

Legislative Proposals
to Contain the Problem of
Unsolicited Electronic Messages
(UEMs)

17 Mar 2006

Title of the Bill

Unsolicited Electronic Messages Bill
("the Bill")

Guiding Principles

- 1) The registered user of an electronic address should have the right to decide whether to receive or refuse further electronic messages at that electronic address.
- 2) There should be room for the development of e-marketing in Hong Kong as a legitimate promotion channel.
- 3) Hong Kong should avoid becoming a haven for illicit spamming activities.

Guiding Principles

- 4) Freedom of speech and expression must not be impaired.
- 5) Penalties and remedies should be proportionate to the severity of the offences.
- 6) The legislative provisions should be enforceable with reasonable effort.

Scope of Application

- To regulate “commercial” electronic messages only
 - Any electronic message which purports to offer, advertise, promote, or sponsor the provision of goods, facilities, services, land or a business or investment opportunity etc.
 - Non-commercial communications from governments, political parties, religious groups, charities, companies or other persons will fall outside the ambit of the Bill.

Scope of Application

- All forms of electronic communications (including e-mails, short messages, fax, any voice or video calls with pre-recorded elements), except:-
 - person-to-person voice or video telephone calls without any pre-recorded elements;
 - transmissions of sound or video material on broadcasting channels already regulated under Telecommunications Ordinance and Broadcasting Ordinance
- Technology neutral – New forms of electronic messages will automatically fall within the ambit of the Bill
- Secretary for Commerce, Industry and Technology may, by regulation, amend the schedule of exemption, having regard to latest technological or service developments

Extra-territorial Application

- The act of sending, or causing the sending of, a commercial electronic message is within the ambit of the Bill if the message has a “Hong Kong link”, e.g.
 - message originates from Hong Kong;
 - message is sent through Hong Kong to another destination;
 - message is sent to an electronic address in Hong Kong;
or
 - marketing of message, or, promotion or advertising of service by means of a UEM is in Hong Kong

Rules About Sending Commercial Electronic Message

- Implement an “opt-out” regime. Sender of commercial electronic messages should stop sending further commercial electronic messages to a recipient if the recipient so requests.
- Functional Unsubscribe Facility
 - For receiving unsubscribe requests from recipients of commercial electronic messages
 - Operational for at least 30 days after commercial electronic message is sent
 - Facility to be offered free of charge
 - Unsubscribe requests to take effect within 10 working days
 - Sender of commercial electronic messages to keep records of unsubscribe requests for at least 7 years

Rules About Sending Commercial Electronic Message

- Do-not-call registers
 - Electronic addresses on registers have the same legal effect as sending unsubscribe requests to all e-marketers
 - Telecommunications Authority (TA) to establish do-not-call registers for appropriate types of electronic addresses
 - Initially, three registers for:
 - voice, sound, video or image messages with pre-recorded elements
 - SMS/MMS messages
 - fax messages
 - According to a study of the US Federal Trade Commission, with the current technical standard for e-mail systems, establishing a Do-not-call register for e-mail addresses will run counter the anti-spam effort.

Rules About Sending Commercial Electronic Messages

- Accurate Sender Information
 - Include in message the name, physical address and electronic address of sender
 - Information accurate for at least 30 days after the commercial electronic message is sent
- Prohibition of misleading subject headings
 - Prohibit sending of commercial e-mail messages with subject headings that could mislead a recipient about the content or subject matter of the message

Rules About Sending Commercial Electronic Messages

- Contraventions enforced by enforcement notice
 - TA to specify contravention and steps required to remedy the contravention in an enforcement notice
 - An offence if enforcement notice is not complied with
 - Penalty
 - Fine up to \$100,000.
 - Continued offence: further fine of \$1,000 a day.
 - In respect of a particular nature of contravention, TA will issue only one enforcement notice to a party. For subsequent breaches, the TA can bring them to court directly.

Rules about Address Harvesting

- Prohibit the supply, acquisition or use of address-harvesting software or harvested-address lists in contravention against the rules about sending commercial electronic messages
- This is a common technique used by e-mail spammers. Costs are however borne by telecommunication services providers and recipients of the electronic messages. Relatively heavy penalties should be introduced to combat the problem.
- Penalty
 - Summary conviction: fine up to \$100,000 and imprisonment up to 2 years
 - Conviction on indictment: fine up to \$1,000,000 and to imprisonment for up to 5 years

Offences Relating to the Sending of Commercial Electronic Messages

- Send commercial electronic messages to electronic addresses obtained using automated means (e.g. “dictionary attack”)
- Knowingly send commercial e-mail messages through open relays or open proxies designed to hide the true identity of the original sender
- Use scripts or other automated means to register for multiple e-mail addresses (e.g. “automatic throwaway accounts”)
- These are also common techniques of spammers. Relatively heavy penalties should be introduced.
- Penalty
 - Summary conviction: fine up to \$100,000 and imprisonment up to 2 years
 - Conviction on indictment: fine up to \$1,000,000 and to imprisonment for up to 5 years

Offences Relating to the Sending of Commercial Electronic Messages

- Fraud and related activities in connection with sending multiple* commercial electronic messages, through the following means:-
 1. Hacking into a computer or telecoms device without authorisation;
 2. through zombie computers;
 3. Falsifying or altering the part of header information which is machine generated automatically; or
 4. Register with information that falsify the identity of actual registrant, or falsely represent himself to be registrant, of 5 or more electronic address or 2 or more domain names

** Multiple means more than 100 commercial electronic messages during a 24-hour period or more than 1,000 commercial electronic messages during a 30-day period*

Offences Relating to the Sending of Commercial Electronic Messages

- Heavy penalty for such acts with elements of fraud or other criminal intent
- Penalty
 - A fine of any amount as determined by the Court
 - Imprisonment for up to 10 years

Compensation

- Compensation for pecuniary loss of affected parties
- Court may
 - order respondent not to repeat or continue certain conduct or act
 - order respondent to perform reasonable act to redress claimant's loss or damage
 - grant an injunction
 - order other appropriate measures
- Civil claims subject to a limitation period of 6 years

Liability of employers and Principals

- Acts done or practices engaged in by a person in the course of employment (in the case of an employee) or with the authority of his principal (in the case of an agent), the acts done or practices engaged in should be considered as also being done or engaged in by the employer or principal
- A defence for the employers and principals if they can prove that they have taken such steps as were practicable to prevent the employee or agent from doing that act or engaging in that practice in the course of their employment or authority

Commencement Date

- Different parts of the Bill may commence on different dates
 - to provide flexibility for e-marketers to gear up their equipment
 - to enable Government to undertake public education activities
 - to enable Government to provide practical guidance and assistance to small and medium enterprises to comply with the Bill

Way Forward

- Public consultation to end on 20 Mar 2006
- Submissions by e-mail to *uem@citb.gov.hk*
- Intend to introduce the Bill in LegCo within 2006

End