

# Information Technology

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## Keeping SPAM in the Can? An Overview of the U.S. CAN-SPAM Act

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### 1. INTRODUCTION

On January 1, 2004 a new law in the United States of America ("U.S.") meant to address the problems associated with the ever-increasing amount of spam received by individuals and organizations came into effect. On that date, the *Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003* ("CAN-SPAM" or the "Act"), signed into law by President George W. Bush back on December 16, 2003 after near-unanimous approval by both houses of Congress (and after nearly six (6) years worth of legislative efforts), had the force of law. As the name of the law suggests, CAN-SPAM was designed to address the increased amount of unsolicited e-mail that individuals and organizations were receiving. As it is the first ever federal anti-spam legislation, the purpose of this piece is to review, briefly, some of the key elements of the Act and examine some of the criticisms of the Act that have already emerged.

### 2. CAN-SPAM

#### (a) General

CAN-SPAM is a relatively short piece of federal legislation consisting of 16 sections, with the official US Government Printing Office version covering approximately 20 pages.<sup>1</sup> The White House press release of December 16, 2003 described CAN-SPAM as establishing "a framework of administrative, civil, and criminal tools to

help America's consumers, business, and families combat unsolicited commercial e-mail, known as spam."<sup>2</sup> It should be noted that CAN-SPAM does not place an outright ban on spam and in fact, CAN-SPAM acknowledges that individuals and organizations may continue to send unsolicited e-mails.<sup>3</sup> Indeed, the Act sets out the parameters within which senders of commercial electronic mail are to operate. Nonetheless, it is arguable that the Act takes some important steps in reducing the amount of spam that an individual or corporation may receive.

#### (b) Purpose

Section 2 of the Act, entitled "Congressional Findings and Policy" sets out the context for the Act. For example, the Act recognizes the importance of e-mail communication in the daily lives of Americans and how spam interferes with and interrupts the usefulness of e-mail as a communications tool. This is because spam requires recipients to spend valuable time and resources to filter it out of e-mail inboxes. The Act also recognizes that spam places additional burdens on America's technology infrastructure and that many are forced to incur additional costs that, other things being equal, they would not have had to incur, just in order to deal with spam. These are some of the reasons for the enactment of the law. Nonetheless, the Act also concedes that CAN-SPAM in of itself will not solve the



problems related to spam; rather, it recognizes the importance of obtaining the co-operation of other countries in the fight against spam and the necessity of developing technological solutions to address the problems raised by spam. Indeed, the co-authors of the legislation, Senators Ron Wyden (D-ORE.) and Conrad Burns (R-MONT.), do not claim that the “Can-Spam Act...offers a silver bullet that will stop all unwanted e-mail...[but rather]..the law will offer important new tools in the fight against spam.”<sup>4</sup>

In terms of the necessity of enacting federal legislation, the Act makes it clear that, while a number of different states had already enacted their own legislation to regulate spam, given the differences between the various pieces of legislation, it would be difficult for law-abiding businesses to know with which statute they are required to comply.<sup>5</sup> These discrepancies, according to Congress, suggest, “a substantial government interest in regulation of commercial electronic mail on a nationwide basis.”<sup>6</sup> As such, Section 8 of the law clearly provides that the “Act supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.”<sup>7</sup>

### **(c) Requirements and Prohibitions**

Section 5 of the Act sets out the various mechanisms intended to protect users of e-mail against spam. As indicated earlier, CAN-SPAM does not provide for a blanket prohibition against spam but requires that those individuals and organizations that do send out spam (“spammers”), do so in accordance with the prohibitions and requirements found in the Act, including:

- (i) a prohibition against using false or misleading transmission information (i.e. the header information cannot mislead the recipient of an e-mail about the sender of the e-mail)<sup>8</sup>;
- (ii) a prohibition against using deceptive subject headings (i.e. the subject heading of an e-mail cannot mislead the recipient, acting reasonably under the circumstances, of such e-mail, about a material fact regarding the contents or subject matter of the message)<sup>9</sup>;

(iii) a prohibition against the practice of e-mail harvesting (i.e. where spammers obtain e-mail addresses from chat rooms, websites and other sources without permission)<sup>10</sup>;

(iv) a prohibition against transmission of spam after an objection is made pursuant to the mechanism as described in 2(c)(v)<sup>11</sup>;

