AMENDMENT NO._________ Calendar No.______

Purpose: In the nature of a substitute.

IN THE SENATE OF THE UNITED STATES—114th Cong., 2d Sess.

S. 356

To improve the provisions relating to the privacy of electronic communications.

Referred to the Committee on ______________________ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended
to be proposed by ______________________

Viz:

1 Strike all after the enacting clause and insert the fol-
2 lowing:

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the “Email Privacy Act”.

5 SEC. 2. VOLUNTARY DISCLOSURE CORRECTIONS.

6 Section 2702 of title 18, United States Code, is
7 amended—

8 (1) in subsection (a)—

9 (A) in paragraph (1)—

10 (i) by striking “divulge” and inserting

11 “disclose”; and
(ii) by striking “while in electronic storage by that service” and inserting “that is in electronic storage with or otherwise stored, held, or maintained by that service”;

(B) in paragraph (2)—

(i) by striking “to the public”;

(ii) by striking “divulge” and inserting “disclose”; and

(iii) by striking “which is carried or maintained on that service” and inserting “that is stored, held, or maintained by that service”; and

(C) in paragraph (3)—

(i) by striking “divulge” and inserting “disclose”; and

(ii) by striking “a provider of” and inserting “a person or entity providing”;

(2) in subsection (b)—

(A) in the matter preceding paragraph (1), by inserting “wire or electronic” before “communication”; and

(B) by amending paragraph (1) to read as follows:
“(1) to an originator, addressee, or intended recipient of such communication, to the subscriber or customer on whose behalf the provider stores, holds, or maintains such communication, or to an agent of such addressee, intended recipient, subscriber, or customer;”; and

(C) by amending paragraph (3) to read as follows:

“(3) with the lawful consent of the originator, addressee, or intended recipient of such communication, or of the subscriber or customer on whose behalf the provider stores, holds, or maintains such communication;”;

(3) in subsection (c) by inserting “wire or electronic” before “communications”;

(4) in each of subsections (b) and (c), by striking “divulge” and inserting “disclose”; and

(5) in subsection (c), by amending paragraph (2) to read as follows:

“(2) with the lawful consent of the subscriber or customer;”.

SEC. 3. AMENDMENTS TO REQUIRED DISCLOSURE SECTION.

Section 2703 of title 18, United States Code, is amended—
(1) by striking subsections (a) through (c) and inserting the following:

“(a) CONTENTS OF WIRE OR ELECTRONIC COMMUNICATIONS IN ELECTRONIC STORAGE.—

“(1) WARRANT.—Except as provided in subsections (i) and (j), a governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication that is in electronic storage with or otherwise stored, held, or maintained by that service only if the governmental entity obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) that—

“(A) is issued by a court of competent jurisdiction; and

“(B) may indicate the date by which the provider shall make the disclosure to the governmental entity.

“(2) PROMPT RESPONSE.—In the absence of a date on the warrant indicating the date by which the provider shall make disclosure to the governmental entity, the provider shall promptly respond to the warrant.
“(b) CONTENTS OF WIRE OR ELECTRONIC COMMUNICATIONS IN A REMOTE COMPUTING SERVICE.—

“(1) IN GENERAL.—

“(A) WARRANT.—Except as provided in subsections (i) and (j), a governmental entity may require the disclosure by a provider of remote computing service of the contents of a wire or electronic communication that is stored, held, or maintained by that service only if the governmental entity obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) that—

“(i) is issued by a court of competent jurisdiction; and

“(ii) may indicate the date by which the provider shall make the disclosure to the governmental entity.

“(B) PROMPT RESPONSE.—In the absence of a date on the warrant indicating the date by which the provider shall make disclosure to the governmental entity, the provider shall promptly respond to the warrant.
“(2) APPLICABILITY.—Paragraph (1) is applicable with respect to any wire or electronic communication that is stored, held, or maintained by the provider—

“(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communication received by means of electronic transmission from), a subscriber or customer of such remote computing service; and

“(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing.

“(e) RECORDS CONCERNING ELECTRONIC COMMUNICATION SERVICE OR REMOTE COMPUTING SERVICE.—

“(1) IN GENERAL.—Except as provided in subsections (i) and (j), a governmental entity may require the disclosure by a provider of electronic communication service or remote computing service of a record or other information pertaining to a subscriber to or customer of such service (not including
the contents of a wire or electronic communication),

only—

“(A) if a governmental entity obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) that—

“(i) is issued by a court of competent jurisdiction directing the disclosure; and

“(ii) may indicate the date by which the provider shall make the disclosure to the governmental entity;

“(B) if a governmental entity obtains a court order directing the disclosure under subsection (d);

“(C) with the lawful consent of the subscriber or customer;

“(D) if a governmental entity submits a formal written request relevant to a law enforcement investigation concerning telemarketing fraud for the name, address, and place of business of a subscriber or customer of the provider, which subscriber or customer is engaged in telemarketing (as defined in section 2325); or
“(E) as otherwise authorized in paragraph (2).

