

A BILL

To

Provide for the regulation of the sending of unsolicited electronic messages and for connected purposes.

Enacted by the Legislative Council.

PART 1

PRELIMINARY

**1. Short title and commencement**

(1) This Ordinance may be cited as the Unsolicited Electronic Messages Ordinance.

(1A) Subject to subsection (2), this Ordinance shall come into operation on the day on which it is published in the Gazette.

(2) ~~This Ordinance~~ Part 2, sections 30, 30A, 31, 35 and 52A and sections 1(2) and 2(2) and Table 2 of Schedule 1 shall come into operation on a day to be appointed by the Secretary for Commerce, Industry and Technology by notice published in the Gazette.

**2. Interpretation**

(1) In this Ordinance, unless the context otherwise requires –  
“account” (帳戶) includes –

- (a) a free account;
- (b) a pre-paid account; and
- (c) anything that may reasonably be regarded as the equivalent of an account;

“Authority” (電訊局長) means the Telecommunications Authority appointed under section 5 of the Telecommunications Ordinance (Cap. 106);

“business” (業務) includes a trade or profession;

“commercial electronic mail message” (商業電郵訊息) means a commercial electronic message sent to an electronic mail address;

“commercial electronic message” (商業電子訊息) means an electronic message the purpose, or one of the purposes, of which is –

- (a) to offer to supply goods, services, facilities, land or an interest in land;
- (b) to offer to provide a business opportunity or an investment opportunity;
- (c) to advertise or promote goods, services, facilities, land or an interest in land;
- (d) to advertise or promote a business opportunity or an investment opportunity;
- (e) to advertise or promote a supplier, or a prospective supplier, of goods, services, facilities, land or an interest in land; or
- (f) to advertise or promote a provider, or a prospective provider, of a business opportunity or an investment opportunity,

in the course of or in the furtherance of any business;

“consent” (同意) has the meaning assigned to it by section 5 (*meaning of “consent” and related matters*);

“court” (法院) includes a magistrate;

“document” (文件) includes, in addition to a document in writing –

- (a) a disc, tape or other device in which data other than visual images are embodied so as to be capable, with or without the aid of some other equipment, of being reproduced from the disc, tape or other device; and
- (b) a film, tape or other device in which visual images are embodied so as to be capable, with or without the aid of

some other equipment, of being reproduced from the film, tape or other device;

“domain name” (域名) means a string (any sequence or combination of letters, characters, numbers or symbols of any language) registered with or allocated or assigned by a domain name authority as part of an electronic address on the Internet;

“domain name authority” (域名當局) means a domain name registrar, domain name registry or other domain name registration body;

“do-not-call register” (~~拒收登記冊~~拒收訊息登記冊) means a register ~~established~~kept under section 30 (*Authority may ~~establish~~keep do-not-call registers*);

“electronic address” (電子地址) means a string (any sequence or combination of letters, characters, numbers or symbols of any language) used to specify a source or destination of an electronic message and includes, but is not limited to, an electronic mail address, Internet protocol address, instant messaging account name, telephone number and facsimile number;

“electronic mail address” (電郵地址) means an electronic address consisting of a user name or mailbox (commonly referred to as the “local part”) and a reference to a domain name (commonly referred to as the “domain part”), whether or not displayed, to which an electronic message can be sent;

“electronic message” (電子訊息) includes a message in any form sent over a public telecommunications service to an electronic address and includes, but is not limited to –

- (a) a text, voice, sound, image or video message; and
- (b) a message combining text, voice, sound, images or video;

“enforcement notice” (執行通知) means a notice issued under section 35 (*Authority may issue enforcement notice*);

“function” (職能) includes a power and a duty;

“Hong Kong company” (香港公司) means –

- (a) a company within the meaning assigned by section 2(1) of the Companies Ordinance (Cap. 32); or
- (b) a body corporate that is incorporated or otherwise established by or under any other Ordinance;

“Hong Kong link” (香港聯繫) has the meaning assigned to it by section 3 (*meaning of “Hong Kong link”*);

“legal proceedings” (法律程序) means legal proceedings of any kind, whether civil or criminal and whether under this Ordinance or otherwise;

“mistake” (錯誤) means a reasonable mistake of fact;

“organization” (機構) includes –

- (a) a Hong Kong company;
- (b) any other company or body corporate, wherever incorporated or otherwise established; and
- (c) a partnership, ~~association, society~~ or other unincorporated body of persons, ~~whether corporate or unincorporate and~~ whether formed or established in Hong Kong or elsewhere;

“public telecommunications network” (公共電訊網絡) means a telecommunications network offered for use by the general public;

“public telecommunications service” (公共電訊服務) has the meaning assigned to it by section 2(1) of the Telecommunications Ordinance (Cap. 106);

“registered user” (登記使用者), in relation to the sending of a commercial electronic message to an electronic address, means –

- (a) if the electronic address is an electronic mail address, the individual or organization who is responsible for the relevant electronic mail address account;
- (b) if the message is sent to an electronic address in connection with an instant messaging service, the

individual or organization who is responsible for the relevant instant messaging account;

- (c) if the electronic address is a telephone number or facsimile number, the individual or organization who is responsible for the relevant telephone or facsimile account; or
- (d) in any other case, the individual or organization who is responsible for the relevant electronic address account;

and, if 2 or more individuals or organizations are jointly responsible for such an account, means any of those individuals or organizations;

“regulations” (規例) means regulations made under section 56 (*regulations*);

“Secretary” (局長) means the Secretary for Commerce, Industry and Technology;

“send” (發送) has the meaning assigned to it by section 4 (*meaning of “send” and related matters*);

“software” (軟件) includes a combination of software and associated data;

“supply” (供應) means supply by way of sale, transfer, exchange, lease, hire or hire-purchase;

“telecommunications” (電訊) has the meaning assigned to it by section 2(1) of the Telecommunications Ordinance (Cap. 106);

“telecommunications device” (電訊裝置) includes any computer, instrument, apparatus or equipment used for the purpose of telecommunications;

“telecommunications network” (電訊網絡) has the meaning assigned to it by section 2(1) of the Telecommunications Ordinance (Cap. 106);

“telecommunications service” (電訊服務) has the meaning assigned to it by section 2(1) of the Telecommunications Ordinance (Cap. 106);

“telecommunications service provider” (電訊服務提供者) means a licensee as defined in section 2(1) of the Telecommunications Ordinance (Cap. 106);

“unsubscribe request” (取消接收要求) has the meaning assigned to it by section 8(4) (*commercial electronic messages must contain unsubscribe facility*);

“working day” (工作日) means any day other than a public holiday or a black rainstorm warning day or gale warning day within the meaning assigned by section 71(2) of the Interpretation and General Clauses Ordinance (Cap. 1).

(1A) For the purposes of paragraphs (a), (b), (c), (d), (e) and (f) of the definition of “commercial electronic message” in subsection (1), it is immaterial whether –

- (a) the goods, services, facilities, land, interest in land, business opportunity or investment opportunity exists; or
- (b) it is lawful to acquire the goods, services, facilities, land, interest in land, business opportunity or investment opportunity.

(1B) For the purposes of the definition of “electronic message” in subsection (1), it is immaterial whether –

- (a) the electronic address exists; or
- (b) the message reaches its intended destination.

(2) In this Ordinance, a reference to the performance of a function includes the exercise of a power and the discharge of a duty.

(3) For the avoidance of doubt, references in this Ordinance to organizations shall not be construed as implying that references to persons do not include companies, bodies corporate, partnerships, ~~associations, societies~~ or other bodies of persons.

(4) Where, in any provision of this Ordinance, a reference is made to another provision of this Ordinance and the reference is followed by text in parenthesis that purports to be descriptive of the subject matter of the provision referred to, the text in parenthesis shall be treated as having been provided for information only and does not have any legislative effect.

### **3. Meaning of “Hong Kong link”**

(1) For the purposes of this Ordinance, a commercial electronic message has a Hong Kong link if, and only if –

- (a) the message originates in Hong Kong;
- (b) the individual or organization who sent the message or authorized the sending of the message is –
  - (i) an individual who is physically present in Hong Kong when the message is sent;
  - (ii) an organization (other than a Hong Kong company) that is carrying on business or activities in Hong Kong when the message is sent; or
  - (iii) a Hong Kong company;
- (c) the telecommunications device that is used to access the message is located in Hong Kong;
- (d) the registered user of the electronic address to which the message is sent is –
  - (i) an individual who is physically present in Hong Kong when the message is accessed; or
  - (ii) an organization that is carrying on business or activities in Hong Kong when the message is accessed; or
- (e) the message is sent to an electronic address that is allocated or assigned by the Authority.

(2) For the purposes of subsection (1)(b), (c), (d) and (e), it is immaterial whether the commercial electronic message originates in Hong Kong or elsewhere.

(3) For the purposes of subsection (1)(b)(iii), it is immaterial whether the commercial electronic message is sent, or is authorized to be sent, from Hong Kong or elsewhere.

#### **4. Meaning of “send” and related matters**

(1) For the purposes of this Ordinance, “send” (發送), in relation to an electronic message, includes cause to be sent and attempt to send.

(2) For the purposes of this Ordinance (including subsection (3)), if an individual authorizes the sending of a commercial electronic message and he does so on behalf of an organization, then –

- (a) the organization shall be treated as authorizing the sending of the message; and
- (b) the individual shall be treated as not authorizing the sending of the message.

(3) For the purposes of this Ordinance, if –

- (a) a commercial electronic message is sent by an individual or organization; and
- (b) the sending of the message is not authorized by any other individual or organization,

the first-mentioned individual or organization shall be treated as authorizing the sending of the message.

(4) For the purposes of any legal proceedings, a telecommunications service provider who merely provides a service that enables a commercial electronic message to be sent shall, unless the contrary is proved, be presumed not to have sent the message and not to have authorized the message to be sent.

(5) For the purposes of any legal proceedings, if a commercial electronic message is sent and at the relevant time the telecommunications device, service or network from which it was sent was controlled by a person without the knowledge of the owners or authorized users of the telecommunications device, service or network, the owners or authorized users shall, unless the contrary is proved, be presumed not to have sent the message and not to have authorized the message to be sent.