(v) a requirement to include a functioning return e-mail address, displayed clearly and conspicuously so that a recipient of spam can submit a reply e-mail message requesting not to receive further spam<sup>12</sup>;

(vi) a requirement to include certain identifying information about spammers of spam including a physical postal address of the sender as well as providing the recipient with an option to “opt-out” from receiving spam in the future from that sender<sup>13</sup>; and

(vii) a requirement to place warning labels on spam containing sexually-oriented material.<sup>14</sup>

In addition to these prohibitions and requirements, the Act also establishes a timetable for some federal agencies to take action in the fight against spam. For example, there is a requirement that within nine (9) months of the law coming into force, the Federal Communications Commission (FCC) develop certain rules to prevent consumers from receiving spam on mobile communication devices such as mobile telephones. Of greater interest is the requirement that no later than six (6) months after the Act becomes effective, the Federal Trade Commission (FTC), the federal agency primarily responsible for the enforcement of the Act, present a report to Congress with respect to a plan and timetable for establishing a nationwide “Do-Not-E-Mail” registry.<sup>15</sup> Such a registry would be in effect no earlier than nine (9) months from the date that the Act becomes law. Finally, the Act establishes provisions whereby, pursuant to recommendations of the Department of Justice and other government agencies, Congress could modify the Act in order to better address the problems of spam.

### **(d) Penalties and remedies**

Violators of CAN-SPAM can expect that if they are found in violation of the Act, they may be subject to some severe penalties. CAN-SPAM enables the FTC working in conjunction with the Department

of Justice, to prosecute perpetrators of spam. Depending on the circumstances, spammers are potentially liable to imprisonment for up to five (5) years and/or fines.<sup>16</sup> Under the Act, the scope of the fines, depending on the circumstances, could amount to up to \$2 million. Other penalties include the forfeiture of property (real and personal) traceable to gross proceeds received as a result of sending spam.

Furthermore, in addition to the FTC enforcing the Act, the Act explicitly authorizes a number of other federal agencies to enforce the Act against those parties under such agency's jurisdiction. For example, it is the Securities and Exchange Commission that may prosecute investment brokers or dealers who send spam contrary to the Act. Similarly, the FCC could prosecute those parties subject to the *Communications Act* of 1934 if they are in violation of the Act.

### 3. CRITICISM

Reaction to the enactment of CAN-SPAM has been decidedly mixed. While organizations such as Yahoo! have publicly lauded the implementation of CAN-SPAM as being an important development, others are much more critical and feel that the Act is counterproductive in the fight against spam. The criticisms include the following:

(a) *Spam is not banned.* Critics point out the most obvious flaw of CAN-SPAM – the fact that it allows spammers to continue sending spam. Indeed, so long as spammers abide by the prohibitions and restrictions set out in the Act, spammers are free to continue to deluge e-mail inboxes with “legal” spam. As such, according to the Coalition Against Unsolicited Commercial E-mails, CAN-SPAM “fails the most basic tests for anti-spam legislation; it doesn't tell anybody not to spam”.<sup>17</sup>

(b) *It is counter-intuitive.* Many critics have suggested that the “opt-in” consent provisions that various state laws had required, prior to being pre-empted by the federal legislation, was preferable as it gave greater control to the recipients of spam as to whether or not they wanted to receive spam. Moreover, the “opt-out” provisions contained in the Act requires individuals to ignore years of anti-spam training and practice – that in order to avoid receiving further spam a recipient is not to respond to spam for fear that it will alert the spammer that the recipient's e-mail address is active.<sup>18</sup>

(c) *It pre-empts stricter laws.* Arguably, CAN-SPAM pre-empted laws that provided greater protections to recipients of spam. As noted above, some state anti-spam laws contained “opt-in” provisions whereby recipients would have to actively indicate that they would like to receive spam. Some of these statutes also contained provisions that required spammers to label the spam (i.e. with an ADV label: or another similar label) that they were sending. Additionally a number of states, such as California, had more substantial penalties for spammers, including granting a private right of action to the recipients of spam to sue spammers. However, with the enactment of CAN-SPAM, all of these protections and remedies were lost.

