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Report of the Bills Committee on Unsolicited Electronic Messages Bill

Purpose

This paper reports on the deliberations of the Bills Committee on Unsolicited Electronic Messages Bill (the Bills Committee).

Background

2. The subject of spamming has been receiving ongoing attention by Members. Questions have been raised from time to time at Council meetings on issues such as statutory measures and/or industry self-regulation to prevent email spamming, junk faxes and unsolicited advertisements via fax or other electronic media.

3. On 25 June 2004, the Office of the Telecommunications Authority (OFTA) issued a consultation paper on "Proposals to contain the problem of unsolicited electronic messages". That paper examined the problem caused by various forms of unsolicited electronic messages (UEMs), the effectiveness of existing anti-spam measures and sought views on a range of possible ways to combat the problem, including the need for anti-spam legislation. On 24 February 2005, the Administration announced the launch of a campaign entitled "STEPS" to fight UEMs in collaboration with the industry and the community. "STEPS" stands for strengthening existing regulatory measures, technical solutions, education, partnerships and statutory measures. A new piece of anti-spam legislation was one of the measures proposed under that campaign.

4. In July 2005, following informal consultations with stakeholders, the Administration consulted the Panel on Information Technology and Broadcasting (ITB Panel) on a draft framework on anti-spam legislation. A two-month public consultation exercise was then conducted on 20 January 2006 on the detailed legislative proposal. On 12 July 2006, the Administration introduced the

Unsolicited Electronic Messages Bill (the Bill) into the Legislative Council (LegCo).

The Bill

5. The object of the Bill is to set up a scheme for regulating the sending of UEMs of a commercial nature and having a "Hong Kong link"¹. A technology neutral stance has been adopted for the Bill so that any forms of electronic messages, including e-mail, fax, short messaging service, voice or video calls, are to be regulated. Under the Bill, person-to-person (PTP) interactive communications, and broadcasting materials already regulated under the Broadcasting Ordinance (Cap. 562) or the Telecommunications Ordinance (Cap. 106) are exempted from regulation.

6. The proposed regulatory scheme under the Bill adopts an "opt-out" approach, whereby a sender may send commercial electronic messages to recipients, but must provide a functional unsubscribe facility through which a recipient can send a request to stop receiving further messages at his electronic address. To support the "opt-out" regime, it is proposed in the Bill to empower the Telecommunications Authority (TA) to set up "do-not-call registers" for suitable types of electronic addresses. The purpose of the registers is to facilitate recipients to opt out from receiving further commercial electronic messages from all electronic marketers and for senders of commercial electronic messages to ascertain the electronic addresses to which they should not send further commercial electronic messages unless they have obtained specific consent. Senders of commercial electronic messages must not use misleading subject headings in the messages and are required to include accurate sender information in the messages.

7. The Bill provides for the establishment of an enforcement notice regime in respect of the rules governing the sending of commercial electronic messages. If TA forms an opinion that a contravention has taken place and will likely continue or be repeated, he will issue an enforcement notice to the person in breach specifying the steps to remedy the contravention. Failure to comply with an enforcement notice will be an offence. The Bill also provides for the establishment of an appeal board whereby a person on whom an enforcement notice is served could appeal to the appeal board against the enforcement notice.

8. Under the Bill, the following activities are prohibited --

- (a) supply, acquisition or use of electronic address-harvesting software or harvested lists of electronic addresses for sending

¹ The term "Hong Kong Link" is defined in clause 3 of the Bill.

commercial electronic messages without the consent of registered users of electronic addresses;

- (b) other techniques commonly used by spammers, including the so-called "dictionary attacks" that send commercial electronic messages to automatically generated electronic address, use of "open relays" or "open proxies" for sending commercial electronic messages that can hide the true sources of the messages, and the use of automated means to register for e-mail accounts that could be used for spamming and discarded after they are traced or blocked; and
- (c) fraud and other illicit activities related to the transmission of multiple commercial electronic messages.

The above contraventions would not be subject to the enforcement notice regime, but would be offences prosecuted in court.

9. Under the Bill, victims of UEMs are entitled to make civil claims for loss or damage against the party who sent the UEMs in contravention of the Bill, irrespective of whether the party had been convicted.

The Bills Committee

10. The House Committee agreed at its meeting on 21 July 2006 to form a Bills Committee to study the Bill. Under the Chairmanship of Hon Howard YOUNG, the Bills Committee has held 16 meetings. The membership list of the Bills Committee is in **Appendix I**. The Bills Committee has invited the public to give views on the Bill. 24 organizations and eight individuals have made written submissions and/or oral representation to the Bills Committee. A list of these organizations and individuals is in **Appendix II**.

Deliberations of the Bills Committee

Coverage of UEMs under the Bill and exclusions

11. The intended coverage of UEMs to be subject to the regulation of the proposed legislation is reflected mainly by the definitions of "commercial electronic message" in clause 2, the definition of "Hong Kong link" in clause 3, and Schedule 1 to the Bill specifying the matters that are excluded from the application of the Bill.

PTP telemarketing calls

12. When introducing the Bill, the Administration explained in the LegCo Brief on the Bill that PTP telemarketing calls require substantial manpower resources and time from the telemarketers. The extent to which they could cause nuisance to recipients, and lead to abuse of the telecommunications networks was much more limited than voice or video messages with pre-recorded or synthesized elements. In view of this and to leave room for such normal and legitimate marketing activities, the Administration held the view that the Bill should not regulate PTP telemarketing calls. To reflect this legislative intent, Schedule 1 to the Bill specifies, inter alia, that PTP telemarketing calls are excluded from the application of the Bill. The Administration further pointed out that if it was decided in future to bring PTP telemarketing calls into the ambit of the Bill, such decision could be effected expeditiously under clause 6 of the Bill by amending Schedule 1 by notice published in the Gazette which is subsidiary legislation subject to LegCo's scrutiny.

13. The Bills Committee has deliberated at length on whether PTP telemarketing calls should be subject to certain rules specified in Part 2 of the Bill governing the sending of commercial electronic messages. The views expressed by deputations on the issue are diverse.

