

CB(1)2307/05-06(04)



# **Response to the Unsolicited Electronic Messages Bill**

**Developed by the Hong Kong Anti-Spam Coalition**

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## **1 Introduction**

The Hong Kong Anti-Spam Coalition ("Coalition") welcomes this further opportunity to provide feedback on the Unsolicited Electronic Messages Bill ("UEM Bill") which was introduced into the Legislative Council on 4 July 2006.

The Coalition reiterates its general support for the steps that the Hong Kong Government is taking towards combating the problem of spam. In March 2006, the Coalition submitted a response to the Consultation Paper on Legislative Proposals to Contain the Problem of Unsolicited Electronic Messages ("Consultation Paper"). Many of the issues that we raised in that response appear to have been given due consideration by the Hong Kong Government and we commend the Government for its implementation of some of our recommendations in the UEM Bill.

The Coalition wishes to take this opportunity to convey to the Legislative Council the importance of some of the Coalition's recommendations that have not yet been incorporated into the UEM Bill. The Coalition is confident that the implementation of these recommendations will have a positive influence on the overall effectiveness of Hong Kong's proposed anti-spam legislation.

## **2 The Hong Kong Anti-Spam Coalition**

The Coalition was formed during the summer of 2003. It currently comprises a group of concerned industry participants, including the Hong Kong Internet Service Providers Association (HKISPA), the Asia Digital

Marketing Association (ADMA) and business leaders from a number of prominent organizations such as MessageLabs, Microsoft and Time Warner.

The aims of the Coalition are to make a real difference to consumers, business and government by bringing together powerful local market knowledge and contacts to foster effective industry self-regulation, legislative solutions, information sharing and other global anti-spam best practices.

As leaders in their industries, the associations and companies which form the Coalition recognize that they must share the responsibility for dealing with spam. The Coalition's efforts thus far have focused on the following areas:

- discussion and development of industry best practices for commercial email;
- evaluation of the extent of the spam problem in Hong Kong (and elsewhere in Asia) through both short and longer term projects;
- developing information highlighting the problem of spam vis-à-vis computer users in Hong Kong and identifying key elements of effective anti-spam legislation;
- development and sponsorship of training programs to educate local IT professionals on the dangers of spam and how to avoid having their systems abused by spammers;
- where possible, sharing of information that would facilitate enforcement action against high-volume spammers; and
- liaison with the Hong Kong Government in these areas.

### **3 The definition of "commercial unsolicited electronic messages" should only encompass messages where the primary purpose is commercial**

Under clause 2 of the UEM Bill, a commercial electronic message is defined as an electronic message "the purpose, or *one of the purposes*, of which is" a purpose from the list set out in clause 2. The Explanatory Memorandum to the UEM Bill notes that, for a message to fall within this definition, its commercial purpose need not be the primary or sole purpose of the message.

In our March 2006 response to the Consultation Paper, we stated that such a definition would encompass too wide a range of messages. The Coalition now reiterates this view to the Legislative Council. The proposed definition of commercial electronic message is likely to apply to many electronic messages that recipients do not view as "commercial", such as an electronic invoice accompanied by a discount coupon for future purchases. This result seems to be contrary to the Hong Kong Government's stated commitment to minimizing compliance costs for small and medium businesses and the development of e-marketing as a legitimate marketing channel.

For these reasons, the Coalition once again suggests that commercial electronic message be defined as an electronic message "the *primary* purpose of which is" a purpose set out in clause 2 of the UEM Bill. This definition is in line with section 3(2)(A) of the US CAN-SPAM Act of 2003.

#### **4 The procedure for reviewing Telecommunications Authority-issued enforcement notices on a merits basis should be modified**

In our March 2006 response to the Consultation Paper, we recommended that the Hong Kong Government introduce a procedure to permit a merits-based review of enforcement notices issued by the Telecommunications Authority. The Coalition is pleased to see that such a procedure has now been introduced in the UEM Bill: clause 44(1) permits a recipient of an enforcement notice to lodge a merits-based appeal to the Appeal Board against it.

However, the Coalition has identified an issue with the merits-based review procedure set out in the UEM Bill. Clause 44(3) states that "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". In practice, the operation of this clause might mean that a person may have criminal proceedings commenced against them for their failure to comply with an enforcement notice even although the validity of the enforcement notice is still under review.

Although it may be unlikely that a criminal prosecution would proceed while an enforcement notice is under appeal (given that the Appeal Board has the power to suspend an enforcement notice), the Coalition recommends that the UEM Bill should be amended so that lodging a notice of appeal has the effect of preventing the relevant authorities from commencing any criminal prosecution against the contravener until the merits-based appeal is resolved. Further, we would also recommend preventing criminal prosecutions from commencing before the expiry of the 14 day period

during which a person is allowed to lodge a notice of appeal under clause 44 of the UEM Bill. This would provide recipients of enforcement notices with sufficient time to appeal an enforcement notice without the concurrent burden of a criminal prosecution, the basis of which depends on the outcome of the merits-based appeal.