(6) In subsection (5), “control” (控制) means either physical control or control through the use of software or other means.

## 5. Meaning of “consent” and related matters

~~(1) In this Ordinance, unless the context otherwise requires—~~

~~“consent” (同意) means express consent, given either orally or in writing;~~

~~“withdraw” (撤回), in relation to consent, means to withdraw the consent either orally or in writing.~~

(1) For the purposes of this Ordinance –

“consent” (同意), in relation to the sending of a commercial electronic message, means –

(a) express consent; or

(b) consent that can reasonably be inferred from the conduct of the individual or organization concerned;

“withdraw” (撤回), in relation to consent, means to expressly withdraw that consent.

(1A) For the purposes of this Ordinance, consent to the sending of a commercial electronic message may be given, and such consent may be withdrawn, by means of an electronic message or in any other manner.

(2) For the purposes of this Ordinance, the registered user of an electronic address shall be treated as having given his consent to the sending of a commercial electronic message to that electronic address if the registered user or a person on his behalf –

(a) has, either in response to a clear and conspicuous request for consent or at his own initiative, given his consent to the sending of the message; and

(b) has not, within a reasonable period ~~before of time prior to~~ the sending of the message, ~~withdrawn the consent referred to in paragraph (a) that consent.~~

(3) For the purposes of this Ordinance (including subsection (2)), if a person other than the registered user of an electronic address uses the relevant account to send an electronic message about –

(a) consent; or

(b) withdrawal of consent,

that person shall be treated as having been authorized to send that message on behalf of the registered user.

(4) Subsection (3) shall not be construed as limiting the circumstances in which a person other than the registered user of an electronic address may –

- (a) consent; or
- (b) withdraw consent,

on behalf of the registered user.

(5) For the avoidance of doubt, the registered user of an electronic address may at any time withdraw any consent given by him to the sending of a commercial electronic message.

## **6. ~~Exclusions~~Exemptions**

~~(1) This Ordinance does not apply to any matter falling within a description set out in Schedule 1.~~

(1) The matters specified in Schedule 1 are exempt from the application of this Ordinance to the extent and subject to the conditions, if any, specified in that Schedule.

(2) The Secretary may, by notice published in the Gazette, amend Schedule 1.

## PART 2

### RULES ABOUT SENDING COMMERCIAL ELECTRONIC MESSAGES

#### **7. Commercial electronic messages must include accurate sender information**

(1) A person shall not send a commercial electronic message that has a Hong Kong link unless –

- (a) the message includes clear and accurate information identifying the individual or organization who authorized the sending of the message;

- (b) the message includes clear and accurate information about how the recipient can readily contact that individual or organization;
  - (c) the message includes such information and complies with such conditions as is or are specified in the regulations, if any; and
  - (d) the information included in the message in compliance with this subsection is reasonably likely to be valid for at least 30 days after the message is sent.
- (2) Subsection (1) does not apply if the person –
- (a) sent the commercial electronic message by mistake; or
  - (b) did not know, and could not with reasonable diligence have ascertained, that the message had a Hong Kong link.

**8. Commercial electronic messages must contain unsubscribe facility**

(1) A person shall not send a commercial electronic message that has a Hong Kong link unless –

- (a) the message includes –
  - (i) a statement to the effect that the recipient may use an electronic address or other electronic means specified in the message (“the unsubscribe facility”) to send an unsubscribe request to the individual or organization who authorized the sending of the message; or
  - (ii) a statement to similar effect;
- (b) the statement is presented in a clear and conspicuous manner;
- (ba) the statement complies with such conditions as are specified in the regulations, if any;

(bb) the unsubscribe facility complies with such conditions as are specified in the regulations, if any;

- (c) if the unsubscribe facility is a telephone number or facsimile number, it is a number allocated or assigned by the Authority;
- (d) the unsubscribe facility is reasonably likely to be capable of receiving the recipient's unsubscribe request, if any, at all times during a period of at least 30 days after the message is sent; and
- (e) the unsubscribe request may be sent by the recipient free of any charge to the recipient for the use of the unsubscribe facility.

(2) Subsection (1) does not apply if the person –

- (a) sent the commercial electronic message by mistake; or
- (b) did not know, and could not with reasonable diligence have ascertained, that the message had a Hong Kong link.

(3) A person to whom an unsubscribe request is sent under this section shall ensure that a record of the request is retained in the format in which it was originally received, or in a format that can be demonstrated to represent accurately the information originally received, for at least ~~7 years~~ 3 years after its receipt.

(4) In this section, “unsubscribe request” (取消接收要求), in relation to a commercial electronic message the sending of which is authorized by an individual or organization, means –

- (a) a message to the effect that the registered user of the electronic address to which the message is sent does not wish to receive, at that electronic address, any further commercial electronic messages from or authorized by that individual or organization; or
- (b) a message to similar effect.

**9. Commercial electronic messages must not be sent after unsubscribe request is sent**

(1) This section applies if a person sends an unsubscribe request to an individual or organization using the unsubscribe facility provided under section 8 (*commercial electronic messages must contain unsubscribe facility*).

(2) The individual or organization shall, within 10 working days from the day on which the unsubscribe request is sent –

- (a) cease sending any further commercial electronic messages to the electronic address in respect of which the unsubscribe request was sent; and
- (b) cease authorizing the sending of any further commercial electronic messages to that electronic address.

(3) Subsection (2) does not apply in relation to a commercial electronic message if, subsequent to the sending of the unsubscribe request, the registered user of the relevant electronic address has given his consent to the sending of the message.

(4) Subsection (2) does not apply in relation to a commercial electronic message if the individual or organization concerned –

- (a) sent the message, or authorized it to be sent, by mistake; or
- (b) did not know, and could not with reasonable diligence have ascertained, that the message had a Hong Kong link.

(5) In this section, “unsubscribe facility” (取消接收選項) has the same meaning as in section 8 (*commercial electronic messages must contain unsubscribe facility*).

**10. Commercial electronic messages must not be sent to electronic address listed in do-not-call register**

(1) A person shall not send a commercial electronic message that has a Hong Kong link to an electronic address that, at the time the message is sent, is listed in a do-not-call register.

(2) Subsection (1) does not apply in relation to a commercial electronic message if, prior to or subsequent to the listing of the electronic address in the do-not-call register, and whether before or after the commencement of this section, the registered user of the electronic address has given his consent to the sending of the message.

(3) Subsection (1) does not apply if the electronic address has been listed in the do-not-call register for less than 10 working days at the time the commercial electronic message is sent.

- (4) Subsection (1) does not apply if the person –
- (a) sent the commercial electronic message by mistake; or
  - (b) did not know, and could not with reasonable diligence have ascertained, that the message had a Hong Kong link.

#### **11. Commercial electronic mail messages must not use misleading subject headings**

A person shall not send a commercial electronic mail message that has a Hong Kong link if the subject heading of the message, if any, would be likely to mislead the recipient about a material fact regarding the content or subject matter of the message.

#### **12. Commercial electronic messages must not be sent with calling line identification information concealed**

(1) A person who sends a commercial electronic message that has a Hong Kong link from an electronic address that is a telephone number or facsimile number (“the sending number”) shall not –

- (a) conceal or withhold from the called party the calling line identification information of the sending number; or
- (b) perform any operation or issue any instruction in connection with the sending of the message for the purpose of, or that has the effect of, concealing or

withholding from the called party the calling line identification information of the sending number.

(2) In this section, “calling line identification information” (來電線路識別資料) means telecommunications network information generated and transmitted by the calling party’s telecommunications network for the purpose of enabling the called party’s telecommunications network to identify the telephone number or facsimile number of the calling party.

## PART 3

### RULES ABOUT ADDRESS-HARVESTING AND RELATED ACTIVITIES

#### 13. Interpretation of Part 3

(1) In this Part –

“address-harvesting software” (地址收集軟件) means software that is specifically designed or marketed for use for –

- (a) searching the Internet or a public telecommunications network for electronic addresses; and
- (b) collecting, compiling, capturing or otherwise obtaining those electronic addresses;

“harvested-address list” (地址收集清單) means –

- (a) a list of electronic addresses;
- (b) a collection of electronic addresses; or
- (c) a compilation of electronic addresses,

where the production of the list, collection or compilation is, to any extent, directly or indirectly attributable to the use of address-harvesting software.

(2) For the purposes of this Part, a person sends multiple commercial electronic messages if he sends more than 100 commercial electronic messages during a 24-hour period or more than 1 000 commercial electronic messages during a 30-day period.

#### **14. Supply of address-harvesting software or harvested-address list**

- (1) No person shall supply or offer to supply –
  - (a) address-harvesting software;
  - (b) a right to use address-harvesting software;
  - (c) a harvested-address list; or
  - (d) a right to use a harvested-address list,

to another person (“the customer”) for use in connection with, or to facilitate, the sending of commercial electronic messages that have a Hong Kong link without the consent of the registered users of the electronic addresses to which they are sent.

(2) A person who contravenes subsection (1) commits an offence and is liable on summary conviction to a fine at level 6.

(3) A person who knowingly ~~or recklessly~~ contravenes subsection (1) commits an offence and is liable on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 5 years.

(4) It is a defence to a charge for an offence under subsection (2) for the person charged to prove that he did not know and had no reason to suspect that the customer, or another person, intended to use the address-harvesting software or the harvested-address list, as the case may be, in connection with, or to facilitate, the sending of commercial electronic messages that have a Hong Kong link without the consent of the registered users of the electronic addresses to which they are sent.

(5) It is a defence to a charge for an offence under subsection (2) for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

#### **15. Acquisition of address-harvesting software or harvested-address list**

- (1) No person shall acquire –
  - (a) address-harvesting software;

- (b) a right to use address-harvesting software;
- (c) a harvested-address list; or
- (d) a right to use a harvested-address list,

for use in connection with, or to facilitate, the sending of commercial electronic messages that have a Hong Kong link without the consent of the registered users of the electronic addresses to which they are sent.

(2) A person who contravenes subsection (1) commits an offence and is liable on summary conviction to a fine at level 6.

(3) A person who knowingly ~~or recklessly~~ contravenes subsection (1) commits an offence and is liable on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 5 years.