14. Hon WONG Ting-kwong and Hon Jasper TSANG are of the view that PTP telemarketing calls may cause as much, if not more, nuisance to a recipient as pre-recorded telemarketing calls. As a basic safeguard for the right of recipients of telemarketing calls, all telemarketing calls including PTP telemarketing calls should be subject to the requirement of including accurate sender information in the messages specified in clause 7 and the requirement of not concealing the calling line identification (CLI) information in sending the messages specified in clause 12. The members consider that the display of CLI information would enable the recipient to decide whether or not to answer a particular call, and the provision of accurate sender information in the messages would enable the recipient to take follow-up actions (such as lodging a complaint) in respect of the call if needed. The display of CLI information is especially important when the recipient is outside Hong Kong and using roaming services and thus may incur substantial airtime charges when answering telemarketing calls.

15. In relation to the requirement of not concealing CLI information in sending commercial electronic messages specified in clause 12, the Bills Committee has noted the Administration's explanation that the Bill only prohibits the sender from concealing CLI information. At present, local network operators are required to transmit CLI information. Whether CLI information would be displayed on the telephones of recipients who are roaming outside Hong Kong would depend on a number of factors, including whether such information would be relayed by the international gateway operators to the

mobile networks outside Hong Kong on which the recipients are roaming, and whether such caller number display service is available on those overseas networks.

16. As the Administration maintains its position that the proposed legislation should not regulate PTP telemarketing calls at this juncture, Hon WONG Ting-kwong has proposed Committee Stage amendments (CSAs) for consideration by the Bills Committee. The objective of Mr WONG's proposed CSAs is to confine the exemption proposed for PTP telemarketing calls to those made pursuant to a previous or current business or client relationship between the caller and the recipient. For PTP telemarketing calls that are made otherwise than pursuant to any such relationship between the caller and the recipient, the requirements in clauses 7 and 12 shall apply.

17. The Hong Kong Call Centre Association² (HKCCA) and Hong Kong Direct Marketing Association (HKDMA) have expressed grave concern on the impact of the amendments proposed by Mr WONG on the employment opportunities in the telemarketing industry, and the operational costs of various other industries which have been using PTP telemarketing to promote their products and services³. They consider that Mr WONG's proposed amendments would deter enterprises from using PTP telemarketing to promote their products and services as the rejection of calls from unfamiliar sources would make it difficult for enterprises to use telemarketing to reach prospective customers.

18. HKCCA and HKDMA are also concerned about the difficulty in defining what would constitute a previous or current business or client relationship, a necessary factor for exemption from the requirements under clauses 7 and 12 under Mr WONG's proposed amendments, and about the possibility of a large amount of complaints and litigation arising from confusion about whether such a relationship exists. The Associations have advised the Bills Committee that currently, it is a common practice of the enterprises using telemarketing to provide their customers with the option of being placed on a do-not-call list. Telemarketers would not call those customers on the do-not-call list in order not to upset them and to maintain the overall cost-efficiency of telemarketing services.

19. Hon WONG Ting-kwong, on the other hand, has explained that his proposed amendments would provide exemption when the PTP telemarketing calls are made pursuant to a previous or current business or client relationship

² According to the written submission of the Hong Kong Call Central Association to the Bills Committee, the Association is a non-profit organization that was formed by a group of call centre users in September 1999. The Association represents predominantly commercial organizations, ranging from the largest of multinational companies to a number of SMEs.

³ According to HKCCA and HKDMA, there are about 405 903 people in Hong Kong who rely on the use of the telephone to promote their products and services. A breakdown is available in their relevant submission LC Paper No. CB(1)1145/06-07(01).

between the caller and the recipient. There should be no negative impact on enterprises using telemarketing to promote their services and products given that their customer lists should have been obtained through a previous or current business or client relationship. As he failed to find any convincing evidence to substantiate the adverse impact on employment opportunities and the operational costs of enterprises, Mr WONG is firmly of the view that his proposed amendments would help create a win-win situation in that telemarketing service standard would be enhanced and a higher response rate can be attained.

20. The Administration has explained its position to the Bills Committee that one of the objectives of the Bill is to strike a proper balance between respecting the rights of recipients and allowing the development of legitimate electronic marketing in Hong Kong. Over-regulation should be avoided in order not to affect adversely the viability of small to medium size enterprises (SMEs) which rely on electronic communications as a key way to promote their business. The Administration considers that regulation of PTP telemarketing calls would be justified only if it causes a serious problem to the public.

21. To assess the extent of the problem to the public caused by PTP telemarketing calls, the Administration had monitored 200 telephone accounts without associated personal data continuously from December 2006 to March 2007. According to the Administration, the assessment reveals that, on average, there is less than one PTP telemarketing call to a telephone account every month. The Administration therefore believes that most PTP telemarketing calls Hong Kong citizens have experienced are related to the use of personal data of the recipients. As PTP telemarketing calls which involve the use of personal data are already regulated under the Personal Data (Privacy) Ordinance (PDPO) (Cap. 486)⁴, the Administration considers that there is no strong need to regulate these calls through the Bill.

22. In this respect, Hon WONG Ting-kwong considers that low percentage of PTP telemarketing calls should not be a primary consideration for deciding whether such calls should be subject to regulation. According to two opinion surveys conducted by the Democratic Alliance for the Betterment and Progress of Hong Kong in February and March 2007, over 70% of the respondents consider that PTP telemarketing calls should be subject to regulation, and over 80% of the respondents agree that all telemarketing calls should be required to provide accurate sender information and not to conceal their CLI information. Hence, Mr WONG considers that with his proposed amendments, the proposed regulatory scheme can better respond to the expectations of the public.

⁴ Section 34 of PDPO stipulates that data user who uses personal data for direct marketing purpose shall, on the first time he/she so uses those data, inform the relevant data subject that he/she is required to cease to so use those data if the data subject so requests. The data subject may at any time exercise his/her right to request the data user to cease to use his/her personal data for direct marketing purpose.