## **5 Explicit treatment of pre-existing business relationships would be helpful**

The treatment of pre-existing business relationships between senders and recipients of commercial electronic messages (eg, through use of a concept such as a "transactional or relationship message") is absent from the UEM Bill. The concept of pre-existing business relationships is important in the anti-spam context because there are certain situations in which it makes sense that a pre-existing business relationship between the sender and recipient would exempt the sender from compliance with various aspects of the UEM Bill.

For example, paragraph 55(f) of the Consultation Paper proposed to exempt senders from including a functional unsubscribe facility in their commercial electronic messages when doing so would be inconsistent with the terms of an earlier agreement formed between the sender and recipient. In our March 2006 response to the Consultation Paper, we agreed with the principle that such an exemption should be introduced. However, the specific exemption proposed in paragraph 55(f) of the Consultation Paper has not been drafted into the UEM Bill.

The Coalition believes that the concept of pre-existing business relationships should be incorporated in the UEM Bill in the following situations:

- A sender should not be required to include a functional unsubscribe facility in a commercial electronic message where that message is sent in furtherance of a pre-existing business relationship between the sender and recipient. An exception of this kind should be added to clause 8 of the UEM Bill.
- A sender should not be prohibited from sending a commercial electronic message to a person listed in a do-not-call register where there is a pre-existing business relationship between the sender and recipient. An exception of this kind should be added to clause 10 of the UEM Bill.

The Coalition notes that one way of addressing both of the above situations would be to define commercial electronic message to exclude transactional

or relationship messages (as that term is defined in section 3(17) of the US CAN-SPAM Act of 2003). This is the approach that has been implemented in the United States, and proposed in New Zealand's Unsolicited Electronic Messages Bill.

## **6 A do-not-call register for email addresses should not be set up**

Clause 30(1) of the UEM Bill permits the Telecommunications Authority to set up a do-not-call register for "registered users of electronic addresses". "Electronic address", as defined in clause 2 of the UEM Bill, includes email addresses.

The Coalition underscores its strong view that it would be counterproductive to set up a do-not-call register that contains email addresses. A do-not-email register presents a substantial security risk because it is likely that spammers would use it for their illegal purposes. The Coalition notes that the US Federal Trade Commission has reached a similar view on the utility of a do-not-email register (an observation which was made in the Consultation Paper).

## **7 The requirement to retain unsubscribe messages for 7 years is impractical and ineffective**

Clause 8(3) of the UEM Bill states that an unsubscribe message must be kept "for at least 7 years after its receipt".

The Coalition is strongly opposed to this requirement for the following reasons:

- The benefits gained from the retention requirement are questionable because the retention of unsubscribe requests is not likely to aid the enforcement of the anti-spam regime. This is primarily because spammers are unlikely to adhere to the proposed requirement.
- Small and medium-sized enterprises in particular, but also large enterprises, will face significant compliance costs in storing and maintaining potentially thousands or millions of unsubscribe messages for a protracted period of time.
- The proposed requirement is unprecedented among Hong Kong's major trading partners with the result that it will add to the burden of legitimate foreign businesses seeking to communicate with Hong Kong residents (on the basis that these foreign businesses would need to adopt procedures specific to Hong Kong).

The Coalition emphasized the importance of harmonization of anti-spam regimes in our March 2006 submission on the Consultation Paper. Compliance with anti-spam laws becomes a complex undertaking for multinational entities if they have to comply with markedly different legal requirements. The record retention requirement proposed under the UEM Bill is one obvious and concerning example of where Hong Kong's anti-spam regime stands in contrast to others, and where this would pose real difficulties for multinational entities.

For the above reasons, the Coalition urges the Legislative Council to remove the record retention requirement in clause 8(3) of the UEM Bill. The Coalition is confident that regulated entities are capable of designing and implementing their own procedures for complying with the UEM Bill.

## **8 Providing a private right of action for all who suffer pecuniary loss due to spam may result in undue litigation**

Clause 52(1) of the UEM Bill allows a person who suffers loss or damage arising from a contravention of the UEM Bill to bring proceedings against the contravener.

Since almost every recipient of an electronic message sent in contravention of the UEM will be able to prove loss or damage in the form of increased storage and data download costs, the Coalition is concerned that the proposed private of action will result in a raft of counterproductive litigation. This would unduly burden the judiciary and hamper the efficiency of the economy at large.

Accordingly, the Coalition strongly recommends that limitations be placed on who is afforded a private right of action under Hong Kong's UEM Bill. One example of a workable limitation is setting a minimum amount of pecuniary loss that must be suffered before a person is eligible to make a claim. Another approach (and one which has been implemented in the United States) would be to restrict the private right of action to certain categories of claimants that are likely to bear relatively high costs as a result of being spammed (notably, internet service providers and email service providers). These claimants are more likely to have the ability and resources to successfully pursue claims, and have a clear stake in ensuring the legitimacy of electronic messages handled by their systems and networks.

## **9 Further consultation**

The Coalition appreciates the opportunity to work with the Legislative Council to refine the UEM Bill. The Coalition welcomes, if desired, further discussion of this response.