(4) It is a defence to a charge for an offence under subsection (2) for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

## **16. Use of address-harvesting software or harvested-address list**

- (1) No person shall use –
- (a) address-harvesting software; or
  - (b) a harvested-address list,

in connection with, or to facilitate, the sending of commercial electronic messages that have a Hong Kong link without the consent of the registered users of the electronic addresses to which they are sent.

(2) A person who contravenes subsection (1) commits an offence and is liable on summary conviction to a fine at level 6.

(3) A person who knowingly ~~or recklessly~~ contravenes subsection (1) commits an offence and is liable on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 5 years.

(4) It is a defence to a charge for an offence under subsection (2) for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

(5) In this section, “use” (用、使用) does not include the act of forwarding the address-harvesting software or harvested-address list to another person.

### **17. Sending of commercial electronic message to electronic address obtained using automated means**

(1) No person shall send a commercial electronic message that has a Hong Kong link to an electronic address that was obtained using an automated means.

(2) A person who contravenes subsection (1) commits an offence and is liable on summary conviction to a fine at level 6 and to imprisonment for 2 years.

(3) A person who knowingly ~~or recklessly~~ contravenes subsection (1) commits an offence and is liable on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 5 years.

(4) It is a defence to a charge for an offence under subsection (2) for the person charged to prove that he did not know and had no reason to suspect that the electronic address was obtained using an automated means.

(5) It is a defence to a charge for an offence under subsection (2) for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

(6) In this section –  
“automated means” (自動化方法) means an automated process that generates possible electronic addresses by combining letters, characters, numbers or symbols into numerous permutations;

“obtained” (取得), in relation to an electronic address, means obtained, whether before or after the commencement of this section, by –

- (a) the person charged; or
- (b) any person from or through whom the person charged acquired the electronic address.

**18. Use of scripts or other automated means to register for 5 or more electronic mail addresses**

(1) No person shall use scripts or other automated means to register for 5 or more electronic mail addresses from which to send, or enable another person to send, multiple commercial electronic messages that have a Hong Kong link without the consent of the registered users of the electronic addresses to which they are sent.

(2) A person who contravenes subsection (1) commits an offence and is liable on summary conviction to a fine at level 6 and to imprisonment for 2 years.

(3) A person who knowingly ~~or recklessly~~ contravenes subsection (1) commits an offence and is liable on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 5 years.

(4) Subsection (1) does not apply to –

- (a) a person who performs functions in connection with the administration of the information systems of an organization, when performing such functions; or
- (b) a telecommunications service provider, when acting in connection with the provision of a public telecommunications service.

(5) In this section –

“register” (登記), in relation to an electronic mail address, means –

- (a) to register with an authority responsible for allocating or assigning the electronic mail address or approving its allocation or assignment; or
- (b) to be allocated or assigned the electronic mail address with the approval of such an authority;

“scripts” (手稿程式) means a list of instructions or commands to an information system.

**19. Relay or retransmission of multiple commercial electronic messages**

(1) No person shall use a telecommunications device, service or network to relay or retransmit multiple commercial electronic messages that have a Hong Kong link, with the intent to deceive or mislead recipients, or any telecommunications service provider, as to the source of such messages.

(2) A person who contravenes subsection (1) commits an offence and is liable –

- (a) on summary conviction, to a fine at level 6 and to imprisonment for 2 years; or
- (b) on conviction on indictment, to a fine of \$1,000,000 and to imprisonment for 5 years.

**PART 4**

**FRAUD AND OTHER ILLICIT ACTIVITIES RELATED TO TRANSMISSION OF COMMERCIAL ELECTRONIC MESSAGES**

**20. Interpretation of Part 4**

(1) In this Part –

“initiate” (啟動), in relation to a commercial electronic message, means –

- (a) to originate or send such a message;
- (b) to procure the origination or sending of such a message; or
- (c) to attempt to originate or send, or procure the origination or sending of, such a message,

but does not include actions that constitute the routine conveyance of such a message;

“routine conveyance” (例行傳遞) means the transmission, routing, relaying, handling or storing, through an automatic technical process, of an electronic message in relation to which message another person has identified the recipient or provided the recipient’s electronic address.

(2) For the purposes of this Part, a person initiates the transmission of multiple commercial electronic messages from a telecommunications device, service or network if he initiates the transmission of more than 100 commercial electronic messages during a 24-hour period, or more than 1 000 commercial electronic messages during a 30-day period, from that telecommunications device, service or network.

(3) For the purposes of this Part, more than one person may be considered to have initiated the transmission of a commercial electronic message or multiple commercial electronic messages.

**21. Initiating transmission of multiple commercial electronic messages from telecommunications device, etc., accessed without authorization**

- (1) A person who ~~knowingly or recklessly~~—
- (a) accesses a telecommunications device, service or network without authorization; and
  - (b) knowingly initiates the transmission of multiple commercial electronic messages that have a Hong Kong link from that telecommunications device, service or network,

commits an offence and is liable on conviction on indictment to a fine and to imprisonment for 10 years.

(2) For the purposes of subsection (1), a person accesses a telecommunications device, service or network without authorization if –

- (a) he accesses that telecommunications device, service or network by any means or in any manner;
- (b) he is not entitled to obtain such access; and
- (c) he has not been authorized to obtain such access by any person who is entitled to grant him such access.

**22. Initiating transmission of multiple commercial electronic messages with intent to deceive or mislead recipients as to source of messages**

(1) A person who knowingly initiates the transmission of multiple commercial electronic messages that have a Hong Kong link from a telecommunications device, service or network without authorization, with the intent to deceive or mislead recipients as to the source of such messages, commits an offence and is liable on conviction on indictment to a fine and to imprisonment for 10 years.

(2) For the purposes of subsection (1), a person initiates the transmission of a commercial electronic message from a telecommunications device, service or network without authorization if –

- (a) he initiates the transmission of the message from that telecommunications device, service or network by any means or in any manner;
- (b) he is not entitled to initiate that transmission; and
- (c) he has not been authorized to initiate that transmission by any person who is entitled to authorize him to initiate the transmission.

**23. Falsifying header information in multiple commercial electronic messages**

(1) A person who –

- (a) materially falsifies header information in multiple commercial electronic messages that have a Hong Kong link; and
- (b) knowingly ~~or recklessly~~ initiates the transmission of such messages from a telecommunications device, service or network,

commits an offence and is liable on conviction on indictment to a fine and to imprisonment for 10 years.

(2) For the purposes of subsection (1) but subject to subsection (3), a person materially falsifies header information in a commercial electronic message if he ~~knowingly~~-falsifies, alters, conceals, deletes or withholds any information in such manner as to impair the ability of the recipient of the message, a telecommunications service provider processing the message or any other person to identify, locate or respond to the person who initiated the transmission of the message.

(3) For the purposes of subsection (1) and in relation to the sending of a commercial electronic message from an electronic address that is a telephone number or facsimile number (“the sending number”), the person initiating the transmission of such a message shall not be treated as having materially falsified header information by reason only that he has performed any operation or issued any instruction in connection with the sending of the message for the purpose of, or that has the effect of, concealing or withholding from the called party the calling line identification information of the sending number.

(4) In this section –

“calling line identification information” (來電線路識別資料) has the same meaning as in section 12(2) (*commercial electronic messages must not be sent with calling line identification information concealed*);

“header information” (標頭資料) means the information attached to a commercial electronic message by a telecommunications device, service or network for the purpose of identifying, or purporting to identify, the person sending the message or the source, routing or destination of the message, and –

- (a) in relation to a commercial electronic mail message, includes, but is not limited to, the originating domain name, Internet protocol address and electronic mail address, but excludes the content in the SMTP data portion; and

- (b) in relation to any other form of commercial electronic message, includes, but is not limited to, the electronic address from which the message originates;

“SMTP data portion” (《簡單郵遞傳送規約》數據部分) has the meaning assigned to it by the Simple Mail Transfer Protocol of Internet Official Protocol Standards, or any successor protocols, published by the Internet Engineering Task Force, or any of its successors, as amended from time to time.

**24. Registering for electronic addresses or domain names using information that falsifies identity of actual registrant**

- (1) A person who –
- (a) ~~knowingly~~ registers, using information that materially falsifies the identity of the actual registrant, for 5 or more electronic addresses or 2 or more domain names; and
  - (b) knowingly ~~or recklessly~~ initiates the transmission of multiple commercial electronic messages that have a Hong Kong link from any of such electronic addresses or domain names or from any combination of such electronic addresses or domain names,

commits an offence and is liable on conviction on indictment to a fine and to imprisonment for 10 years.

(2) For the purposes of subsection (1), a person uses information that materially falsifies the identity of the actual registrant if he ~~knowingly~~ falsifies, alters, conceals, deletes or withholds any information in such manner as to –

- (a) impair the ability of the relevant authority responsible for allocating or assigning the electronic address or approving its allocation or assignment or the relevant domain name authority, as the case may be, to identify or locate the actual registrant; or

- (b) impair the ability of the recipient of any commercial electronic message transmitted from the electronic address or domain name, a telecommunications service provider processing the message or any other person to identify, locate or respond to the person who initiated the transmission of the message.
- (3) In this section, “register” (登記、註冊) means –
- (a) in relation to an electronic address –
    - (i) to register with an authority responsible for allocating or assigning the electronic address or approving its allocation or assignment; or
    - (ii) to procure the allocation or assignment of the electronic address, or the approval of its allocation or assignment, by such an authority; and
  - (b) in relation to a domain name, to register the domain name with, or to procure its allocation or assignment by, any domain name authority.

**25. False representations regarding registrant or successor in interest to registrant of electronic address or domain name**

- (1) A person who –
- (a) falsely represents himself to be the registrant or the legitimate successor in interest to the registrant of 5 or more electronic addresses or 2 or more domain names; and
  - (b) knowingly ~~or recklessly~~ initiates the transmission of multiple commercial electronic messages that have a Hong Kong link from any of such electronic addresses or domain names or from any combination of such electronic addresses or domain names,

commits an offence and is liable on conviction on indictment to a fine and to imprisonment for 10 years.

(2) In this section, “registrant” (登記人、註冊人) means a person who registers for an electronic address or domain name within the meaning assigned by section 24(3) (*registering for electronic addresses or domain names using information that falsifies identity of actual registrant*).