23. The Bills Committee also notes the Administration's concern about the enforcement difficulties in relation to the CSAs proposed Hon WONG Ting-kwong. As the content of PTP telemarketing calls could vary from call to call and usually no recording is available, OFTA would have enormous difficulties in collecting sufficient evidence to ascertain whether a call would fall within the definition of "commercial electronic message" in order to follow up on such complaints and enforce such provisions. The Administration envisages that, if the amendments are enacted, OFTA will receive a large number of complaints about PTP telemarketing calls which do not provide accurate sender information or the caller display of which is concealed, irrespective of whether the recipients have any business or client relationship with the senders. OFTA would have to incur substantial resources on investigating these complaints and collecting evidence. Sufficient evidence might not be available in most of the complaints for follow-up actions. This is not desirable in terms of effective enforcement of the law and efficient use of resources. Nevertheless, the Administration has undertaken to continue to monitor the problem of PTP interactive telemarketing calls to assess if they warrant regulation in future.

24. Hon WONG Ting-kwong has counter-argued that as in the case of other types of complaints, the enforcement authority would need to collect evidence from various channels. The formulation of proper guidelines for the public to lodge complaints would help overcome the envisaged difficulties. Similarly, the Administration's envisaged difficulties arising from the public's unfamiliarity with the proposed exemption for PTP telemarketing calls made pursuant to a previous or current business or client relationship can be overcome by publicity and public education upon enactment of the legislation.

25. Hon Ronny TONG has expressed support for Mr WONG's proposed CSAs. Other members of the Bills Committee have not indicated their position during the deliberations of the Bills Committee. Towards the conclusion of the deliberations of the Bills Committee, Mr WONG indicated that he would move the CSAs. A copy of the CSAs to be moved by Mr WONG is attached in **Appendix III**.

26. As regards the relevance of the CSAs proposed by Hon WONG Ting-kwong to the scope of the Bill, the Administration is of the view that it has been clearly reflected in the Bill, the explanatory memorandum of the Bill and the LegCo Brief that the purposes of the Bill do not include regulation of PTP telemarketing calls. The legal advice the Administration has obtained is that the CSAs proposed by Mr WONG do not comply with the requirements of Rule 57(4)(a) of the Rules of Procedures of LegCo⁵.

⁵ Rule 57(4)(a) of the Rules of Procedures stipulates that an amendment must be relevant to the subject matter of the bill and to the subject matter of the clause to which it relates.

27. The Bills Committee has noted Mr WONG's disagreement to the Administration's view. Mr WONG considers that it is clear from the LegCo Brief that regulation of PTP telemarketing calls is relevant to the subject matter of the Bill. Moreover, as expressly stated by the Administration in the LegCo Brief, the Bill is structured in a way that if it is decided in future to bring person-to-person telemarketing calls into the ambit of the Bill, such decision could be effected expeditiously by way of a notice published in the Gazette. Mr WONG therefore submits that his proposed CSAs only involve a revision that might otherwise be revised by SCIT in future, to the matters that are currently specified to be excluded from the application of the Bill.

Transactional and service-related messages

28. In their submissions and presentations to the Bills Committee, some members of the direct marketing industry and some chambers of commerce have expressed concern that transactional or service-related messages, such as bills or invoices with company logos or short promotion messages, introductory messages for services, warranty information etc. may fall within the definition of "commercial electronic message" in the Bill, and thus would have to comply with the rules in Part 2 of the Bill. This could cause substantial disruption to their normal correspondence with their customers and result in heavy compliance costs. Some of these deputations have suggested that only those "commercial electronic message" the primary purpose of which is to promote and sell goods or services should be subject to the regulation of the proposed legislation.

29. The Administration has advised that after consideration and drawing reference to the arrangements in the CAN-SPAM Act of the United States (US), the Administration agrees that it is appropriate to exempt commercial electronic messages the primary purpose of which is transactional, service-related or employment-related from the application of Part 2 of the Bill. The proposed exemptions are prescribed in Items 2 to 4 in Table 2 of Schedule 1 under the CSAs to be moved by the Administration.

Web traffic and other modes of information provision in response to a request

30. A deputation has pointed out that the definitions of "electronic message" and "commercial electronic message" in the Bill taken together would have the effect of making commercial information displayed on websites subject to the regulation of the Bill. The Administration has advised that it does not intend to apply Part 2 of the Bill to website traffic and any commercial electronic message sent to a person in response to information communicated by or the conduct of that person. The proposed exemption is prescribed in Item 1 in Table 2 of Schedule 1 under the CSAs to be moved by the Administration. To prevent potential abuse of this exemption, it is stipulated in the proposed CSAs that the commercial electronic message being exempted should be sent to the person

within a reasonable period of time after the information is communicated to the sender by the person.

Television programme services and sound broadcasting services

31. Under Schedule 1 to the Bill, television programme services regulated under the Broadcasting Ordinance and sound broadcasting services regulated under the Telecommunications Ordinance are excluded from the application of the Bill. Noting that currently, broadband television services are not regulated under the Broadcasting Ordinance, the Bills Committee has examined whether the provisions in the Bill should apply to this type of television services given that the services are delivered to viewers or audience in response to the request of the viewers/audience. The Administration agrees with the Bills Committee's observation and has further advised that those television programme services which are not licensed under the Broadcasting Ordinance, such as broadband TV, and those sound broadcasting services which are not licensed under the Telecommunications Ordinance should also be excluded from the application of the Bill, because the nature of such services is that they could not comply with the requirements in the Bill. The Administration will move CSAs to amend Schedule 1 to the Bill accordingly.

Sending of commercial electronic messages by non-profit-making organizations

32. The Bills Committee has considered whether the coverage of the Bill is too broad in that organizations which are not formed or incorporated for the purpose of or with a view to gaining profit would not be exempted from the regulation of the proposed legislation. The Administration has explained that the public in general is supportive of regulating UEMs of a commercial nature. Given this consensus and to avoid any grey area in the legislation, it is considered appropriate to focus on the content of a message, rather than the nature of the organization sending the message. The Administration has also highlighted the following considerations --

- (a) some non-commercial organizations such as charitable organizations may have a business arm or engage in commercial activities;
- (b) it would be difficult to arrive at a consensus on what types of organizations should be exempted; and
- (c) there are no appropriate legal definitions in Hong Kong law for some types of organizations, such as political parties.

33. The Administration has also assured members that the proposed legislation would not give rise to concern of censorship on the contents of electronic messages. This is because only commercial electronic messages

would be subject to regulation. Under normal circumstances, OFTA and the Police would only conduct investigation after receiving a complaint. The enforcement authorities would first ascertain whether the content of a message fell under the definition of "commercial electronic message" in the Bill before taking further enforcement actions.

