonable attorneys' fees, against any*
14 *party.*

15 **SEC. 8. EFFECT ON OTHER LAWS.**

16 (a) *FEDERAL LAW.*—(1) *Nothing in this Act shall be*
17 *construed to impair the enforcement of section 223 or 231*
18 *of the Communications Act of 1934 (47 U.S.C. 223 or 231,*
19 *respectively), chapter 71 (relating to obscenity) or 110 (re-*
20 *lating to sexual exploitation of children) of title 18, United*
21 *States Code, or any other Federal criminal statute.*

22 (2) *Nothing in this Act shall be construed to affect in*
23 *any way the Commission's authority to bring enforcement*
24 *actions under FTC Act for materially false or deceptive rep-*

1 *resentations or unfair practices in commercial electronic*
2 *mail messages.*

3 *(b) STATE LAW.—*

4 *(1) IN GENERAL.—This Act supersedes any stat-*
5 *ute, regulation, or rule of a State or political subdivi-*
6 *sion of a State that expressly regulates the use of elec-*
7 *tronic mail to send commercial messages, except to*
8 *the extent that any such statute, regulation, or rule*
9 *prohibits falsity or deception in any portion of a*
10 *commercial electronic mail message or information*
11 *attached thereto.*

12 *(2) STATE LAW NOT SPECIFIC TO ELECTRONIC*
13 *MAIL.—This Act shall not be construed to preempt the*
14 *applicability of—*

15 *(A) State laws that are not specific to elec-*
16 *tronic mail, including State trespass, contract,*
17 *or tort law; or*

18 *(B) other State laws to the extent that those*
19 *laws relate to acts of fraud or computer crime.*

20 *(c) NO EFFECT ON POLICIES OF PROVIDERS OF*
21 *INTERNET ACCESS SERVICE.—Nothing in this Act shall be*
22 *construed to have any effect on the lawfulness or unlawfulness,*
23 *under any other provision of law, of the adoption, im-*
24 *plementation, or enforcement by a provider of Internet ac-*

1 cess service of a policy of declining to transmit, route, relay,
2 handle, or store certain types of electronic mail messages.

3 **SEC. 9. DO-NOT-E-MAIL REGISTRY.**

4 (a) *IN GENERAL.*—Not later than 6 months after the
5 date of enactment of this Act, the Commission shall trans-
6 mit to the Senate Committee on Commerce, Science, and
7 Transportation and the House of Representatives Com-
8 mittee on Energy and Commerce a report that—

9 (1) sets forth a plan and timetable for estab-
10 lishing a nationwide marketing Do-Not-E-Mail reg-
11 istry;

12 (2) includes an explanation of any practical,
13 technical, security, privacy, enforceability, or other
14 concerns that the Commission has regarding such a
15 registry; and

16 (3) includes an explanation of how the registry
17 would be applied with respect to children with e-mail
18 accounts.

19 (b) *AUTHORIZATION TO IMPLEMENT.*—The Commis-
20 sion may establish and implement the plan, but not earlier
21 than 9 months after the date of enactment of this Act.

22 **SEC. 10. STUDY OF EFFECTS OF COMMERCIAL ELECTRONIC**
23 **MAIL.**

24 (a) *IN GENERAL.*—Not later than 24 months after the
25 date of the enactment of this Act, the Commission, in con-

1 *sultation with the Department of Justice and other appro-*
2 *priate agencies, shall submit a report to the Congress that*
3 *provides a detailed analysis of the effectiveness and enforce-*
4 *ment of the provisions of this Act and the need (if any)*
5 *for the Congress to modify such provisions.*

6 **(b) REQUIRED ANALYSIS.**—*The Commission shall in-*
7 *clude in the report required by subsection (a)—*

8 (1) *an analysis of the extent to which techno-*
9 *logical and marketplace developments, including*
10 *changes in the nature of the devices through which*
11 *consumers access their electronic mail messages, may*
12 *affect the practicality and effectiveness of the provi-*
13 *sions of this Act;*

14 (2) *analysis and recommendations concerning*
15 *how to address commercial electronic mail that origi-*
16 *nates in or is transmitted through or to facilities or*
17 *computers in other nations, including initiatives or*
18 *policy positions that the Federal Government could*
19 *pursue through international negotiations, fora, orga-*
20 *nizations, or institutions; and*

21 (3) *analysis and recommendations concerning*
22 *options for protecting consumers, including children,*
23 *from the receipt and viewing of commercial electronic*
24 *mail that is obscene or pornographic.*

1 **SEC. 11. IMPROVING ENFORCEMENT BY PROVIDING RE-**
2 **WARDS FOR INFORMATION ABOUT VIOLA-**
3 **TIONS; LABELING.**

4 *The Commission shall transmit to the Senate Com-*
5 *mittee on Commerce, Science, and Transportation and the*
6 *House of Representatives Committee on Energy and*
7 *Commerce—*

8 *(1) a report, within 9 months after the date of*
9 *enactment of this Act, that sets forth a system for re-*
10 *warding those who supply information about viola-*
11 *tions of this Act, including—*

12 *(A) procedures for the Commission to grant*
13 *a reward of not less than 20 percent of the total*
14 *civil penalty collected for a violation of this Act*
15 *to the first person that—*