## PART 5

### ADMINISTRATION AND ENFORCEMENT

#### **26. Interpretation of Part 5**

In this Part –

“approved code of practice” (認可實務守則) has the meaning assigned to it by section 28(8) (*Authority may approve codes of practice*);

“authorized officer” (獲授權人員) means a public officer authorized by the Authority under section 27 (*Authority may appoint authorized officers*);

“specified offence” (指明罪行) means an offence under this Part or Part 3 (*rules about address-harvesting and related activities*) or Part 7 (*miscellaneous*).

#### **27. Authority may appoint authorized officers**

The Authority may authorize in writing any public officer to perform any of the functions conferred or imposed on authorized officers by this Part Ordinance as are specified in the authorization.

#### **28. Authority may approve codes of practice**

(1) Subject to subsection (3), for the purpose of providing practical guidance in respect of the application or operation of any provision of this Ordinance, the Authority may –

- (a) approve and issue such codes of practice (whether prepared by him or not) as in his opinion are suitable for that purpose; and
  - (b) approve such codes of practice issued or proposed to be issued otherwise than by him as in his opinion are suitable for that purpose.
- (2) A code of practice –
  - (a) may consist of a code, standard, rule, specification or any other documentary form of practical guidance prepared by the Authority or other body or authority; and
  - (b) may apply, incorporate or refer to any document that has been formulated or published by a body or authority either as in force at the time the document is approved by the Authority or as amended, formulated or published from time to time.
- (3) Where a code of practice is approved under subsection (1), the Authority shall, by notice published in the Gazette –
  - (a) identify the code concerned and specify the date on which its approval is to take effect; and
  - (b) specify the provision or provisions of this Ordinance for which the code is so approved.
- (4) The Authority may –
  - (a) from time to time revise the whole or any part of any code of practice prepared by him under this section; and
  - (b) approve any revision or proposed revision of the whole or any part of any code of practice for the time being approved under this section.
- (5) The provisions of subsection (3) shall, with the necessary modifications, apply in relation to any revision or approval under subsection (4)

as they apply in relation to the approval of a code of practice under subsection (1).

(6) The Authority may at any time withdraw his approval from any code of practice approved under this section.

(7) Where under subsection (6) the Authority withdraws his approval from a code of practice approved under this section, he shall, by notice published in the Gazette, identify the code concerned and specify the date on which its approval is to cease to have effect.

(8) References in this Ordinance to an approved code of practice are references to that code as approved under this section and as it has effect for the time being, including by virtue of any revision of the whole or any part of it approved under this section.

(9) The power of the Authority under subsection (1)(b) to approve a code of practice issued or proposed to be issued otherwise than by him shall include the power to approve a part of such a code and, accordingly, in this Ordinance, “code of practice” may be read as including a part of such a code.

~~(10) — For the avoidance of doubt, it is hereby declared that a code of practice approved under subsection (1) is not subsidiary legislation.~~

(10) A code of practice approved under this section and a notice published under subsection (3) or (7) are not subsidiary legislation.

## **29. Use of approved codes of practice in legal proceedings**

(1) A failure on the part of any person to observe any provision of an approved code of practice shall not of itself render that person liable to legal proceedings.

(2) However, if, in any legal proceedings, the court is satisfied that a provision of an approved code of practice is relevant to determining a matter that is in issue in the proceedings –

- (a) the code of practice is admissible in evidence in the proceedings; and

- (b) proof that the person contravened or did not contravene a relevant provision of the code of practice may be relied on by any party to the proceedings as tending to establish or negate that matter.

(3) In any legal proceedings, a code of practice that appears to a court to be the subject of a notice under section 28(3) (*Authority may approve codes of practice*) shall, in the absence of evidence to the contrary, be presumed to be the subject of such notice.

(4) In any legal proceedings, a document that purports to be a copy of a code of practice that is the subject of a notice under section 28(3) (*Authority may approve codes of practice*) shall, in the absence of evidence to the contrary, be presumed to be a true copy of the code.

(5) In this section, “court” (法院) includes –

- (a) a magistrate;
- (b) the Unsolicited Electronic Messages (Enforcement Notices) Appeal Board established under section 43(1) (~~*Appeal Board established*~~); and
- (c) any other tribunal.

### 30. Authority may ~~establish~~keep do-not-call registers

(1) The Authority may ~~for the purposes of this Ordinance establish and~~ keep one or more registers ~~containing a list~~ of electronic addresses for the purposes of this Ordinance, each of which is to be known as a do-not-call register, and may do all things necessary for, or incidental or conducive to, the establishment, operation and administration of such registers.

(2) The purposes of a do-not-call register are –

- (a) to provide registered users of electronic addresses with a convenient means by which they may notify senders of commercial electronic messages that they do not wish to receive such messages at those electronic addresses; and

- (b) to provide senders of commercial electronic messages with a convenient means by which they may ascertain whether a registered user of an electronic address does not wish to receive unsolicited commercial electronic messages at that electronic address.

(3) Without limiting the generality of subsection (1), the Authority may ~~establish and~~ keep separate do-not-call registers for different kinds of electronic addresses.

(4) Without limiting the generality of subsection (1), A do-not-call register may be kept in such form as the Authority considers appropriate including –

- (a) in a documentary form; or  
(b) in a form other than a documentary form.

(5) If a do-not-call register is kept in a form other than a documentary form, then the information contained in it ~~pursuant to subsection (1)~~ must be capable of being reproduced in a legible form.

~~(6) The Authority shall not list an electronic address in a do-not-call register unless the registered user of that electronic address has given his consent to its inclusion in the register and to it being made available under section 31 (access to do-not-call registers).~~

(7) A document purporting to be –

- (a) a copy of an entry in or extract of a do-not-call register;  
and  
(b) certified by the Authority or an authorized officer as a true copy of the entry or extract referred to in paragraph (a),

shall be admissible as evidence of its contents in any legal proceedings.

(7A) A certificate purporting to be signed by the Authority or an authorized officer and stating that an electronic address was or was not listed in a do-not-call register at a date specified in the certificate shall be admissible as evidence of its contents in any legal proceedings.

~~(8) — The Authority may do all things necessary to be done to establish, maintain and operate do not call registers for the purposes of this Ordinance.~~

### **30A. Powers of Authority in relation to do-not-call registers**

~~(1) Without limiting the generality of section 30(1) (Authority may keep do-not-call registers), the Authority may determine –~~

- ~~(a) the criteria for determining whether an electronic address is eligible to be listed in a do-not-call register;~~
- ~~(b) the procedures for adding an electronic address to a do-not-call register;~~
- ~~(c) the period for which an electronic address may be listed in a do-not-call register;~~
- ~~(d) the circumstances in which and the manner in which an electronic address may be removed from a do-not-call register;~~
- ~~(e) the fees to be paid for the provision by the Authority of any service in relation to a do-not-call register; and~~
- ~~(f) any other matter relating to the establishment, operation or administration of a do-not-call register.~~

~~(2) The Authority shall not add an electronic address to a do-not-call register unless the registered user of that electronic address has given his consent to its inclusion in the register and to it being made available under section 31 (access to do-not-call registers).~~

### **31. Access to do-not-call registers**

~~(1) To achieve~~Subject to subsection (2), the Authority shall, having regard to the purposes described in section 30(2) (Authority may ~~establish~~keep do-not-call registers), ~~the Authority shall cause a do-not-call register, or the information contained in it,~~a do-not-call register to be made available to senders of commercial electronic messages.

~~(2) Without limiting the generality of subsection (1), the Authority may cause a do not call register, or the information contained in it, to be made available to senders of commercial electronic messages in such form and manner, and subject to such conditions, as the Authority considers appropriate.~~

(2) The Authority may, for the purpose of performing his functions under subsection (1), determine –

- (a) the procedures to be followed by any person who wishes to obtain access to information contained in a do-not-call register;
- (b) the conditions that must be met before such information is made available to any person;
- (c) the form in which and the manner in which such information is made available to any person;
- (d) the conditions subject to which such information is made available to any person; and
- (e) any other matter relating to the provision by the Authority to any person of any such information.

(3) Without limiting the powers of the Authority under section 30A(1)(e) (powers of Authority in relation to do-not-call registers) but subject to subsection (4), the Authority may charge fees for making information contained in a do-not-call register available to any person under this section.

(4) The Authority shall provide facilities to enable the registered user of an electronic address to verify, free of charge, whether that electronic address is listed in a do-not-call register.

### **32. Offences relating to misuse of information**

~~(1) No person to whom an unsubscribe request is sent under section 8 (commercial electronic messages must contain unsubscribe facility) shall use any information obtained thereby other than for the purpose of complying with the~~

~~requirements of that section or section 9 (commercial electronic messages must not be sent after unsubscribe request is sent).~~

~~(2) — No person to whom a do not call register, or any information contained in a do not call register, is made available under section 31 (access to do not call registers) shall use any information obtained thereby other than for the purpose described in section 30(2)(b) (Authority may establish do not call registers).~~

~~(3) — A person who contravenes subsection (1) or (2) commits an offence and is liable on summary conviction to a fine at level 6.~~

~~(4) — A person who knowingly or recklessly contravenes subsection (1) or (2) commits an offence and is liable on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 5 years.~~

~~(5) — It is a defence to a charge for an offence under subsection (3) for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.~~

### **33. Authority may issue directions to telecommunications service providers**

(1) Subject to subsection (2), the Authority may issue directions in writing to a telecommunications service provider requiring it to take such action as the Authority considers necessary –

- (a) to facilitate the telecommunications service provider's compliance with any provision of this Ordinance or the regulations; or
- (b) to enable the Authority or an authorized officer to perform any function under this Ordinance or the regulations,

and the telecommunications service provider shall give effect to such directions.

(2) No direction shall be issued under subsection (1) unless the Authority is satisfied that the telecommunications service provider has been afforded a reasonable opportunity to make representations to the Authority.

(3) For the avoidance of doubt, the Authority may issue directions under subsection (1) to require a telecommunications service provider to give information to the Authority for the purpose of enabling the Authority to establish, operate or administer a do-not-call register.

