S. 877 (BURNS-WYDEN) CAN-SPAM ACT OF 2003
CHANGES MADE BY THE SENATE COMMERCE, SCIENCE AND TRANSPORTATION COMMITTEE ON JUNE 19, 2003

PROVISION	S. 877 AS INTRODUCED APRIL 10, 2003	S. 877 AS PASSED BY THE SENATE COMMERCE COMMITTEE
TITLE	Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act of 2003)	Same
CONGRESSIONAL FINDINGS	Makes 11 findings relating to the need for the legislation.	Essentially the same
PUBLIC POLICY DETERMINATIONS	Senders of unsolicited commercial e-mail should not mislead recipients as to the source and content of e-mail, and recipients should have the right to opt-out.	Same
DEFINITIONS	Defines various terms, including "affirmative consent," "implied consent," "commercial electronic mail message" and "unsolicited commercial electronic mail message."	Definition of "affirmative consent" also permits transfer of a recipient's e-mail address if notice of possible transfer was provided at time consent was communicated. Adds definition for "procure." Other definitions are essentially the same.
DEFINITION OF COMMERCIAL ELECTRONIC MAIL MESSAGE	Defined as e-mail, the *primary* purpose of which is to advertise or promote a commercial product or service.	Same

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DEFINITION OF IMPLIED CONSENT	1) Defined as a commercial e-mail sent within 3 years of a business transaction between sender and recipient, *and* recipient is given an opportunity to opt-out at the time of the transaction or in the first e-mail after the Act's effective date. 2) If a company's division or line of business holds itself out as a "particular" line of business or division, rather than as the entity of which it is a part, the line of business or division is treated as the sender of the e-mail. 3) No provision.	1) Same 2) Same 3) A visit to a website where recipient did not knowingly submit an e-mail address does not constitute implied consent.
DEFINITION OF TRANSACTIONAL OR RELATIONSHIP MESSAGES	"Transactional or relationship messages" are e-mails, the primary purpose of which is to facilitate, complete or confirm, or provide or request information relating to, an existing commercial transaction or relationship.	Also includes e-mails for the primary purpose of: 1) Providing information regarding warranty, product recall, or safety or security for products or services used or purchased by recipient; 2) Providing notification concerning a change in the terms or features, or a change in recipient's standing or status, or account balance or statement regarding, a subscription, membership, account, loan or comparable ongoing commercial relationship; and 3) Delivering goods or services that recipient has previously agreed to with sender.

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DEFINITION OF UNSOLICITED COMMERCIAL E-MAIL MESSAGE	A message sent without recipient's prior affirmative or implied consent, and is not a "transactional or relationship message."	Same
CRIMINAL PROHIBITION AND PENALTIES	1) Makes it a crime to send an *unsolicited* commercial e-mail with knowledge and intent that the header information is materially false or misleading. 2) Punishable by up to one year imprisonment and a fine up to $5,000.	Similar, but applies to *any* commercial e-mail messages with such knowledge and intent, not merely *unsolicited* commercial e-mail messages.

CIVIL PROHIBITIONS	1) Unlawful to initiate a commercial e-mail that contains header information that is materially or intentionally false or misleading.
	
	2) Unlawful to initiate a commercial e-mail that contains a misleading subject heading.
		1) Similar, but states that a "from" line that accurately identifies any person who initiated the message shall not be considered false or misleading.
		
		2) (McCain)
		
		  a) Unlawful for a person to promote a business, or goods or services in an e-mail which contains materially false or misleading header information if the person:
		
		    i) Knows or should have known in ordinary course that the goods or services were being promoted in the message;
		
		    ii) Received or expected to receive economic benefit from such promotion; and
		
		    iii) Took no reasonable action to prevent or detect and report the transmission to FTC.

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		b) Liability for violation shall be imputed to a third party that has a greater than 50 percent ownership or economic interest in the business of the person violating the provision, or has actual knowledge that goods or services are promoted in a commercial e-mail that violates this provision, and receives or expects to receive an economic benefit from such promotion. c) States and ISPs may not enforce this provision.
	3) Unlawful to initiate an unsolicited commercial e-mail unless it contains a functioning return address to which recipient can send a reply to opt-out from future mail from sender and affiliates.	3) Similar, but applies to the transmission of *any* commercial e-mail message; expressly states that it does not apply to a transactional or relationship message.
	4) Unlawful to send an unsolicited commercial e-mail to someone who has opted-out. Sender has 10 days to process opt-out request.	4) Similar. Makes it unlawful to transfer or release the e-mail address of a person who has opted-out for any purpose other than compliance with the Act or other provision of law.
	5) Unlawful to send unsolicited commercial e-mail unless the message: a) Clearly and conspicuously indicates it is an advertisement or solicitation; b) Provides clear and conspicuous notice of opportunity to opt-out from receiving further e-mails; and c) Indicates the initiator's physical mailing address.	5) Same