Application of the proposed legislation to the Government

34. The Bills Committee has examined whether the proposed legislation should be binding on the Government. It is revealed in a recent survey conducted by the Administration that 19 Government bureaux and departments send out electronic messages to the public regularly in order to carry out or promote their work. The Administration acknowledges that given the wide definition of "commercial electronic message" in the Bill, the electronic messages sent by these Government bureaux or departments may fall within the definition of "commercial electronic message". The Administration has emphasized that Government bureaux and departments have been following the spirit of the Bill as they generally send electronic messages to recipients who either requested to receive such messages or who do not object to receiving such messages. They will stop sending such message should the recipients so request. The Administration is not aware of any complaints about such Government messages becoming a source of spam for the public. As the problem of Government sending out spam does not exist, the Administration is of the view that it is not necessary to make the proposed legislation binding on the Government.

35. Hon Emily LAU, Hon Ronny TONG and Hon SIN Chung-kai have expressed the view that the proposed legislation should be binding on the Government, given that some of the electronic messages sent by Government bureaux and departments are commercial electronic messages falling within the coverage of UEMs that the Bill seeks to regulate. They consider it not acceptable that the Government would not be bound by the proposed legislation just because it has not committed and/or would not likely commit any act in contravention of the proposed legislation. It would be unfair and inconsistent with the principle of equality before the law if the Government is not required to abide by the proposed legislation.

36. The Bills Committee has noted that section 66(1) of the Interpretation and General Clauses Ordinance (Cap. 1) provides that "No Ordinance (whether enacted before, on or after 1 July 1997) shall in any manner whatsoever affect the right of or be binding on the State unless it is therein expressly provided or unless it appears by necessary implication that the State is bound thereby.", and that the word "State", as defined in section 3 of Cap. 1, includes the Government of the Hong Kong Special Administrative Region.

37. The Bills Committee has also noted that some local legislation, such as that relating to environmental protection, bound the Government, but public officers are immune from criminal liability for contravening provisions of those pieces of legislation in discharging their duties. Comparable anti-spam legislation in Australia binds the Australian Government but no criminal liability is imposed on the Australian Government and their public officers. The Panel on Administration of Justice and Legal Services had discussed the issue in detail⁶ and held the view that in the context of regulatory offences, the issue of whether public officers should be immune from criminal liability is essentially a matter of policy and not a matter of constitutional or legal principle. When legislative proposals were introduced into LegCo imposing obligations which were also binding on the Government, the issue of public officers' immunity from criminal liability if they were in breach of those obligations in discharging their public duties should be considered on a case-by-case basis.

38. Having regard to the different approaches adopted in various Ordinances for making regulatory provisions binding on the Government, Hon Emily LAU has proposed CSAs to the effect that the future UEM Ordinance will bind the Government, but neither the Government nor any public officer in the officer's capacity as such is liable to be prosecuted for an offence against this Ordinance. It was initially agreed by the Bills Committee that Hon Emily LAU would move the CSAs in her own name. Subsequently, the Administration has indicated that its position remains that it is not necessary to make the proposed legislation bind the Government. However, having regard to the good example which binding the Government would set for the community at large and telemarketers in particular, the need not to delay passage of the Bill, and the fact that Government would have no problem in complying with the Bill, the Administration will incorporate the CSAs proposed by Ms LAU as part of the CSAs to be moved by the Administration.

39. In this connection, the Administration has confirmed that Government bureaux and departments have responsibilities to ensure that their staff would comply with any legal requirements in the course of performing their duties. There is an established system within the civil service for handling staff who breach departmental instructions, which could result in disciplinary actions being taken against the concerned staff. The Administration would remind all Government bureaux and departments and their staff of the need to comply with the requirements in the Bill. Hon Emily LAU has requested the Administration to make clear this point in the speech of SCIT for moving the relevant CSAs.

⁶ The Panel on Administration of Justice and Legal Services submitted its report to the House Committee on 7 July 2006 and the relevant paper is LC Paper No. CB(2)2650/05-06.

Rules governing the sending of commercial electronic messages

Retention period for unsubscribe requests (clause 8)

40. Clause 8 requires a sender of commercial electronic messages to keep a record of the unsubscribe requests received for at least seven years. The Bills Committee has noted the concern raised by some deputations that the requirement may impose too heavy a burden on businesses and e-marketers in that they will face significant compliance costs in storing and maintaining a huge number of unsubscribe messages for such a protracted period of time.

41. According to the Administration, the reason for prescribing a relatively long statutory retention period for unsubscribe requests is to facilitate victims of UEMs sent in contravention of the provisions of the Bill to take civil action against the senders within six years after the contravention as permitted under the Limitation Ordinance (Cap. 347). The availability of records of unsubscribe requests would also facilitate law enforcement agencies to carry out investigations and may offer protection to the sender of commercial electronic messages who could provide a full record of such requests received, if it contends that the concerned unsubscribe request has never been received.

42. Members share the concern of deputations and consider that a retention period of three years would suffice as victims of spam would unlikely take more than three years to initiate civil action. Having regard to members' views and deputations' concerns, the Administration agrees to shorten the retention period to three years and would move CSAs to amend clause 8 accordingly.

Do-not-call registers

43. Clauses 30 and 31 empower TA to establish, maintain and operate do-not-call registers of different types of electronic addresses and prescribe conditions for making available information in the registers.

Do-not-call registers to be established

44. According to the Administration, OFTA will establish three do-not-call registers, one for pre-recorded voice or video messages, one for fax messages and one for messages through short messaging service/multimedia messaging service. The registers will contain only the electronic addresses registered but not any personal data such as the names of the registered users. As to why no do-not-call register will be set up for email addresses, the Administration has explained that setting up such a register could be counter-productive. This is because spammers would be prone to use the email addresses listed in such a do-not-call register for spamming as this could significantly save their efforts on screening invalid electronic addresses. Moreover, unlike telephone calls, at present, the general technical standards for Internet email services did not provide for authentication

of the origin of email messages. After conducting a review in 2004, the United States Federal Trade Commission maintained that no do-not-call register for email addresses should be set up. Hong Kong should draw reference to the experience of US in this regard.

