

SUMMARY OF SENATOR SCHUMER’S SPAM ACT (S. 1231)

PROVISION	S. 1231 AS INTRODUCED JUNE 11, 2003
TITLE	Stop Pornography and Abusive Marketing Act (SPAM Act)
CONGRESSIONAL FINDINGS	Makes 7 findings relating to the need for the legislation
PURPOSES	<ol style="list-style-type: none"> 1) To preserve e-mail as a vital tool in interstate commerce by reducing the costs associated with unsolicited commercial e-mail (“UCE”), reducing the amount of UCE, and eliminating misleading content in all commercial e-mail, and 2) To give consumers control over their in-boxes.
DEFINITIONS	Defines various terms, including “affirmative consent,” “commercial electronic mail message,” “implied consent,” “functioning return electronic mail address,” “unsolicited commercial electronic mail message” and “header information.”
AFFIRMATIVE CONSENT	<p>Affirmative consent requires clear and conspicuous notice to the recipient:</p> <ol style="list-style-type: none"> 1) That the recipient is granting permission to receive commercial e-mails; 2) As to the types of commercial e-mails that are covered; and 3) What additional senders are covered by the recipient’s consent.
COMMERCIAL ELECTRONIC MAIL MESSAGE	Defined as e-mail, the primary purpose of which is to advertise or promote, for a commercial purpose, a commercial product or service.

IMPLIED CONSENT	Defined as a business transaction between the sender and recipient within previous 3 years, where at the time of the transaction or thereafter, the recipient was given an opportunity to opt-out.
ELECTRONIC MAIL SERVICE	A service for the transmission of e-mails. The service must retain identifying information about the person making use of the service and co-operate with law enforcement actions brought under the Act.
UNSOLICITED COMMERCIAL E-MAIL MESSAGE	UCE is commercial e-mail sent without recipient’s prior affirmative or implied consent, or e-mail sent after recipient expressed a desire to not receive commercial e-mail from the sender. Excludes e-mail sent by lawful owners of copyright, patent, publicity or trademark rights to an unauthorized user of protected material notifying such user that such use is unauthorized.
ESTABLISHMENT OF NATIONAL NO-SPAM REGISTRY AND ENFORCEMENT	<ol style="list-style-type: none"> 1) Federal Trade Commission (“FTC”) is required to establish a registry (the “Registry”) of e-mail addresses of persons who do not wish to receive UCE. 2) Except as authorized by the FTC, it is unlawful to send UCE to an address that has been registered on the Registry. 3) FTC shall establish procedures for reporting violations of provisions of the Act relating to the Registry, including links on FTC’s website and a toll-free telephone number. 4) FTC may impose civil penalty of up to \$5,000 for each violation, and up to \$100,000 for each unauthorized use of the Registry.
REGULATIONS REGARDING REGISTRY	<ol style="list-style-type: none"> 1) FTC to issue regulations within 180 days for establishing and maintaining the Registry, providing the Registry to marketers, protecting the Registry from unauthorized use and enforcing provisions regarding the Registry. 2) FTC may create categories of e-mail for which recipients who are minors may receive protection, including products and services that a minor is prohibited by law from purchasing and e-mail that contains or advertises adult content or links to adult content. Senders are required to honor such categories regardless of implied or actual consent given by the minor. 3) FTC to assess fees on users of the Registry.

SAFE HARBOR	No violation if the recipient’s address has been on the Registry for less than 30 days, or if the sender reasonably relies on the Registry and takes reasonable measures to comply with the Act.
LABELING REQUIREMENTS FOR UCE	<ol style="list-style-type: none"> 1) Unlawful to send UCE unless the message clearly and conspicuously states “ADV:” as the first characters in the subject line. 2) Labeling requirement does not apply if sender is a member of a self-regulatory organization (“SRO”) approved by FTC, has agreed in writing to meet the SRO’s requirements, and the sender is deemed by the SRO to be in full compliance with its requirements.
SELF-REGULATORY ORGANIZATIONS	<ol style="list-style-type: none"> 1) FTC may approve applications by entities that wish to be designated SROs. 2) In order to qualify, an SRO must have guidelines and procedures requiring participants to: <ol style="list-style-type: none"> a) Comply with the Act; b) Provide information in each e-mail identifying the sender; c) Provide notice of how addresses are collected, used and to whom disclosed; d) Provide recipients with clear and conspicuous choices regarding the use of their e-mail addresses; e) Enable customers to correct or modify their e-mail addresses or any of the choices made regarding use and disclosure of such addresses; f) Take reasonable steps to prevent unauthorized disclosure or release of addresses; g) Provide clear and conspicuous information in each e-mail on how recipients can file a complaint regarding the failure of a participant to follow the SRO’s requirements; and h) Provide an agent for service of process and consent to suit in the U.S. 3) The SRO must require participants to provide a written certification from a senior officer stating that the participant has procedures that satisfy the SRO’s guidelines, requirements and restrictions, and the participant has taken good faith efforts to maintain compliance. 4) The SRO must implement procedures and requirements to provide for subsequent periodic review of the policy and practices of a participant to ensure compliance with the SRO’s requirements.