“(2) **Subscriber or Customer Information.**—A provider of electronic communication service or remote computing service shall, in response to an administrative subpoena authorized by Federal or State statute, a grand jury, trial, or civil discovery subpoena, or any means available under paragraph (1), disclose to a governmental entity the—

“(A) name;

“(B) address;

“(C) local and long distance telephone connection records, or records of session times and durations;

“(D) length of service (including start date) and types of service used;

“(E) telephone or instrument number or other subscriber or customer number or identity, including any temporarily assigned network address; and

“(F) means and source of payment for such service (including any credit card or bank account number);

of a subscriber or customer of such service.
“(3) NOTICE NOT REQUIRED.—A governmental entity that receives records or information under this subsection is not required to provide notice to a subscriber or customer.”;

(2) in subsection (d)—

(A) by striking “(b) or”;

(B) by striking “the contents of a wire or electronic communication, or”;

(C) by striking “sought,” and inserting “sought”; and

(D) by striking “section” and inserting “subsection”; and

(3) by adding at the end the following:

“(h) NOTICE.—Except as provided in section 2705, a provider of electronic communication service or remote computing service may notify a subscriber or customer of a receipt of a warrant, court order, subpoena, or request under subsection (a), (b), (c), or (d) of this section.

“(i) RULE OF CONSTRUCTION RELATED TO LEGAL PROCESS.—Nothing in this section or in section 2702 shall limit the authority of a governmental entity to use an administrative subpoena authorized by Federal or State statute, a grand jury, trial, or civil discovery subpoena, or a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the
case of a State court, issued using State warrant proce-
dures) by a court of competent jurisdiction to—

“(1) require an originator, addressee, or in-
tended recipient of a wire or electronic communica-
tion to disclose a wire or electronic communication
(including the contents of that communication) to
the governmental entity;

“(2) require a person or entity that provides an
electronic communication service to the officers, di-
rectors, employees, or agents of the person or entity
(for the purpose of carrying out their duties) to dis-
close a wire or electronic communication (including
the contents of that communication) to or from the
person or entity itself or to or from an officer, direc-
tor, employee, or agent of the entity to a govern-
mental entity, if the wire or electronic communica-
tion is stored, held, or maintained on an electronic
communications system owned, operated, or con-
trolled by the person or entity; or

“(3) require a person or entity that provides a
remote computing service or electronic communica-
tion service to disclose a wire or electronic commu-
nication (including the contents of that communica-
tion) that advertises or promotes a product or serv-
ice and that has been made readily accessible to the
general public.

“(j) Rule of Construction Related to Con-
gressional Subpoenas.—Nothing in this section or in
section 2702 shall limit the power of inquiry vested in the
Congress by Article I of the Constitution of the United
States, including the authority to compel the production
of a wire or electronic communication (including the con-
tents of a wire or electronic communication) that is stored,
held, or maintained by a person or entity that provides
remote computing service or electronic communication
service.”.

SEC. 4. DELAYED NOTICE.

Section 2705 of title 18, United States Code, is
amended to read as follows:

“§ 2705. Delayed notice

“(a) In General.—A governmental entity acting
under section 2703 may apply to a court for an order di-
recting a provider of electronic communication service or
remote computing service to which a warrant, order, sub-
poena, or other directive under section 2703 is directed
not to notify any other person of the existence of the war-
rant, order, subpoena, or other directive.

“(b) Determination.—A court shall grant a re-
quest for an order made under subsection (a) for delayed
notification of up to 180 days if the court determines that
there is reason to believe that notification of the existence
of the warrant, order, subpoena, or other directive will
likely result in—

“(1) endangering the life or physical safety of
an individual;
“(2) flight from prosecution;
“(3) destruction of or tampering with evidence;
“(4) intimidation of potential witnesses; or
“(5) otherwise seriously jeopardizing an inves-
tigation or unduly delaying a trial.
“(c) EXTENSION.—Upon request by a governmental
entity, a court may grant one or more extensions, for peri-
ods of up to 180 days each, of an order granted in accord-
ance with subsection (b).”.

SEC. 5. RULE OF CONSTRUCTION.

Nothing in this Act or an amendment made by this
Act shall be construed to preclude the acquisition by the
United States Government of—

(1) the contents of a wire or electronic commu-
nication pursuant to other lawful authorities, includ-
ing the authorities under chapter 119 of title 18
(commonly known as the “Wiretap Act”), the For-
eign Intelligence Surveillance Act of 1978 (50
U.S.C. 1801 et seq.), or any other provision of Federal law not specifically amended by this Act; or

(2) records or other information relating to a subscriber or customer of any electronic communication service or remote computing service (not including the content of such communications) pursuant to the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.), chapter 119 of title 18 (commonly known as the “Wiretap Act”), or any other provision of Federal law not specifically amended by this Act.