(d) *The Do Not Spam List provisions are ineffective.* While supporters of CAN-SPAM laud the Act as establishing the framework for a national Do Not Spam registry similar to the federal Do Not Call list, critics are quick to point out that the law merely requires that the FTC report on the mechanisms for the establishment of such a list within 6 months of January 1, 2004 rather than ordering the FTC to create the list. Moreover, while Timothy Muris, FTC Chairman, indicated that he would do his best to enforce the legislation, he has also been one of the most vocal critics of the Act and has indicated that the Do Not Spam list would be “difficult to create and virtually impossible to enforce.”<sup>19</sup>

### 4. CONCLUSION

The foregoing demonstrates that while the criticisms of the Act are valid, the prohibitions and requirements contained in the Act do provide important “first steps” in a legal battle against spam. Indeed, news reports post-January 1, 2004 suggest that it is unclear whether or not CAN-SPAM will succeed. For example, one anti-spam software company reported that 99% of spam sent after January 1, 2004 was still non-compliant with the federal law.<sup>20</sup> However a story in the *New York Times* on January 7, 2004 suggested that spammers were at least aware of the law and expressed some concern with its provisions.<sup>21</sup> Thus, as with other laws meant to address the digital economy, only time will tell whether or not the law will be effective.

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<sup>1</sup> Available at <http://www.spamlaws.com/federal/108s877enrolled.pdf> (hereinafter, "CAN-SPAM").

<sup>2</sup> Available at <http://www.whitehouse.gov/news/releases/2003/12/20031216-4.html>. For the purposes of this piece, "spam" will refer to unsolicited *commercial* electronic mail, which is defined in the Act as meaning "any electronic mail message that primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose)." See Section 3(2) of the Act.

<sup>3</sup> In fact, some commentators have suggested that all that CAN-SPAM achieves is a requirement that all spam be truthful rather than banning spam and as such, this is a primary criticism of the Act. This will be discussed in greater detail in Section 3(a), *infra*.

<sup>4</sup> R. Wyden and C. Burns, "Why we've finally canned spam" December 16, 2003 available at <http://news.com.com/20-10-1028-51256999.html>

<sup>5</sup> CAN-SPAM, Section 2(a)(11).

<sup>6</sup> *Ibid.*, Section 2(b)(1). But as it will be examined in Section 3(b), *infra*, critics have charged that the use of the federal supremacy doctrine to pre-empt existing state laws dealing with spam, may actually be detrimental to the fight against spam as many states, such as California, had enacted legislation that were said to be less-lenient towards spam as well providing additional remedies.

<sup>7</sup> CAN-SPAM, Section 8(2)(b).

<sup>8</sup> *Ibid.*, Section 5(a)(1).

<sup>9</sup> *Ibid.*, Section 5(a)(2).

<sup>10</sup> *Ibid.*, Section 5(b).

<sup>11</sup> *Ibid.*, Section 5(a)(4).

<sup>12</sup> *Ibid.*, Section 5(a)(3).

<sup>13</sup> *Ibid.*, Section 5(a)(5).

<sup>14</sup> *Ibid.*, Section 5(d).

<sup>15</sup> *Ibid.*, Section 9(a). Although, as will be discussed in Section 3(d), *infra*, the viability of such a list is of questionable value given

<sup>16</sup> *Ibid.*, Section 4(a).

<sup>17</sup> D. McGuire, "New Law Won't Can Spam, Critics Say" available at <http://www.washingtonpost.com/ac2/wp-dyn/A5943-2003Dec16?language=printer> (hereinafter "*New Law*").

<sup>18</sup> T. Bridis, "Congress OKs National Anti-Spam Bill", *eWeek Enterprise News & Reviews*, January 8, 2004 available at [http://www.eweek.com/print\\_article/0,3048,a=114202,00.asp](http://www.eweek.com/print_article/0,3048,a=114202,00.asp).

<sup>19</sup> *New Law*, *supra* note xvii.

<sup>20</sup> "MX Logic Finds Nearly 100 percent of spam not compliant with new CAN-SPAM law" available at [http://www.mxlogic.com/news\\_events/](http://www.mxlogic.com/news_events/)

01\_08\_04.html.

<sup>21</sup> S. Hansell, "Spam Keeps Coming, but Its Senders Are Wary", *New York Times*, January 7, 2004 available at [www.nytimes.com](http://www.nytimes.com).