45. Regarding the procedure for making registration on the do-not-call registers, the Administration has advised that the public may add/remove their electronic addresses to/from the do-not-call registers through an automated process. Registered users of electronic addresses may add their electronic address to a do-not-call register by calling a designated telephone number and entering the required information. For some Private Automatic Branch Exchange telephone systems where the CLI information displayed does not correspond to the actual telephone number intended to be added to the do-not-call register, registration can be achieved by calling the designated telephone number and entering the telephone number to be added and the system will make a return call for confirmation. At present, there are over 10 million telephone and fax numbers in use. The computer systems of the do-not-call registers would have sufficient capacity to cater for the registration of all these numbers, and the systems would be able to process some 120 000 registration requests each day.

46. As to how frequent senders of commercial electronic messages should access the do-not-call registers to ensure compliance with the provisions related to do-not-call registers, the Administration has advised that senders of commercial electronic messages should access the updated do-not-call registers at least every 10 working days during the period of sending out commercial electronic messages to ensure compliance with the requirements stipulated in clause 10.

Charge for access to do-not-call registers

47. Taking note of the Administration's plan to impose a charge on senders of commercial electronic messages for accessing a do-not-call register, the Bills Committee has examined the need to add a provision to empower TA to impose such a charge and whether the charge should be subject to statutory regulation. According to the Administration, OFTA plans to establish a simple charging scheme based on the cost-recovery principle. Drawing reference to overseas experience, OFTA estimates that the charge should be in the region of a few thousands dollars for one year's unlimited access to a do-not-call register. Apart from charging an annual fee for registered telemarketers, OFTA will also make other arrangements to cater for other telemarketers who run their marketing campaigns on an ad hoc basis. Given the relatively low level of fees involved and that the cost-recovery principle would be adhered to as far as possible, the Administration does not consider it necessary to regulate the level of fees/charges under the Bill.

48. The Bills Committee has noted that the Administration would move CSAs to add new sub-clauses 31(3) and 31(4) to empower the TA to impose a charge for accessing a do-not-call register, and to specify the right of a registered user of an electronic address to verify, free of charge, whether his electronic address is listed in a do-not-call register.

Updating of do-not-call registers

49. Pointing out that the registered users of the same telephone numbers may change from time to time due to the recycling of surrendered telephone numbers, members have suggested that there should be a mechanism to update the do-not-call registers. The Administration agrees to members' suggestion and will move a CSA to add an enabling provision in clause 33 to empower TA to issue directions to telecommunications service providers, who are allocated telephone numbers by OFTA, to, inter alia, provide information on surrendered telephone numbers so that OFTA can remove these numbers from the do-not-call registers.

Other amendments relating to do-not-call registers

50. In response to the suggestion of the Bills Committee, the Administration has agreed to move CSAs to replace the term "拒收登記冊" with "拒收訊息登記冊" in the Bill to ensure clarity and consistency of the term in the Bill. The Administration would also move CSAs to add new clause 30A to explicitly prescribe the powers of TA in relation to do-not-call registers.

Unsolicited Electronic Messages (Enforcement Notices) Appeal Board

51. Clauses 43 to 51 establish the Unsolicited Electronic Messages (Enforcement Notices) Appeal Board and prescribe the power of the Chief Executive to appoint the Chairman, Deputy Chairmen and members of the Appeal Board, the powers of the Appeal Board, the right of a person to appeal, the procedure on appeal, the powers of the Court of Appeal to determine questions of law, offences relating to appeals and the power of SCIT to make relevant rules.

52. The Bills Committee has noted that while it is specified in clause 43(4) that the Chairman and a Deputy Chairman shall each be appointed for a term of not more than three years but may be reappointed, there is no provision to specify the maximum tenure of appointment of panel members. In response to the suggestion of Hon Emily LAU, the Administration agrees to move CSAs to amend clause 43 to prescribe that the term of the panel members should not be more than three years, the same as that of the Chairman and Deputy Chairmen. The Administration has also confirmed that it will stick to the "six boards, six

years" rule in making the appointments for the Appeal Board as far as practicable.

53. It is specified in clause 43(3) that the Chairman and Deputy Chairmen should be persons qualified for appointment as a District Judge under the District Court Ordinance (Cap. 336). The Bills Committee has considered whether other basic criteria, such as the need to avoid potential conflict of interest, for the appointment of the Chairman, Deputy Chairmen and panel members of the Appeal Board should also be specified in the Bill. In this regard, the Bills Committee has made reference to some existing provisions relating to the appointment of chairmen, deputy chairmen or members of statutory appeal boards and noted that other than general legal or professional qualifications, no appointment criteria are set out in the existing provisions. However, in respect of actual hearings or selection of appeal board members for individual hearings, some legislation, such as the Urban Renewal Authority Ordinance (Cap. 563), contain express provisions on how potential conflict of interest should be avoided. Taking into account the nature and operation of the Appeal Board to be set up under the Bill, the Administration has agreed to move CSAs to include similar provisions in clause 45.

Provisions targeting at professional spammers and fraud and other illicit activities related to transmission of commercial electronic messages (Parts 3 and 4 of the Bill)

Concept of "multiple commercial electronic messages"

54. The term "multiple commercial electronic messages" is adopted in certain provisions in Parts 3 and 4 of the Bill. The meaning of the term is prescribed in Part 3 and Part 4 respectively in terms of the minimum number of commercial electronic messages sent/transmitted during a 24-hour period and a 30-day period. The Bills Committee has sought explanation on the need for setting thresholds of the number of messages sent under the provisions concerned.

55. According to the Administration, the definition of "multiple commercial electronic messages" adopted in the Bill is modelled on the US CAN-SPAM Act. The Administration has made enquiries with the US Federal Trade Commission and the US Department of Justice on the thresholds set for "multiple commercial electronic messages" in the Act. According to the US Federal Trade Commission and the US Department of Justice, the thresholds set in the US CAN-SPAM Act could limit the actions that could be taken by the States or internet service providers. The objective is to protect businesses from being inundated with legal actions on the basis of a mere handful of technical violations. The US Department of Justice has further advised that, in practice, the thresholds in the US CAN-SPAM Act are well below the standard e-mail practices adopted by spammers and have not hampered their enforcement

objective of targeting professional spamming activities. Singapore's Spam Control Bill has adopted the same thresholds for "multiple commercial electronic messages" as in the US CAN-SPAM Act. The Administration considers it desirable to adopt similar thresholds to harmonise with those jurisdictions on similar offences, which are geared towards tackling professional spammers, thereby facilitating information and intelligence exchange as well as law enforcement.