16 *(i) identifies the person in violation of*
17 *this Act; and*

18 *(ii) supplies information that leads to*
19 *the successful collection of a civil penalty by*
20 *the Commission; and*

21 *(B) procedures to minimize the burden of*
22 *submitting a complaint to the Commission con-*
23 *cerning violations of this Act, including proce-*
24 *dures to allow the electronic submission of com-*
25 *plaints to the Commission; and*

1 (2) a report, within 18 months after the date of
2 enactment of this Act, that sets forth a plan for re-
3 quiring commercial electronic mail to be identifiable
4 from its subject line, by means of compliance with
5 Internet Engineering Task Force Standards, the use
6 of the characters “ADV” in the subject line, or other
7 comparable identifier, or an explanation of any con-
8 cerns the Commission has that cause the Commission
9 to recommend against the plan.

10 **SEC. 12. RESTRICTIONS ON OTHER TRANSMISSIONS.**

11 Section 227(b)(1) of the Communications Act of 1934
12 (47 U.S.C. 227(b)(1)) is amended, in the matter preceding
13 subparagraph (A), by inserting “, or any person outside
14 the United States if the recipient is within the United
15 States” after “United States”.

16 **SEC. 13. REGULATIONS.**

17 (a) *IN GENERAL.*—The Commission may issue regula-
18 tions to implement the provisions of this Act (not including
19 the amendments made by sections 4 and 12). Any such reg-
20 ulations shall be issued in accordance with section 553 of
21 title 5, United States Code.

22 (b) *LIMITATION.*—Subsection (a) may not be construed
23 to authorize the Commission to establish a requirement pur-
24 suant to section 5(a)(5)(A) to include any specific words,
25 characters, marks, or labels in a commercial electronic mail

1 message, or to include the identification required by section
2 5(a)(5)(A) in any particular part of such a mail message
3 (such as the subject line or body).

4 **SEC. 14. APPLICATION TO WIRELESS.**

5 (a) *EFFECT ON OTHER LAW.*—Nothing in this Act
6 shall be interpreted to preclude or override the applicability
7 of section 227 of the Communications Act of 1934 (47
8 U.S.C. 227) or the rules prescribed under section 3 of the
9 Telemarketing and Consumer Fraud and Abuse Prevention
10 Act (15 U.S.C. 6102).

11 (b) *FCC RULEMAKING.*—The Federal Communications
12 Commission, in consultation with the Federal Trade Com-
13 mission, shall promulgate rules within 270 days to protect
14 consumers from unwanted mobile service commercial mes-
15 sages. The Federal Communications Commission, in pro-
16 mulgating the rules, shall, to the extent consistent with sub-
17 section (c)—

18 (1) provide subscribers to commercial mobile
19 services the ability to avoid receiving mobile service
20 commercial messages unless the subscriber has pro-
21 vided express prior authorization to the sender, except
22 as provided in paragraph (3);

23 (2) allow recipients of mobile service commercial
24 messages to indicate electronically a desire not to re-

1 *ceive future mobile service commercial messages from*
2 *the sender;*

3 (3) *take into consideration, in determining*
4 *whether to subject providers of commercial mobile*
5 *services to paragraph (1), the relationship that exists*
6 *between providers of such services and their sub-*
7 *scribers, but if the Commission determines that such*
8 *providers should not be subject to paragraph (1), the*
9 *rules shall require such providers, in addition to com-*
10 *plying with the other provisions of this Act, to allow*
11 *subscribers to indicate a desire not to receive future*
12 *mobile service commercial messages from the*
13 *provider—*

14 (A) *at the time of subscribing to such serv-*
15 *ice; and*

16 (B) *in any billing mechanism; and*

17 (4) *determine how a sender of mobile service*
18 *commercial messages may comply with the provisions*
19 *of this Act, considering the unique technical aspects,*
20 *including the functional and character limitations, of*
21 *devices that receive such messages.*

22 (c) *OTHER FACTORS CONSIDERED.—The Federal*
23 *Communications Commission shall consider the ability of*
24 *a sender of a commercial electronic mail message to reason-*

1 ably determine that the message is a mobile service commer-
2 cial message.

3 (d) **MOBILE SERVICE COMMERCIAL MESSAGE DE-**
4 **FINED.**—*In this section, the term “mobile service commer-*
5 *cial message” means a commercial electronic mail message*
6 *that is transmitted directly to a wireless device that is uti-*
7 *lized by a subscriber of commercial mobile service (as such*
8 *term is defined in section 332(d) of the Communications*
9 *Act of 1934 (47 U.S.C. 332(d)) in connection with such*
10 *service.*

11 **SEC. 15. SEPARABILITY.**

12 *If any provision of this Act or the application thereof*
13 *to any person or circumstance is held invalid, the remain-*
14 *der of this Act and the application of such provision to*
15 *other persons or circumstances shall not be affected.*

16 **SEC. 16. EFFECTIVE DATE.**

17 *The provisions of this Act, other than section 9, shall*
18 *take effect on January 1, 2004.*

Attest:

Secretary.

108TH CONGRESS
1ST SESSION

S. 877

**SENATE AMENDMENT TO
HOUSE AMENDMENT**