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	6) It is a defense if the sender has established and implemented reasonable practices and procedures to prevent violations and the violation occurred despite good faith efforts to comply.	6) Similar
	7) Unlawful to initiate an unsolicited commercial e-mail if sender knows, or acts with reckless disregard, that the address was illegally "harvested" from a website or online service of another person.	7) Unlawful to send or assist in the origination of such messages *where the person knows, should have known or consciously avoids knowing* that the addresses were harvested by automated means from a website, online service or by automated generation of addresses.
	8) No provision	8) Unlawful to use scripts to establish multiple e-mail accounts from which unsolicited commercial e-mail is sent in violation of the misleading header, subject heading, functioning return address, opt-out, and clear and conspicuous disclosure provisions.
	9) No provision	9) Unlawful to knowingly relay or retransmit unsolicited commercial e-mail that violates the above provisions.
ENFORCEMENT AND CIVIL PENALTIES	1) Federal Trade Commission ("FTC") is empowered to enforce violations as unfair or deceptive acts or practices under the FTC Act, except against banks, securities firms and insurers.	1) Same
	2) The state insurance authority in the state of domicile enforces the Act for insurers.	2) Same
	3) The federal banking agencies enforce the Act for depository institutions; the SEC enforces the Act for securities firms.	3) Same

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	4) Establishes a private right of action for ISPs if ISP is adversely affected by a violation. Remedies include injunctive relief and recovery of the greater of actual losses or $10 for each violation (up to $500,000), and attorneys' fees. The maximum recoverable increases to $1.5 million if the violation is willful and knowing.	4) Similar, but damages are calculated by multiplying number of violations by up to $100 (for violation of prohibition on e-mails with a false or misleading header) or by $25, up to a maximum of $1 million for other violations. (There is no cap on damages for violations involving false or misleading headers.) The $1 million limit is raised to $3 million where the violation was willful and knowing or involved address harvesting or multiple e-mail accounts from which unlawful e-mails were sent.
	5) Does not mention other private rights of action.	5) Same
STATE ENFORCEMENT	1) State attorneys general may bring enforcement actions in state or federal court: a) To enforce compliance, or b) Actual monetary losses, or c) For damages of $10 for each violation, up to a maximum of $500,000, or up to $1.5 million if the violation was willful and knowing.	1) Similar, but damages are calculated by multiplying number of violations by up to $100 (for violation of prohibition on e-mails with a false or misleading header) or by $25, up to a maximum of $1 million for other violations. (There is no cap on damages for violations involving false or misleading headers.) The $1 million limit is raised to $3 million where the violation was willful and knowing or involved address harvesting or multiple e-mail accounts from which unlawful e-mails were sent.
	2) States may also recover attorneys' fees.	2) Same
	3) State attorney general must inform FTC or appropriate federal regulator before initiating action; FTC or federal regulator may intervene in the litigation.	3) Same
	4) State attorney general may not bring an action against a party while a federal action is pending.	4) Same

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EFFECT ON OTHER LAWS	Supersedes any state or local law relating to the sending of commercial e-mail except those relating to trespass, contract or tort law, or acts of fraud or theft.	Supersedes any state or local law or regulation that *expressly* regulates the sending of commercial e-mail, except those prohibiting false or deceptive commercial e-mail. Does not preempt state laws relating to trespass, contract or tort law, or state laws relating to acts of fraud or computer crime.
RECOMMENDATIONS BY FTC WITHIN 6 MONTHS OF IMPLEMENTATION OF DO-NOT-CALL LIST	No provision	Requires FTC to recommend a plan and timetable for creating a nationwide marketing do-not-e-mail list modeled on the do-not-call list, or an explanation of any issues that cause the FTC to recommend against creating such a list.
STUDY	1) FTC, in consultation with the Justice Department and other appropriate agencies, must conduct a study in 24 months analyzing the effectiveness and enforcement of the Act and the need to modify it. 2) No provision	1) Similar. Also requires study on addressing unsolicited commercial e-mail originating in or through foreign countries and options for protecting consumers, including children, from receiving obscene or pornographic unsolicited e-mail. 2) (Cantwell) Requires analysis and recommendations concerning alternative proposals for reducing unsolicited commercial e-mail, including a do-not-e-mail list and a prohibition on the transmission of unsolicited commercial e-mail absent a pre-existing business relationship and industry self-regulation models.
EFFECTIVE DATE	120 days after enactment.	Same