**34. Authority may obtain information or documents relevant to investigation**

(1) If the Authority is satisfied that there are reasonable grounds for believing that a person is, or is likely to be, in possession of information (including but not limited to passwords) or a document that is relevant to the Authority's investigation of a contravention or suspected contravention of a provision of this Ordinance, the Authority may serve a notice in writing on the person, accompanied by a copy of this section in Chinese and English –

- (a) requesting the person to –
  - (i) give the information in writing to the Authority; or
  - (ii) produce the document to the Authority,as the case requires, before a date (“the relevant date”) specified in the notice, being a date reasonable in all the circumstances of the case; and
- (b) stating that if the person is of the view that he cannot, or does not wish to, comply with the request, then he may make representations in writing to the Authority as to why he is of that view before the relevant date.

(2) Where the Authority receives representations referred to in subsection (1)(b) from a person, the Authority shall, after considering the representations, serve a notice in writing on the person –

- (a) stating that the Authority has considered the representations; and
- (b) stating either –
  - (i) that the notice served on the person under subsection (1) is withdrawn with effect from the

date of service of the notice under this subsection;

or

- (ii) that the notice served on the person under subsection (1) remains in force and the Authority will on a date specified in the notice served under this subsection seek an order under subsection (3) unless the person has, before that date, complied with the notice served on the person under subsection (1).

(3) Where a notice served on a person under subsection (1) has not been withdrawn under subsection (2)(b)(i) and the person has not complied with the notice before the relevant date, or before the date specified in the notice served on the person under subsection (2), as the case may be, then a magistrate may, on application by the Authority –

- (a) if satisfied by information on oath that there are reasonable grounds for believing that the person is, or is likely to be, in possession of the information or a document to which the first-mentioned notice relates and that the information or document is relevant to the Authority's investigation of a contravention or suspected contravention of a provision of this Ordinance; ~~and~~
- (b) after considering the representations, if any, referred to in subsection (1)(b) received by the Authority in consequence of the service of the first-mentioned notice; and
- (c) after considering the representations, if any, made by the person on the hearing of the application,

issue an order that the person shall, within the time specified in the order, give the information in writing to the Authority or produce the document to the Authority, as the case requires.

(3A) The person in respect of whom an application is made by the Authority under subsection (3) shall be entitled to be heard on the hearing of the application either in person or through a counsel or solicitor.

(3B) In addition, where the person in respect of whom an application is made by the Authority under subsection (3) is an organization, that person shall be entitled to be heard on the hearing of the application –

- (a) in the case of a Hong Kong company or other company or body corporate, through any of its directors or other officers;
- (b) in the case of a partnership, through any of its partners;  
and
- (c) in the case of any other organization, through any of its officers.

(4) Any information or document to be given or produced to the Authority by a person in compliance with a notice under subsection (1) or an order under subsection (3) shall be so given or produced by reference to the information or document at the time of service of that notice except that the information or document may take account of any processing that was done between the time of service and the time when the information or document is so given or produced if that processing would have been done irrespective of the service of that notice.

~~(5) The Authority shall not disclose any information or document given or produced to him under this section unless he is satisfied that—~~

- ~~(a) it is necessary to disclose the information or document for the purposes of a proceeding under subsection (3);~~
- ~~(b) it is necessary to disclose the information or document for the purposes of—~~
  - ~~(i) the prevention or detection of crime;~~
  - ~~(ii) the apprehension, prosecution or detention of offenders; or~~

- ~~(iii) the fulfilment of any obligation under an international agreement applicable to Hong Kong and relating to unsolicited electronic messages; or~~
- ~~(e) it is otherwise in the public interest to disclose the information or document.~~

~~(6) The Authority shall, before he discloses any information or document under this section, give the person who gave or produced the information or document to the Authority a reasonable opportunity to make representations on the proposed disclosure, and the Authority shall consider all representations made to him before he makes a final decision to disclose the information or document, as the case may be.~~

(7) For the avoidance of doubt, it is hereby declared that where a person gives or produces any information or document under this section notwithstanding that the information or document is the subject of a confidentiality agreement with another person that prevents the first-mentioned person from releasing the information or document, the first-mentioned person shall not be liable for any civil liability or claim whatever in respect of the giving or production of that information or document, as the case may be, contrary to that agreement.

(8) Nothing in this section shall require a person to give any information, or to produce any document, that the person could not be compelled to give in evidence, or produce, in civil proceedings before the Court of First Instance.

- (9) A person commits an offence if he, without reasonable excuse –
- (a) fails to comply with an order under subsection (3);
  - (b) fails to comply with subsection (4); or
  - (c) in purported compliance with a notice under subsection (1) or an order under subsection (3), knowingly gives information that is false or misleading,

and shall be liable on summary conviction to a fine at level 5 and to imprisonment for 2 years.

(10) In this section, “processing” (處理), in relation to any information or document, includes amending, augmenting, deleting or rearranging all or any part of the information or document, whether by automated means or otherwise.

**34A. Disclosure of information and documents  
given or produced under section 34**

(1) The Authority shall not disclose any information or document given or produced to him under section 34 (Authority may obtain information or documents relevant to investigation) unless he is satisfied that –

- (a) it is necessary to disclose the information or document for the purposes of a proceeding under subsection (3) of that section;
- (b) it is necessary to disclose the information or document for the purposes of –
  - (i) the prevention or detection of crime;
  - (ii) the apprehension, prosecution or detention of offenders; or
  - (iii) the fulfilment of any obligation under an international agreement applicable to Hong Kong and relating to unsolicited electronic messages; or
- (c) it is otherwise in the public interest to disclose the information or document.

(2) The Authority shall not disclose any information or document given or produced to him under section 34 (Authority may obtain information or documents relevant to investigation) unless he has given the person who gave or produced the information or document to the Authority a reasonable opportunity to make representations on the proposed disclosure, and the Authority shall consider all representations made to him before he makes a decision whether or not to disclose the information or document, as the case may be.

**35. Authority may issue enforcement notice**

- (1) Where the Authority is of the opinion that any person –
  - (a) is contravening any provision of Part 2 (*rules about sending commercial electronic messages*); or
  - (b) has contravened any provision of Part 2 (*rules about sending commercial electronic messages*) in circumstances that make it likely that the contravention will continue or be repeated,

then the Authority may serve a notice in writing on the person, accompanied by a copy of this section in Chinese and English –

- (c) stating that he is of that opinion;
  - (d) specifying the contravention as to which he is of that opinion and the reasons why he believes it is a contravention; and
  - (e) directing the person to take such steps as are specified in the notice to remedy the contravention or the matters occasioning the service of the notice, as the case may be, within such period as is specified in the notice.
- (2) The steps specified in an enforcement notice to remedy any contravention or matter to which the notice relates may be framed –
  - (a) to any extent by reference to any approved code of practice; and
  - (b) so as to afford the relevant person a choice between different ways of remedying the contravention or matter, as the case may be.
- (3) Subject to subsection (4), the period specified in an enforcement notice for taking the steps specified in it shall not expire before the end of the period specified in section 44 (*appeals to Appeal Board*) within which an appeal against the notice may be made.

(4) If the Authority is of the opinion that by reason of special circumstances the steps specified in an enforcement notice should be taken as a matter of urgency –

- (a) he may include a statement to that effect in the notice together with the reasons why he is of that opinion; and
- (b) where such a statement is so included, subsection (3) shall not apply but the notice shall not require those steps to be taken before the end of the period of 7 days beginning with the date on which the notice was served.

(5) The Authority may cancel an enforcement notice by notice in writing served on the relevant person.

### **36. Offence relating to enforcement notices**

(1) A person who contravenes an enforcement notice served on him under section 35 (*Authority may issue enforcement notice*) commits an offence.

- (2) A person who commits an offence under this section is liable –
  - (a) on a first conviction, to a fine at level 6; and
  - (b) on a second or subsequent conviction, to a fine of \$500,000,

and, in the case of a continuing offence, to a further daily fine of \$1,000 for each day during which the offence continues.

(3) It is a defence to a charge for an offence under this section for the person charged to prove that he exercised all due diligence to comply with the enforcement notice.

#### **36A. Authority may impose financial penalties**

(1) The Authority may, by notice in writing served on a telecommunications service provider, require the telecommunications service provider to pay to the Government the financial penalty specified in the notice in any case where it fails to comply with any direction issued in respect of the

telecommunications service provider under section 33 (Authority may issue directions to telecommunications service providers).

(2) A financial penalty imposed under subsection (1) shall not exceed –

(a) \$200,000 for the first occasion on which a financial penalty is so imposed;

(b) \$500,000 for the second occasion on which a financial penalty is so imposed; and

(c) \$1,000,000 for any subsequent occasion on which a financial penalty is so imposed.

(3) The Authority shall not impose a financial penalty under this section unless, in all the circumstances of the case, the financial penalty is proportionate and reasonable in relation to the failure or series of failures concerned giving rise to that financial penalty.

(4) The Authority shall not impose a financial penalty under this section unless he has given the telecommunications service provider concerned a reasonable opportunity to make representations, and the Authority shall consider all representations made to him before he makes a decision whether or not to impose a financial penalty.

(5) Subsection (1) shall not apply in the case of the telecommunications service provider concerned unless the Authority is satisfied that it has been afforded a reasonable opportunity of complying with the direction in respect of which that subsection is sought to be applied.

(6) A financial penalty imposed under this section is recoverable as a civil debt due to the Government.

### **37. Powers of entry, search, arrest, etc.**

(1) The Authority or an authorized officer may –

(a) without warrant, arrest any person whom he reasonably suspects of having committed a specified offence; and

- (b) where a warrant has been issued under section 38(1) (*power of magistrate to issue search warrant*) in respect of any premises or place –
- (i) enter and search the premises or place;
  - (ii) detain any person found in or on the premises or place, during such period as is reasonably required to permit the search to be carried out, where that person might prejudice the purpose of the search if he were not so detained; and
  - (iii) seize, remove or detain any telecommunications device or other thing found in or on the premises or place that is or that contains, or that appears to him to be or to contain, or to be likely to be or to contain, evidence of the commission of a specified offence.