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

56. Clause 21 makes it an offence for any person to knowingly or recklessly initiate the transmission of multiple commercial electronic messages that have a Hong Kong link from a telecommunications device, service or network that the person has accessed without authorization.

57. In considering the intended application of the provision, the Bills Committee has examined the circumstances to which clause 21 of the Bill would be applicable but section 161 of the Crimes Ordinance (Cap. 200)⁷ would not.

58. The Administration has explained that the major difference between clause 21 of the Bill and section 161 of the Crimes Ordinance lies with the fact that the latter requires proof of a "dishonest" intent, whereas clause 21 of the Bill does not. In other words, a spammer who has an "honest" intent to make a gain by sending multiple commercial electronic messages will be caught by clause 21 of the Bill but not section 161 of the Crimes Ordinance. In addition, section 161 of the Crimes Ordinance applies if a person who accesses a computer with an intent to commit a crime. Clause 21 of the Bill will be the underlying provision which creates the "crime". If clause 21 does not make such an activity an offence, section 161 of the Crimes Ordinance will not be applicable as the spammer would not have committed any crime.

Enforcement of the proposed legislation

59. As the Bill seeks to establish an entirely new regulatory scheme for unsolicited commercial electronic messages, the Bills Committee has studied the approach and procedures to be adopted by the Administration for enforcement of the provisions in the Bill. The Bills Committee notes that the Bill does not provide for a statutory mechanism for handling complaints, but OFTA will, through administrative means, adopt a targeted and progressive approach to handle complaints from the public to make the best use of their resources and to maximize the effectiveness of the law. In this respect, OFTA would accept "reports" from those members of the public who do not wish to be directly involved in the investigation. Reporting, in this case, helps to indicate the scale

⁷ Section 161 of Cap. 200 deals with the offence of access to computer with criminal or dishonest intent.

of a particular email "campaign" and hence allows OFTA to effectively channel its resources in prioritising investigations.

60. The Administration has advised that there would be publicity to inform the public of the proper ways to lodge complaints about UEMs, and there would be close liaison and information exchange between the Police and OFTA to ensure that complaints would be handled effectively.

61. On the manpower requirement for enforcing the proposed legislation, the Administration has advised that OFTA has set up an anti-spam team which comprises four staff headed by a Division head. The Administration estimates that after the enactment of the Bill, additional staff in the region of three to five would likely be required to handle reports and complaints and carry out simple investigation.

Mechanism for gauging public opinions

62. On the gauging of public opinions, the Administration has advised that at present, OFTA has set up the Telecommunications Users and Consumers Advisory Committee, members of which include representatives from the commercial sector, the industry, the general public and the Consumer Council, to listen to their opinion on various issues. The Administration considers that the Advisory Committee is an appropriate platform to gauge the industry and public opinion on issues in relation to unsolicited electronic messages, including the enforcement of the Bill.

63. Hon Emily LAU has made some comments and suggestions on the appointment mechanism of the Advisory Committee. For example, members of the Advisory Committee should be nominated by the relevant sectors so that they could reflect the views of their sectors and report deliberations of the Advisory Committee to their sectors. The Administration agrees to consider possible refinements to the appointment mechanism.

Division of enforcement responsibility between OFTA and the Police

64. The Bills Committee has noted that there is no express provision in the Bill regarding the division of responsibility between the Hong Kong Police Force (the Police) and OFTA for the enforcement of the proposed legislation. The Administration has advised the Bills Committee of its intention that the Police would be responsible for enforcing Part 4 of the Bill while OFTA would be responsible for enforcing the rest of the Bill with the assistance of the Police where necessary. In response to the Bills Committee's request for consideration of reflecting this intended arrangement in the Bill, the Administration has responded that since the Police has general powers over all criminal offences under the Police Force Ordinance (Cap. 232), it would not be necessary to specifically spell out in the Bill that the Police would be responsible for

enforcing Part 4 of the Bill. Nevertheless, the Administration has undertaken that SCIT will highlight the division of enforcement responsibility between TA and the Police in his speech at the resumption of the Second Reading debate on the Bill.

Codes of practice (clause 28)

65. Clause 28 authorizes TA to approve codes of practice for the purpose of providing practical guidance in respect of the application or operation of any provision of the Bill, and to revise a code of practice and withdraw approval from any code of practice approved under the proposed legislation.

66. The Bills Committee has considered whether there is a need to include provisions in the Bill to oblige TA to conduct consultation with relevant parties in preparing the codes of practice. The Administration is of the view that it is inappropriate to provide for statutory consultation on codes of practice in the Bill. However, it will consult the ITB Panel, as well as the relevant industries and the public, in preparing the codes of practice and on their subsequent major amendments. The Administration has also undertaken to highlight this policy intention in the speech of SCIT at the resumption of Second Reading debate on the Bill. In this regard, the Bills Committee has noted that under the Telecommunications Ordinance, the obligation of TA to conduct consultation in the course of preparing codes of practice is confined to a few very important issues, such as those relating to telecommunications service operators' right of access to land, dominance and interconnection.

67. Under clause 28(3) and (7), TA is required to publish a notice in the Gazette for notification of any approval of/revision of/withdrawal of approval from a code of practice. Clause 28(10) provides that a code of practice approved under the clause is not subsidiary legislation. In response to the Bills Committee's suggestion, the Administration has agreed to move a CSA to amend clause 28(10) to clarify that a notice published in the Gazette for notification of approval of/revision of/withdrawal of approval from a code of practice is also not subsidiary legislation.

Authority may issue directions to telecommunications service providers (clause 33)

68. Clause 33 empowers TA to issue directions to a telecommunications service provider for the purpose of --

- (a) facilitating the telecommunications service provider's compliance with the Bill or the regulations made under the Bill; or
- (b) enabling the Authority or an authorized officer to perform any function under the Bill or the regulations.

