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## Business Software Alliance

# Submission in response to the Unsolicited Electronic Messages Bill

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## 1 Introduction - BSA welcomes the UEM Bill

- 1.1 The Business Software Alliance ("BSA") appreciates the opportunity to convey its views on the Unsolicited Electronic Messages Bill ("UEM Bill") to the Legislative Council.
- 1.2 BSA and its members are keenly interested in the Hong Kong Government's approach to anti-spam regulation. In March 2006, BSA made a submission in response to the Consultation Paper on Legislative Proposals to Contain the Problem of Electronic Messages ("Consultation Paper"), and is encouraged to observe that some of its recommendations – including the need to define "affirmative consent" and introduce a merits-based review of enforcement notices – have since been implemented in the UEM Bill.
- 1.3 In this submission, BSA wishes to draw to the Legislative Council's attention some remaining weaknesses in the UEM Bill and offer solutions as to how they may be overcome. By doing so, BSA is hopeful that the Hong Kong Government will further strengthen what BSA already considers to be a robust and pragmatic piece of anti-spam legislation. Reference is made to our past submission, as we have not repeated all the points previously made.

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## 2 BSA's perspective on spam regulation

- 2.1 As the voice of the world's leading commercial software publishers and their hardware partners, BSA represents the interests of a number of stakeholders involved in the spam debate. BSA members interact with the spam issue as developers of anti-spam technologies, providers of hardware and networking solutions, email service providers and e-marketers. BSA is a strong supporter of legislative measures to control spammers and advocates a harmonized approach that ensures that illicit spammers are held accountable without imposing undue compliance costs on legitimate e-marketers.
- 2.2 BSA members include Adobe, Apple, Autodesk, Avid, Bentley Systems, Borland, Cadence Design Systems, Cisco Systems, CNC Software/Mastercam, Dell, Entrust, HP, IBM, Intel, Internet Security Systems, McAfee, Microsoft, PTC, RSA Security, SAP, SolidWorks, Sybase, Symantec, Synopsys, The MathWorks, and UGS.



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### **3 The UEM Bill should accommodate pre-existing business relationships**

- 3.1 Perhaps the most significant reservation BSA has with the UEM Bill is that it does not accommodate pre-existing business relationships between senders and recipients of commercial electronic messages – see, in particular, clauses 8(2), 9(4), 10(4), and 30(2).
- 3.2 BSA's view is that it is appropriate for anti-spam legislation to not increase the obligations on persons who send commercial electronic messages in furtherance of pre-existing business relationships. This is because, in those circumstances, the sender and recipient have voluntarily entered into a business relationship pursuant to which they expect to receive transactional or relationship messages with a commercial focus. In BSA's opinion, this situation is clearly distinguishable from a typical spamming scenario.
- 3.3 BSA considers that pre-existing business relationships are relevant to a number of aspects of the UEM Bill including the requirement to include a functional unsubscribe facility and the prohibition on sending messages to persons listed on a do-not-call register.
- 3.4 The most holistic method of accommodating pre-existing business relationships in the UEM Bill (which reflects the approach taken in the United States and proposed in New Zealand) would be to amend the definition of commercial electronic message so as to exclude transactional or relationship messages. The concept of a transactional or relationship message is defined in section 3(17) of the United States' CAN-SPAM Act of 2003 to include messages the primary purpose of which is to:
- (a) facilitate or complete a commercial transaction that the recipient has previously agreed to enter into with the sender; or
  - (b) 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.
- 3.5 An alternative to the holistic approach described above would be to separately address each aspect of the UEM Bill that pre-existing business relationships appear relevant to.
- (a) Previously, the Hong Kong Government proposed a private arrangements exception to the requirement to include a functional unsubscribe facility. This exception would have exempted a sender from the requirement to include a functional unsubscribe facility where such a requirement was "inconsistent with the terms of a contract or other agreement between the sender or recipient". In its submission in response to the Consultation Paper,



BSA expressed its support for this exception if qualified by a presumption that all transactional or relationship messages (as defined in the US legislation) would fall within it. BSA maintains its support for a revised private arrangements exception as one way of accommodating pre-existing business relationship in the UEM Bill.

- (b) BSA also supports (as an alternative to the amendment to the definition of commercial electronic message outlined above) the enactment of a pre-existing business relationship exception to the clause 10 prohibition on sending commercial electronic messages to persons listed on a do-not-call register. In BSA's opinion, e-marketers should not be prohibited from sending commercial electronic messages to a person listed on a do-not-call register where the e-marketer can demonstrate that they have a pre-existing business relationship with the recipient.

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#### **4 The requirement to retain unsubscribe requests should be removed**

*(Clause 8(3) of the UEM Bill)*

- 4.1 Equally concerning to BSA is the requirement that recipients of unsubscribe requests retain those messages for at least 7 years. BSA is of the strong view that this is not only unnecessary and undesirable, but also unworkable.
- 4.2 It is unnecessary to impose a record retention requirement on e-marketers because those persons are capable of establishing their own systems to ensure compliance. No other comparable jurisdictions in the Asia Pacific region (including Australia, Singapore and New Zealand) or the United States have introduced (or propose to introduce) a record retention requirement in their anti-spam legislation. To the best of BSA's knowledge, the absence of such a requirement has not presented any difficulties for enforcement agencies in those countries. We reiterate the need to harmonize anti-spam laws where possible; inconsistencies present major difficulties for the development by multinationals of global compliance procedures. The result of inconsistencies with the multitude of anti-spam regimes would be that multinationals bear the burden of the extra-territorial operation of those regimes, rather than the illegitimate spammers against whom these measures are targeted.
- 4.3 In addition to being unnecessary, BSA considers that it is undesirable to impose a record retention requirement of the kind contemplated in clause 8(3) of the UEM Bill. This is because such a requirement will place a significant burden on regulated entities (not just small and medium businesses, but also major enterprises), and is unlikely to assist enforcement efforts given that illicit spammers can be expected to ignore the proposed requirement.