~~(2) The Authority or an authorized officer may, in the performance of his functions under subsection (1)–~~

- ~~(a) break into and forcibly enter any premises or place that he is empowered to enter and search; and~~
- ~~(b) remove by force any person or thing obstructing him in the performance of such functions.~~

(3) The Authority or an authorized officer may, in carrying out a search of any premises or place entered under ~~this section~~ a warrant issued under section 38(1) (*power of magistrate to issue search warrant*) –

- (a) inspect, operate and analyze any telecommunications device or other thing found in or on the premises or place;
- (ab) require to be given or produced to him any information (including but not limited to passwords) or document or other thing as will enable him to inspect, operate and

analyze any telecommunications device or other thing referred to in paragraph (a);

- (b) require any information that relates, or that appears to him to relate, or to be likely to relate, to the commission or suspected commission of a specified offence and that is –
  - (i) contained in a computer in, on or accessible from the premises or place; or
  - (ii) contained in any other telecommunications device or other thing found in or on the premises or place and that is capable of being retrieved on a computer,
 to be produced on a computer in or on the premises or place in a visible and legible form, and examine the information;
- (c) require any information described in paragraph (b) to be produced in a form in which it can be taken away and in which it is either visible and legible or capable of being retrieved on a computer; and
- (d) take away the copy so produced under paragraph (c).

(3A) The Authority or an authorized officer may –

- (a) break into and forcibly enter any premises or place that he is empowered to enter and search under a warrant issued under section 38(1) (power of magistrate to issue search warrant); and
- (b) remove by force any person or thing obstructing him in the performance of his functions under this section.

(4) Where the Authority or an authorized officer arrests a person under subsection (1)(a), he shall, without delay, take the person to a police station to be dealt with there in accordance with the Police Force Ordinance (Cap. 232) or deliver him into the custody of a police officer for that purpose.

(5) The Authority or an authorized officer may call upon police officers or other public officers to assist him in the performance of any function under this section.

(6) This section is without prejudice to any powers of arrest, entry and search conferred on police officers under any other enactment or rule of law.

### **38. Power of magistrate to issue search warrant**

(1) Where a magistrate is satisfied by information on oath that there are reasonable grounds for suspecting that there is, or is likely to be, in or on any premises or place any telecommunications device or other thing that is or that contains, or that is likely to be or to contain, evidence of the commission of a specified offence, the magistrate may issue a warrant authorizing the Authority or an authorized officer to enter and search the premises or place.

(2) Where the Authority or an authorized officer enters any premises or place under a warrant issued under subsection (1), he shall, on request, produce the warrant and evidence of his identity for inspection by any person found in or on the premises or place.

### **39. Obstruction of Authority, authorized officers, etc.**

- (1) Without prejudice to any other Ordinance, a person who –
- (a) wilfully obstructs the Authority or an authorized officer in the performance of his functions under ~~this Ordinance~~ section 37 (powers of entry, search, arrest, etc.);
  - (b) wilfully fails to comply with any requirement properly made to him by the Authority or an authorized officer under that section; or
  - (c) without reasonable excuse, fails to give the Authority or an authorized officer any other assistance that he may reasonably require to be given for the purpose of performing his functions under ~~this Ordinance~~ that section,

commits an offence and is liable on summary conviction to a fine at level 3 and to imprisonment for 6 months.

(2) Without prejudice to any other Ordinance, a person who makes a statement that he knows to be false or does not believe to be true, or otherwise knowingly misleads the Authority, an authorized officer or any other person in the performance of his functions under this Ordinance commits an offence and is liable on summary conviction to a fine at level 5 and to imprisonment for 2 years.

#### **40. Recovery of costs and expenses of investigation by Authority**

(1) Where a person is convicted by a court of a specified offence on a prosecution instituted as a result of an investigation by the Authority, the court may order the person to pay to the Authority the whole or a part of the costs and expenses of that investigation.

(2) Any costs and expenses awarded to the Authority by an order made under this section shall constitute a debt due to the Authority from the person ordered to pay them and are recoverable as a civil debt.

(3) For the avoidance of doubt, this section is without prejudice to any power conferred on the court under the Costs in Criminal Cases Ordinance (Cap. 492).

(4) In this section, “costs and expenses” (費用及開支), in relation to an investigation, means staff costs and expenses and the financing of liabilities paid out of the Office of the Telecommunications Authority Trading Fund in respect of that investigation.

#### **40A. Service of notices for purposes of sections 34, 35 and 36A**

(1) A notice under section 34 (Authority may obtain information or documents relevant to investigation), section 35 (Authority may issue enforcement notice) or section 36A (Authority may impose financial penalties) may be served by prepaying (where requisite), registering and posting an envelope addressed to the person on or to whom the notice is to be served at his

usual or last known place of abode or business and containing the notice; and, unless there is evidence to the contrary, the notice shall be deemed to have been served and received at the time at which such envelope would have been delivered in the ordinary course of post.

(2) For the purposes of this section, a company within the meaning assigned by section 2(1) of the Companies Ordinance (Cap. 32) shall be deemed to have its usual place of business at its registered office for the purposes of that Ordinance, and any other company or body corporate shall be deemed to have a usual place of business at its principal office or any other place at which it carries on business.

**41. Immunity of Authority, authorized officers, etc.**

(1) No person to whom this subsection applies, acting in good faith, shall be personally liable for any civil liability or claim whatever in respect of any act done or default made in the performance or purported performance of any function under this Ordinance.

(2) The persons to whom subsection (1) applies are –

- (a) the Authority;
- (b) any authorized officer; and
- (c) any police officer or other public officer assisting the Authority or authorized officer in the performance or purported performance of any function under this Ordinance.

**PART 6**

**UNSOLICITED ELECTRONIC MESSAGES (ENFORCEMENT NOTICES) APPEAL BOARD**

**42. Interpretation of Part 6**

In this Part –

- “appeal” (上訴) means an appeal under section 44 (*appeals to Appeal Board*);
- “Appeal Board” (上訴委員會) means the Unsolicited Electronic Messages (Enforcement Notices) Appeal Board established under section 43(1) ~~(*Appeal Board established*)~~;
- “appellant” (上訴人) means a person lodging an appeal;
- “Chairman” (主席) means the Chairman of the Appeal Board appointed under section 43(2) ~~(*Appeal Board established*)~~;
- “Deputy Chairman” (副主席) means a Deputy Chairman of the Appeal Board appointed under section 43(2) ~~(*Appeal Board established*)~~;
- “legally qualified” (具所需法律資格) means qualified for appointment as a District Judge under section 5 of the District Court Ordinance (Cap. 336);
- “panel member” (備選委員) means a member of the panel of persons appointed under section 43(5) ~~(*Appeal Board established*)~~;
- “presiding officer” (審裁官), in relation to an appeal, means the presiding officer referred to in ~~section 45(1)(a) (*procedure on appeal*)~~ section 45 (*composition of Appeal Board for purposes of appeal*).

### 43. Appeal Board established

(1) A board to be known as the “Unsolicited Electronic Messages (Enforcement Notices) Appeal Board” is established.

(2) ~~Subject to subsections (3) and (4), the~~ The Chief Executive shall appoint a legally qualified person to be the Chairman of the Appeal Board and such other legally qualified persons as he thinks fit to be Deputy Chairmen of the Appeal Board.

~~(3) — A person shall not be appointed under subsection (2) unless the person is eligible to be appointed a District Judge under section 5 of the District Court Ordinance (Cap. 336).~~

~~(4) Subject to subsections (7) and (8), the Chairman and a Deputy Chairman shall each be appointed for a term of not more than 3 years but may be reappointed.~~

(5) The Chief Executive shall appoint a panel of persons, not being public officers, whom he considers suitable for appointment-selection under section 45(1)(b) (~~procedure on appeal~~composition of Appeal Board for purposes of appeal) as members of the Appeal Board.

(5A) A person shall be appointed under subsection (2) or (5) for a term of not more than 3 years but may be reappointed.

(6) An appointment under subsection (2) or (5) shall be notified in the Gazette.

(7) The Chairman, a Deputy Chairman or a panel member may at any time resign by notice in writing to the Chief Executive.

(8) The Chief Executive may revoke the appointment of the Chairman, a Deputy Chairman or a panel member on the ground of incapacity, bankruptcy, neglect of duty or misconduct proved to the satisfaction of the Chief Executive.

(9) The remuneration, if any, of the Chairman, a Deputy Chairman and a panel member shall be paid at a rate that the Financial Secretary determines.

#### **44. Appeals to Appeal Board**

(1) A person on whom an enforcement notice is served under section 35 (*Authority may issue enforcement notice*) may appeal to the Appeal Board against the enforcement notice or any part of the enforcement notice.

(2) A person who wishes to appeal under this section must lodge a notice of appeal with the Appeal Board not later than 14 days after the enforcement notice is served on him under section 35 (*Authority may issue enforcement notice*).

(3) Unless ordered by the Appeal Board under section 46(1)(i) (*powers of Appeal Board*), the lodging of a notice of appeal shall not have the effect of

suspending the operation of the enforcement notice or any part of the enforcement notice under appeal.

**45. Procedure on Composition of Appeal Board for purposes of appeal**

- (1) For the purposes of an appeal, the Appeal Board shall consist of –
- (a) ~~the Chairman or a Deputy Chairman, as determined by the Chairmana~~ presiding officer, who shall preside at the hearing of the appeal ~~(the “presiding officer”)~~; and
  - (b) 2 panel members ~~appointed~~ selected by the presiding officer.

(2) Subject to subsections (3), (4) and (5), the Chairman or, if the Chairman so determines, a Deputy Chairman selected by the Chairman shall act as presiding officer.

(3) The Chairman shall not act as presiding officer if he has a direct or indirect interest in the appeal.

(4) The Chairman shall not select a Deputy Chairman to act as presiding officer if the Deputy Chairman has a direct or indirect interest in the appeal.

(5) In the event that the Chairman and each Deputy Chairman has a direct or indirect interest in an appeal, the Chief Executive may select a panel member who is legally qualified and who does not have a direct or indirect interest in the appeal to act as presiding officer.

(6) The presiding officer shall not select a panel member to hear an appeal if the panel member has a direct or indirect interest in the appeal.

(27) If the term of appointment of the presiding officer or a panel member ~~selected~~ appointed under subsection (1) ~~(b)~~ expires during the hearing of an appeal, the presiding officer or panel member may continue to hear the appeal until the appeal is determined.