69. Noting that there is no provision in the Bill to sanction a telecommunications service provider for non-compliance with the directions issued by TA under clause 33, the Bills Committee has requested the Administration to consider adding a provision for the purpose of enforcing clause 33. In response, the Administration will propose a new clause 36A to provide for financial penalty for such non-compliance. Based on the penalty level prescribed in section 36C of the Telecommunications Ordinance for non-compliance with directions issued under that Ordinance, the Administration had initially proposed that the penalty level under new clause 36A was up to \$200,000 for the first occasion of non-compliance, up to \$500,000 for the second occasion, and up to \$1 million for any subsequent occasion

70. Having noted the Administration's proposed CSAs including new clause 36A, the Hong Kong General Chamber of Commerce and the Communications Association of Hong Kong have conveyed to the Bills Committee the concerns of some telecommunications service providers over clause 33 and new clause 36A. Their concerns centre on two aspects, namely the wide and non-specific powers conferred on TA to issue directions to them and the heavy financial penalty that may be imposed on them by TA for non-compliance with any such direction. The telecommunications service providers have pointed out that as the purpose of clause 33 is simply to facilitate TA to seek the assistance and support of telecommunications service providers for enforcement of the provisions in the Bill, the penalty level under section 36C of the Telecommunications Ordinance (which is for sanctioning non-compliance with directions issued by TA in relation to license conditions and other industry activities regulated under the Ordinance) is too heavy to be commensurate with the nature of the non-compliance under clause 33.

71. In the light of the concerns of the telecommunications service providers, the Administration has agreed to amend clause 33 to clearly specify that TA should only issue directions for the purposes of --

- (a) assisting TA to determine whether to commence an investigation into a contravention or suspected contravention of the Bill;
- (b) to investigate such contraventions or suspected contraventions; and
- (c) to provide information to TA for the purpose of assisting and enabling TA to establish, operate or administer do-not-call registers.

72. The Administration has also agreed to amend clause 33 to clarify that where a matter is one where TA can exercise his powers under other clauses of the Bill, TA will not exercise his powers in clause 33 for such a matter. Moreover, a provision would be added in clause 33 to specify that a reasonable

period should be given for a telecommunications service provider to comply with any direction issued by TA.

73. As regards the penalty for non-compliance with the directions issued by TA clause 33, the Bills Committee has noted that if no provision is included in the Bill to specify the penalty for such non-compliance, the only means available to TA to ensure compliance is to seek a court order to compel a telecommunications service provider to take or not to take certain actions. The Bills Committee considers that this approach is not conducive to effective enforcement of the proposed legislation. The Bills Committee therefore maintains its initial view that there should be a provision to sanction telecommunications service providers for non-compliance with the directions issued by TA under clause 33, but the penalty level should be lower than that under section 36C of the Telecommunications Ordinance.

74. Taking into account the views of the Bills Committee, the Administration has confirmed that the proposed penalty level in new clause 36A⁸ would be revised downward to: up to \$50,000 for the first occasion of non-compliance; up to \$100,000 for the second occasion; and up to \$200,000 for any subsequent occasion.

Authority may obtain information or documents relevant to investigation (clause 34)

75. Clause 34 provides that if TA is satisfied that there are reasonable grounds for believing that a person is, or is likely to be, in possession of information or a document that is relevant to TA's investigation of a contravention or suspected contravention of a provision of the Bill, he may serve a notice on the person requiring him to give the information or produce the document to TA. If the person is of the view that he cannot, or does not wish to, comply with the notice, then he may make representations to TA. If TA, after considering those representations, decides that the notice should remain in force, then the person must comply with the notice within a specified period, and if he fails to do so, TA may then seek an order of a magistrate requiring the person to give the information or produce the document to TA.

76. Regarding the proceedings in which TA seeks an order from a magistrate under clause 34(3), the Bills Committee has noted that the provision does not provide that the affected person would be given an opportunity to be heard and make representations at the relevant proceedings, and suggested that the right to be heard should be provided expressly in clause 34 in order to safeguard the affected person's interest. The Administration accepts the Bills Committee's suggestion and agrees to move CSAs to clause 34 accordingly.

⁸ Subsequent to the discussion at the Bills committee, clause 36A has been renumbered as clause 33A under the CSAs to be moved by the Administration.

Use of "reasonable force" in exercising the powers of entry, search, arrest, etc (clause 37)

77. Clause 37 empowers TA or any authorized officer to arrest without warrant any person whom he reasonably suspects of having committed a specified offence⁹ and, where authorized by a warrant, enter and search the premises or place in respect of which the warrant is issued. Regarding the provision in clause 37(2) to empower TA to use force to break into and enter any premises or place and to remove any person or thing by force, members have made reference to the relevant provisions i.e. sections 29 and 37(1)(b), in the Interception of Communications and Surveillance Ordinance and requested the Administration to consider stating explicitly in the Bill that only "reasonable force" would be used.

78. The Administration has responded that many existing laws of Hong Kong authorize the use of force but do not expressly spell out the words "reasonable force". The notion of "reasonableness" is already built in the administrative law regime. Clause 37(2) is consistent with section 50 of the Police Force Ordinance (Cap. 232) on the power of arrest of the Police and section 122 of the Copyright Ordinance (Cap. 528) on the power of investigating officers. The Administration is therefore of the view that it is not necessary to explicitly provide that only "reasonable force" should be used.

79. The Administration has also explained that clause 37 of the Bill confers powers of entry and search for the general enforcement of specified offences under the Bill, while relevant provisions of the Interception of Communications and Surveillance Ordinance only confer ancillary powers of entry to facilitate the carrying out of covert operations authorized under that Ordinance, and thus those provisions serve a substantially different purpose from that of clause 37 of the Bill.

Information required to be produced during a search (clause 37)

80. The Bills Committee has suggested specifying in the Bill that the information that TA may require to be produced includes "passwords" to ensure that TA could obtain relevant information contained in a computer or any other telecommunications device in carrying out a search under clause 37. The Administration agrees to the suggestion and will move a CSA to add a new clause 37(3)(ab) to empower TA to seek information (such as passwords), documents or other things.