	<p>5) The SRO must implement provisions to identify participation in the program, including a seal that can be recognized by filtering technology.</p> <p>6) The SRO must implement a dispute resolution process for recipients of UCE. The Act specifies timeframes and procedures for resolving disputes, as well as an appeal process to the FTC.</p> <p>7) Eligibility, compliance and dispute resolution mechanisms and determinations are to be made by persons who are independent of the program participant.</p> <p>8) FTC may revoke the approval of an SRO that fails to meet the requirements of the Act.</p> <p>9) FTC may compel an SRO to provide proprietary information or personally identifiable information of consumers to FTC.</p> <p>10) It is unlawful for a person to misrepresent that it is a participant in SRO.</p>
COMPLIANCE WITH ISP POLICIES	It is unlawful to send commercial e-mail or UCE in violation of an ISP's policies.
VALID INFORMATION	It is unlawful to send commercial e-mail or UCE which contains false, misleading or deceptive information in the subject line, header or router information, or in the body of the message.
OPT-OUT	<p>1) All commercial e-mail and UCE must contain a return e-mail address or other Internet-based mechanism that a recipient may use to opt-out of future UCE from the sender. There is an exception if the address or mechanism is unexpectedly and temporarily unable to receive e-mail due to technical problems if such problems are corrected in a reasonable time.</p> <p>2) All commercial e-mail and UCE must contain clear and conspicuous opportunity to opt-out of future commercial e-mail and UCE from the sender.</p> <p>3) It is unlawful to send commercial e-mail or UCE to the recipient after the recipient has opted-out.</p>

<p>ILLEGAL HARVESTING OF E-MAIL ADDRESSES</p>	<p>It is unlawful to send, or assist in sending, commercial e-mail or UCE if the sender knows or acts with reckless disregard as to whether:</p> <ol style="list-style-type: none"> 1) The recipient's e-mail address was obtained using automated means from an Internet website or proprietary online service; 2) The website or proprietary online service contained a notice stating that the site or service will not give, sell or transfer addresses to any other party for the purpose of sending UCE; or 3) The recipient's e-mail address was obtained using automated generation of addresses.
<p>SENDER'S POSTAL ADDRESS</p>	<p>It is unlawful to send commercial e-mail or UCE without clearly and conspicuously identifying the sender's valid, physical address.</p>
<p>AGENCY ENFORCEMENT</p>	<ol style="list-style-type: none"> 1) FTC enforces the Act, except as specified below. 2) The federal banking agencies enforce the Act against depository institutions and the SEC enforces the Act against securities firms. 3) The state insurance authority of the state of domicile enforces the Act against insurers.
<p>ENFORCEMENT BY STATES</p>	<ol style="list-style-type: none"> 1) State attorneys general may bring enforcement actions in state or federal court. Remedies include injunctive relief or recovery of the greater of actual losses or up to \$10 for each violation, and attorneys' fees. 2) In determining the penalty, courts are to take into account the degree of culpability, prior conduct, ability to pay and economic gain. 3) State attorney general must inform FTC before initiating action; FTC may intervene in the litigation. 4) State attorney general may not bring an action against a party while a federal action (by FTC or appropriate federal regulator) is pending.

<p>ENFORCEMENT BY ISPS</p>	<ol style="list-style-type: none"> 1) ISP may bring action in state or federal court. Remedies include injunctive relief or recovery of the greater of actual losses or up to \$10 for each violation, and attorneys' fees. 2) In determining the penalty, courts are to take into account the degree of culpability, prior conduct, ability to pay and economic gain.
<p>ACTION BY INDIVIDUAL CONSUMERS</p>	<ol style="list-style-type: none"> 1) A recipient of an e-mail may bring action in state court. Remedies include injunctive relief and monetary damages of the greater of actual losses or up to \$1,000 and attorneys' fees for each violation. In determining the penalty, courts are to take into account the degree of culpability, prior conduct, ability to pay and economic gain. 2) No action may be brought by recipient against ISP or an electronic mail service provider that is involved in only the routine transmission of e-mail. 3) No class action is permitted by recipients.