#### **45A. Procedure on appeal**

(31) In the hearing of an appeal, every question before the Appeal Board shall be determined by the opinion of the majority of the members hearing the appeal except a question of law which shall be determined by the presiding officer, and in the case of an equality of votes the presiding officer shall have a casting vote.

~~(4) A party to an appeal shall be entitled to be heard either in person or through a counsel or solicitor, and if any party is a company, through any of its directors or other officers, or if a partnership, through any of its partners.~~

(2) A party to an appeal shall be entitled to be heard either in person or through a counsel or solicitor.

(3) In addition, where a party to an appeal is an organization, that party shall be entitled to be heard –

(a) in the case of a Hong Kong company or other company or body corporate, through any of its directors or other officers;

(b) in the case of a partnership, through any of its partners; and

(c) in the case of any other organization, through any of its officers.

(54) The Appeal Board may, if it sees fit, permit a party to an appeal to submit written representations to the Appeal Board in lieu of the party appearing at a sitting of the Appeal Board either in person or through a counsel or solicitor or a director, officer or partner referred to in subsection (3) at a sitting of the Appeal Board.

(65) Every sitting of the Appeal Board shall be held in public unless the Appeal Board considers that in the interests of justice a sitting or part of a sitting should not be held in public, in which case it may hold the sitting or part of the sitting in private.

(76) After hearing an appeal, the Appeal Board shall determine the appeal by upholding, varying or ~~quashing~~ setting aside the enforcement notice and may make such consequential orders as it considers necessary.

(7) The Appeal Board shall notify in writing the parties to the appeal of its decision and the reasons for the decision.

~~(8) Every decision of the Appeal Board under subsection (7) shall be in writing and contain a statement of the reasons for the decision.~~

#### **46. Powers of Appeal Board**

(1) Subject to section 47 (*privilege against disclosure*) and section 50 (*privileges and immunities of Appeal Board members and witnesses*), in the hearing of an appeal, the Appeal Board may –

- (a) subject to subsection (2), receive and consider any material, whether by way of oral evidence, written statements, documents or otherwise, and whether or not it would be admissible in a court;
- (b) by notice in writing signed by the presiding officer, summon any person –
  - (i) to produce to the Appeal Board any ~~information or~~ document that is relevant to the appeal and is in his custody or under his control; or
  - (ii) to appear before the Appeal Board and to give evidence relevant to the appeal;
- (c) administer oaths and affirmations;
- (d) require evidence to be given on oath or affirmation;
- (e) make an award as to costs –
  - (i) against an appellant, if the Appeal Board is satisfied that he has conducted his case in a frivolous or vexatious manner; and

- (ii) against any other party to the appeal, if the Appeal Board is satisfied that in all the circumstances of the case it would be unjust and inequitable not to do so;
- (f) where the Appeal Board is satisfied that it is just and equitable to do so, require a party to the appeal to pay the costs of the Appeal Board in hearing the appeal;
- (g) make an order prohibiting a person from publishing or otherwise disclosing any material the Appeal Board receives;
- (h) make an order prohibiting the publication or other disclosure of any material the Appeal Board receives at a sitting, or part of a sitting, that is held in private; and
- (i) make an order suspending the operation of an enforcement notice.

(2) Subsection (1)(a) shall not entitle a person to require the Appeal Board to receive and consider any material that had not been submitted to or made available to the Authority at any time before the enforcement notice under appeal was served.

(3) Costs referred to in subsection (1)(e) and (f) are recoverable as a civil debt.

(4) The Chairman may determine any matter of practice or procedure relating to the hearing of appeals where no provision governing such matter is made in this Ordinance or in ~~the~~any rules made under section 51 (*rules*).

#### **47. Privilege against disclosure**

For the purposes of an appeal, the appellant, the Authority and any other person summoned under section 46(1)(b) (*powers of Appeal Board*) shall each have the same privileges in respect of the disclosure of any material as if the proceedings before the Appeal Board were proceedings before a court.

#### **48. Case may be stated for Court of Appeal**

(1) The Appeal Board may refer any question of law arising in an appeal to the Court of Appeal for determination by way of case stated.

(2) On the hearing of the case, the Court of Appeal may –

- (a) determine the question stated; or
- (b) remit the case to the Appeal Board, in whole or in part, for reconsideration in the light of the Court’s determination.

(3) Where a case is stated under subsection (1), the Appeal Board shall not determine the relevant appeal before the Court of Appeal determines the relevant point of law.

#### **49. Offences relating to appeals**

(1) In relation to an appeal, a person who, without reasonable excuse, refuses or fails –

- (a) to attend and give evidence when required to do so by the Appeal Board;
- (b) to answer truthfully and completely questions put to him by the Appeal Board; or
- (c) to produce any document that he is required by the Appeal Board to produce,

commits an offence and is liable on summary conviction to a fine at level 3 and to imprisonment for 6 months.

(2) A person who publishes or otherwise discloses any material in contravention of –

- (a) an order under section 46(1)(g) (*powers of Appeal Board*);  
or
- (b) an order under section 46(1)(h) (*powers of Appeal Board*),

commits an offence and is liable on summary conviction to a fine at level 5 and to imprisonment for 2 years.

(3) It is a defence to a charge for an offence under subsection (2)(b) for the person charged to prove that he did not know and had no reason for

knowing that the Appeal Board had made an order under section 46(1)(h) (*powers of Appeal Board*) prohibiting the publication or other disclosure of the material concerned.

#### **50. Privileges and immunities of Appeal Board members and witnesses**

(1) The Chairman, a Deputy Chairman and a panel member have, in the performance of their functions under this Part, the same privileges and immunities as a judge of the Court of First Instance in civil proceedings in that Court.

(2) A witness before the Appeal Board shall be entitled to the same privileges and immunities as if he were a witness in civil proceedings in the Court of First Instance.

#### **51. Rules**

The Secretary may make rules –

- (a) to provide for the lodging of appeals; and
- (b) ~~relating to~~ generally for regulating the practice and procedure of the Appeal Board.

### **PART 7**

#### **MISCELLANEOUS**

#### **52. Claims for loss or damage**

(1) A person who suffers loss or damage by reason of a contravention of any provision of this Ordinance (“the claimant”) shall be entitled to bring proceedings against the person who committed the contravention ~~(whether or not he has been convicted of an offence in relation to the contravention).~~

(1A) For the purposes of subsection (1), it is immaterial whether –

- (a) the contravention constitutes an offence; or
- (b) the person who committed the contravention has been convicted of an offence in relation to the contravention.

(2) Subject to subsection (5), proceedings under subsection (1) shall be brought in the District Court but all such remedies shall be obtainable in such proceedings as, apart from this subsection, would be obtainable in the Court of First Instance.

(3) Without limiting the generality of subsection (2), the District Court may, if it considers it fair, just and reasonable in the circumstances to do so –

- (a) make a declaration that the respondent has committed an act, or engaged in conduct, in contravention of this Ordinance;
- (b) order that the respondent shall perform any reasonable act or course of conduct to redress any loss or damage suffered by the claimant;
- (c) order that the respondent shall pay to the claimant compensation by way of damages for any loss or damage suffered by the claimant by reason of the respondent's act or conduct; and
- (d) grant an injunction or any other appropriate remedy, order or relief against the respondent.

(4) By virtue of this subsection and notwithstanding any other enactment or rule of law, the District Court shall have jurisdiction to hear and determine any proceedings under subsection (1) and shall have all such powers as are necessary or expedient for it to have in order to provide, grant or make any remedy, injunction, order or relief ~~mentioned~~ referred to in subsection (3).

(5) Where an amount claimed for loss or damage under subsection (1) does not exceed the amount ~~mentioned~~ referred to in paragraph 1 of the Schedule to the Small Claims Tribunal Ordinance (Cap. 338), the proceedings shall be brought in the Small Claims Tribunal, and that Ordinance shall apply to the claim in the same manner as if it were a monetary claim founded in tort as referred to in that paragraph.

(6) The Limitation Ordinance (Cap. 347) shall apply, with necessary modifications, to a claim under this section in the same manner as it applies to an action founded on tort.

(7) For the avoidance of doubt, nothing in this section affects, limits or diminishes any rights, privileges, obligations or liabilities conferred or imposed on a person under any other enactment or rule of law.

### **52A. Offences relating to misuse of information**

(1) No person to whom an unsubscribe request is sent under section 8 (commercial electronic messages must contain unsubscribe facility) shall use any information obtained thereby other than for the purpose of complying with the requirements of that section or section 9 (commercial electronic messages must not be sent after unsubscribe request is sent).

(2) No person to whom any information contained in a do-not-call register is made available under section 31 (access to do-not-call registers) shall use any information obtained thereby other than for the purpose described in section 30(2)(b) (Authority may keep do-not-call registers).

(3) A person who contravenes subsection (1) or (2) commits an offence and is liable on summary conviction to a fine at level 6.

(4) A person who knowingly contravenes subsection (1) or (2) commits an offence and is liable on conviction on indictment to a fine of \$1,000,000 and to imprisonment for 5 years.

(5) It is a defence to a charge for an offence under subsection (3) for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

### **53. Liability of principals, agents, employers and employees**

(1) Any act done or conduct engaged in by a person in the course of his employment (the “employee”) shall be treated for the purposes of this

Ordinance as done or engaged in by his employer as well as by him, whether or not it was done or engaged in with the employer's knowledge or approval.

(2) Any act done or conduct engaged in by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes of this Ordinance as done or engaged in by that other person as well as by him.

(3) In any proceedings for an offence under this Ordinance brought against any person in respect of an act or conduct alleged to have been done or engaged in, as the case may be, by an employee or agent of that person, it is a defence for that person to prove that he took such steps as were practicable to prevent the employee or agent from doing the act or engaging in the conduct, or from doing or engaging in, in the course of his employment or authority, acts or conduct, as the case may be, of that description.

(4) In any proceedings for an offence under this Ordinance brought against any employee in respect of an act or conduct alleged to have been done or engaged in, as the case may be, by the employee, it is a defence for the employee to prove that he did the act or engaged in the conduct in good faith –

- (a) in the course of his employment; or
- (b) in accordance with instructions given to him by or on behalf of his employer in the course of his employment.