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- 4.4 Further, as a practical matter, BSA believes that the record retention requirement would not work. For instance, it is not clear how a sender could comply where a recipient submits an unsubscribe request using a web-based form. This method of submitting unsubscribe requests is commonly provided by senders of commercial electronic messages.
- 4.5 For these reasons, BSA strongly submits that the Government should remove the proposed record retention requirement from clause 8(3) of the UEM Bill.

**5 The proposed private right of action should be limited to ISPs and email service providers**

*(Clause 52 of the UEM Bill)*

- 5.1 BSA wishes to reiterate its concerns about the breadth of the private right of action in clause 52 of the UEM Bill. That clause permits any person who has suffered loss or damage as a result of another's contravention of the UEM Bill to commence proceedings against the last-mentioned person.
- 5.2 In BSA's opinion, affording standing to individual spam recipients (as opposed to intermediaries such as ISPs and email service providers) may encourage unproductive litigation, the negative consequences of which will primarily fall on Hong Kong's judiciary. In many cases, the losses suffered by individual spam recipients simply do not justify the cost of court proceedings, and BSA's experience in other jurisdictions has been that, individual spam recipients seldom have the necessary expertise to identify and pursue spammers in any event.
- 5.3 By contrast, BSA considers that ISPs, email service providers and other intermediaries are well-equipped to bring effective civil actions against spammers and are capable of representing the interests of individual spam recipients as well as their own.
- 5.4 Thus, BSA urges the Government to limit the proposed private right of action to ISPs, email service providers and other intermediaries that have a clear interest in the legitimacy of online marketing channels. Another way of addressing the concerns raised above would be for the Government to limit the proposed private right of action to claims above a set monetary threshold.



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## 6 The definition of commercial electronic message should be amended to exclude messages with an incidental commercial purpose

(Clause 2 of the UEM Bill)

- 6.1 BSA is concerned that the breadth of the proposed definition of commercial electronic message will undermine the Hong Kong Government's objective of facilitating the development of e-marketing as a legitimate marketing channel in Hong Kong.
- 6.2 Clause 2 of the UEM Bill defines "commercial electronic message" as an electronic message the purpose, or one of the purposes, of which is specified in paragraphs (a) to (f) of that definition. The inclusion of the phrase "one of the purposes" means that the definition of commercial electronic message captures messages that have an *incidental* commercial purpose. For example, an email that contains a product recall notice coupled with an offer to provide a replacement product will be regulated by the UEM Bill.
- 6.3 BSA does not think that it is appropriate for the UEM Bill to regulate electronic messages that have an incidental or minor commercial purpose. Messages of that kind are not widely regarded as 'spam' and it will impose significant compliance costs on e-marketers (particularly small and medium businesses) if those messages fall within the scope of the regime.
- 6.4 Thus, BSA recommends that the definition of commercial electronic message be amended to only cover electronic messages where their *primary purpose* is one specified in clause 2 of the UEM Bill. This approach accords with that taken in section 3(2)(A) of the US CAN-SPAM Act of 2003.

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## 7 The operation of enforcement notices should be suspended while a merits-based review is possible or in progress

(Clause 44 of the UEM Bill)

- 7.1 BSA welcomes the Hong Kong Government's proposal to introduce a merits-based review of enforcement notices issued by the Telecommunications Authority.
- 7.2 However, BSA opposes clause 44(3) of the UEM bill which provides that unless



ordered the Appeal Board, the lodging of an appeal notice will not suspend the operation of the enforcement notice. This is problematic because it means that a person could contravene an enforcement notice (and therefore become liable to criminal sanctions) while awaiting the outcome of an appeal as to the correctness of issuing the enforcement notice in the first place.

- 7.3 This would clearly be an undesirable result and BSA urges the Hong Kong Government to take steps to address it. In particular, BSA recommends that clause 44 of the UEM Bill be amended to provide that the relevant authority can only commence criminal proceedings alleging failure to comply with an enforcement notice upon:
- (a) expiry of the 14 day period allowed for lodging a notice of appeal; or
  - (b) completion of a merits-based review establishing the correctness of the Telecommunications Authority's decision.

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## 8 The Telecommunications Authority should not develop a do-not-email register

*(Clause 30 of the UEM Bill)*

- 8.1 BSA reiterates its view that the development of a do-not-email register would have adverse consequences for the Hong Kong Government's anti-spam efforts, and strongly counsels against the Telecommunications Authority using its power under clause 30 of the UEM Bill to do so. This is because a do-not-email register is likely to serve as a directory of valid email addresses for illicit spammers who would use it to send emails in contravention of Hong Kong's anti-spam regime.

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## 9 Conclusion

- 9.1 BSA commends the Hong Kong Government for its work on the UEM Bill to date. In BSA's opinion, the UEM Bill bears the hallmarks of a robust and pragmatic piece of anti-spam legislation that appears to strike a reasonable balance between the interests of stakeholders. By addressing the issues raised in this submission, the Hong Kong Government will further strengthen the UEM Bill.
- 9.2 BSA thanks the Administration and Legislative Council for their consideration of this submission, and welcomes the opportunity to discuss the points we have raised.