(5) Subsection (4) does not apply to an employee who, at the time the act was done or the conduct was engaged in, was in a position to make or influence a decision regarding that act or conduct.

#### **54. Liability of directors, partners, etc.**

(1) Where ~~a company or a partnership~~ an organization has done any act or engaged in any conduct constituting an offence under this Ordinance, the following person shall, unless ~~he proves there is evidence showing~~ that he did not authorize the act to be done or the conduct to be engaged in, be presumed also to have done the act or to have engaged in the conduct –

- (a) in the case of ~~the company~~ a Hong Kong company or other company or body corporate (“the company”) –
- (i) any director of the company who, at the time the act was done or the conduct was engaged in, was responsible for the internal management of the company; or
  - (ii) if there was no such director, any person who, at the time the act was done or the conduct was engaged in, was responsible under the immediate authority of the directors of the company for the internal management of the company;
- (b) in the case of ~~the a~~ partnership –
- (i) any partner in the partnership who, at the time the act was done or the conduct was engaged in, was responsible for the internal management of the partnership; or
  - (ii) if there was no such partner, any person who, at the time the act was done or the conduct was engaged in, was responsible under the immediate authority of the partners in the partnership for the internal management of the partnership; and
- (c) in the case of any other organization, any officer of the organization or other person who, at the time the act was done or the conduct was engaged in, was responsible for the internal management of the organization.

~~(2) Where an unincorporated body of persons has done any act or engaged in any conduct constituting an offence under this Ordinance, any officer or other person who, at the time the act was done or the conduct was engaged in, was responsible for the internal management of the body shall, unless he proves~~

~~that he did not authorize the act to be done or the conduct to be engaged in, be presumed also to have done the act or to have engaged in the conduct.~~

(3) A person charged with an offence under this Ordinance by virtue of subsection (1) ~~or (2)~~ is taken ~~to have proved that he did not authorize the act in question to be done or the conduct in question to be engaged in~~ not to have done the act in question or not to have engaged in the conduct in question if –

- (a) sufficient evidence is adduced to raise an issue ~~with respect to that fact~~ that he did not authorize the act to be done or the conduct to be engaged in; and
- (b) the contrary is not proved by the prosecution beyond reasonable doubt.

#### **55. Transactions relating to contravention not void or voidable**

A transaction is not void or voidable by reason only that a contravention of any of the provisions of this Ordinance has taken place in relation to or as a result of the transaction.

#### **56. Regulations**

The Secretary may make regulations –

- (a) for the purposes of any provision of this Ordinance that contemplates or authorizes the making of regulations with respect to any matter;
- (b) providing for such matters as are necessary for giving full effect to the provisions of this Ordinance; and
- (c) generally for carrying out the purposes and provisions of this Ordinance.

#### **57. Consequential amendments**

The enactments referred to in Schedule 2 are amended in the manner set out in that Schedule.

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~~SCHEDULE 1~~

[s. 6]

~~MATTERS EXCLUDED FROM APPLICATION OF ORDINANCE~~

Item	Description
1.	<del>Voice, sound, image or video messages, or messages combining text, voice, sound, images or video, that involve person to person interactive communications between a caller and a recipient without any pre-recorded or synthesized (machine generated or simulated) element.</del>
2.	<del>Voice, sound, image or video messages, or messages combining text, voice, sound, images or video, that involve— (a) person to person interactive communications between a caller and a recipient; and (b) a pre recorded or synthesized (machine generated or simulated) element, whereby the pre recorded or synthesized element is activated in response to information communicated by the caller.</del>
3.	<del>Television programme services regulated under the Broadcasting Ordinance (Cap. 562).</del>
4.	<del>Sound broadcasting services regulated under the Telecommunications Ordinance (Cap. 106).</del>

SCHEDULE 1

[s. 6]

EXEMPTIONS1. Interpretation

(1) In this Schedule –

“sound broadcasting service” (聲音廣播服務) means –

(a) a service that includes broadcasting as defined in section 13A(1) of the Telecommunications Ordinance (Cap. 106);

or

(b) a service of a like nature;

“television programme service” (電視節目服務) means –

(a) a television programme service as defined in section 2(1) of the Broadcasting Ordinance (Cap. 562); or

(b) a service of a like nature.

(2) For the avoidance of doubt, the exemption of a matter from the application of Part 2 of this Ordinance (*rules about sending commercial electronic messages*) in accordance with Table 2 shall not be construed as implying that the other provisions of this Ordinance apply to that matter.

2. Exemptions

(1) The matters described in an item in Table 1 are exempt from the application of this Ordinance.

(2) The matters described in an item in column 1 in Table 2 are exempt from the application of Part 2 of this Ordinance (*rules about sending commercial electronic messages*) subject to the conditions, if any, specified in column 2, of that item.

TABLE 1  
MATTERS EXEMPTED FROM APPLICATION OF ORDINANCE

<u>Item</u>	<u>Description of exempt matter</u>
<u>1.</u>	<u>Voice, sound, image or video messages, or messages combining text, voice, sound, images or video, that involve person-to-person interactive communications between a caller and a recipient without any pre-recorded or synthesized (machine-generated or simulated) element.</u>
<u>2.</u>	<u>Voice, sound, image or video messages, or messages combining text, voice, sound, images or video, that involve –</u> <u>(a) person-to-person interactive communications between a caller and a recipient; and</u> <u>(b) a pre-recorded or synthesized (machine-generated or simulated) element,</u> <u>whereby the pre-recorded or synthesized element is activated in response to information communicated by the caller.</u>
<u>3.</u>	<u>Television programme services, whether or not licensed under the Broadcasting Ordinance (Cap. 562).</u>
<u>4.</u>	<u>Sound broadcasting services, whether or not licensed under the Telecommunications Ordinance (Cap. 106).</u>

TABLE 2  
MATTERS EXEMPTED FROM APPLICATION  
OF PART 2 OF ORDINANCE

<u>Item</u>	<u>Description of exempt matter</u>	<u>Conditions to which exemption is subject</u>
1.	<p data-bbox="336 651 903 801"><u>Any commercial electronic message sent to a person that meets the following conditions –</u></p> <p data-bbox="376 831 903 1160">(a) <u>the message is sent in response to information communicated to the sender by that person (including but not limited to information communicated through the Internet);</u></p> <p data-bbox="376 1189 903 1458">(b) <u>the information is communicated to the sender by that person either directly or in consequence of the conduct of that person;</u></p> <p data-bbox="376 1487 903 1697">(c) <u>the message would not have been sent but for the communication of that information; and</u></p> <p data-bbox="376 1727 903 1933">(d) <u>the message is of a kind that the person would normally expect to receive as a result of the communication of that</u></p>	<p data-bbox="951 651 1305 1160"><u>The exemption is subject to the condition that the commercial electronic message is sent to the person within a reasonable time after the information is communicated to the sender by that person.</u></p>

information.

- |    |  |                       |
|----|--|-----------------------|
| 2. | <u>Any electronic message the primary purpose of which is –</u>  | <u>Not applicable</u> |
|    | <u>(a) to facilitate, complete or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;</u>   |                       |
|    | <u>(b) to provide warranty information, product recall information or safety or security information with respect to a commercial product or service purchased or used by the recipient; or</u>                                    |                       |
|    | <u>(c) to deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.</u> |                       |
| 3. | <u>Any electronic message the primary purpose of which is to provide –</u>   | <u>Not applicable</u> |
|    | <u>(a) notification concerning a change in the terms or features of;</u>   |                       |
|    | <u>(b) notification of a change in the recipient's standing or status with respect to; or</u>  |                       |

(c) at regular periodic intervals,  
account balance information or  
other type of account statement  
with respect to,

a subscription, membership, account,  
loan or comparable ongoing commercial  
relationship involving the ongoing  
purchase or use by the recipient of  
goods or services offered by the sender.

- |  |                              |
|--|------------------------------|
| <p><u>4. Any electronic message the primary<br/>purpose of which is to provide<br/>information directly related to an<br/>employment relationship or a related<br/>benefit plan in which the recipient is<br/>currently involved, participating or<br/>enrolled.</u></p> | <p><u>Not applicable</u></p> |
|--|------------------------------|

## SCHEDULE 2

[s. 57]

## CONSEQUENTIAL AMENDMENTS

**Telecommunications Ordinance****1. Offences by telecommunications officer, etc.**

(1) Section 24 of the Telecommunications Ordinance (Cap. 106) is amended by renumbering it as section 24(1).

(2) Section 24 is amended by adding –

“(2) This section does not apply to any act done by a telecommunications officer, or any person who, though not a telecommunications officer, has official duties in connection with a telecommunications service, for the purpose of –

- (a) facilitating compliance with this Ordinance or ~~any other law~~ the Unsolicited Electronic Messages Ordinance ( \_ of 2007);
- (b) implementing the terms or conditions of a licence of a licensee or any contract made between a licensee and a customer of the licensee; or
- (c) facilitating compliance with a lawful request of a customer of a licensee in connection with a service supplied by the licensee to the customer.”.

**Resolution establishing Office of the Telecommunications  
Authority Trading Fund**

**2. Services to be provided under the trading fund**

Schedule 1 to the resolution of the Legislative Council establishing the Office of the Telecommunications Authority Trading Fund (Cap. 430 sub. leg. D)

is amended, in item 1, by repealing “~~and the~~ Telephone Ordinance (Cap. 269)” and substituting “~~the Telephone Ordinance (Cap. 269) and the~~ Unsolicited Electronic Messages Ordinance ( of ~~2006~~2007)”.

### **Electronic Transactions Ordinance**

**3. Proceedings in relation to which sections 5, 5A, 6, 7 and 8 of this Ordinance do not apply under section 13(1) of this Ordinance**

Schedule 2 to the Electronic Transactions Ordinance (Cap. 553) is amended –

- (a) in paragraph (zq), in the Chinese text, by repealing “ ; 或” and substituting a semicolon;
- (b) in paragraph (zr), by repealing the full stop at the end and substituting a semicolon;
- (c) by adding –
  - “(zs) the Unsolicited Electronic Messages (Enforcement Notices) Appeal Board established under the Unsolicited Electronic Messages Ordinance ( of ~~2006~~2007).”.