⁹ Under clause 26, "specified offence" means an offence under Part 5 or Part 3 of the Bill. The Administration will move a CSA to add "or Part 7 (miscellaneous)" at the end of that clause.

Production of search warrant for inspection by affected person (clause 37)

81. Regarding the execution of a warrant for entry, search and arrest, the Bills Committee has sought explanation on how far the relevant existing procedures adopted by TA and the Police require the enforcement officers to provide the person affected with adequate information on the reason(s) for the entry, search and arrest and the legal basis for the exercise of the power. In particular, members are concerned whether the affected person is entitled to inspect the warrant under the existing procedures.

82. According to the Administration, under the existing procedures, the law enforcement agencies will act according to the various legislative provisions prescribing the circumstances under which the powers of entry, search and arrest may be exercised. Generally, the search warrant will be shown to the affected person. A copy of the warrant will be provided to the affected person if he so requests. OFTA, when exercising such powers in accordance with the various legislative provisions under the Telecommunications Ordinance, takes a similar approach. The Administration is of the view that the existing procedures are sufficient to safeguard the rights of the person affected.

83. Members are of the view that the current practice stated above should be reflected in the Bill so that the general public would have a clear understanding that the affected person is entitled to inspect the warrant and obtain a copy of the warrant. In the light of the Bills Committee's suggestion, the Administration agrees to move a CSA to include a provision (new sub-clause 38(2)) modelled on section 25(7) of the Broadcasting Ordinance along the line that the authorized officers should, upon request, produce the search warrant for inspection.

Obstruction of Authority, authorized officers, etc. (clause 39)

84. Under clause 39, it is an offence for a person, inter alia, wilfully fails to comply with any requirement properly made to him by TA or an authorized officer and the offence is punishable by a maximum fine at level 3 (currently \$10,000) and imprisonment for a maximum term of 6 months. The Bills Committee considers that given the possible wide ambit of "any requirement properly made", the application of the offence provision will be too broad in effect. The Administration has clarified in response that its intention is to apply the penalties provided for in clause 39 to cases of non-compliance under clause 37 (powers of entry, search, arrest, etc.) only. The Administration will move CSAs to amend clause 39 to reflect this policy intention.

Recovery of costs and expenses of investigation by TA (clause 40)

85. Clause 40 empowers the court to order a person who has been convicted of a specified offence to pay to TA the whole or a part of the costs and expenses of the investigation resulting in the conviction. In this regard, the Bills

Committee has sought explanation on the policy of allowing TA to recover the costs and expenses of investigation and clarification on the scope of costs and expenses recoverable from the convicted offenders.

86. The Administration has explained that it is not a common arrangement for trading fund departments, such as OFTA, to undertake law enforcement responsibility. Since the OFTA Trading Fund is not funded by the Government but by licence fees, the Administration considers it reasonable for OFTA to recover the costs and expenses incurred in the course of investigations from parties convicted of offences under the Bill. This arrangement is already adopted under the Telecommunications Ordinance¹⁰. In view of members' concern, the Administration will move a CSA to add a new clause 40(4) to specify that the recoverable costs and expenses under clause 40 is confined to staff costs and expenses and the financing of liabilities paid out of the OFTA Trading Fund in respect of the investigation. As such, the costs of police officers undertaking investigations of potential offences under the Bill, as well as assisting TA in the course of investigation or enforcement work, which would not be charged to the OFTA Trading Fund, would not be recoverable from the convicted offenders.

Other concerns about enforcement

87. Some deputations have expressed concern about the difficulties associated with extra-territorial enforcement of the provisions in the Bill. The Administration has acknowledged that identifying and bringing to justice spammers sending unsolicited e-mails to Hong Kong could be difficult. The enforcement agency, i.e. OFTA or the Police, would need co-operation with overseas enforcement agencies. The Bill empowers the enforcement agency to exchange information with overseas counterparts to fulfil obligations under relevant international agreements¹¹. If any future international agreements require other reciprocal arrangements, the Administration will seek amendments to the future legislation. The Administration has also advised that at present, there is no existing international agreement applicable to Hong Kong and related to UEMs at present. However, the Government has been actively developing such co-operation with overseas anti-spam bodies. There is at present a regional memorandum of understanding (MOU) on anti-spamming cooperation to which the Commerce, Industry and Technology Bureau is a signatory agency. This MOU serves as a useful forum for the exchange of information on and experience in combating the problem of UEMs.

¹⁰ Under section 36A(6) of the Telecommunications Ordinance, OFTA is empowered to recover any costs or expenses incurred in respect of a determination or determination process under subsection 36A(1) of the Ordinance.

¹¹ The relevant provision in the Bill is clause 34(5)(b)(iii). Under the CSAs to be moved by the Administration, the relevant provision is new clause 34A(1)(b)(iii).

Timing for commencement of provisions in the Bill (clause 1)

88. The Administration has advised the Bills Committee of its intention to bring the Bill, except Part 2 and other provisions related to the opt-out regime, into force as soon as possible after enactment. For this purpose, the Administration will move CSAs to clause 1 to the effect that the enacted Bill, except Part 2 and certain provisions related to the opt-out regime and the establishment of do-not-call registers, can commence operation immediately upon gazettal without the need to make a separate commencement notice. For Part 2 and those related provisions, they will come into operation on a day to be appointed by SCIT through a commencement notice, which is subject to negative vetting by LegCo. For these provisions to commence operation, it is necessary for SCIT to have made regulations under clause 56 to provide for matters in relation to the opt-out regime and for TA to have promulgated under clause 28 the necessary codes of practice. The Administration has indicated its intention for those provisions to commence operation about six months after the enactment of the Bill, during which time the Administration will also publicize the new legislation. In this connection, members have urged the Administration to conduct thorough consultation with relevant parties in drawing up those regulations and codes of practice.

89. In this connection, the Administration has invited the Bills Committee to give views on the timing for the commencement of the provisions related to the do-not-call registers. According to the Administration, because of tendering procedures and system development, the do-not-call registers could only be ready for operation by November 2007 at the earliest. If all telephone and fax numbers in use are to be placed on the do-not-call registers, it may take up to three months for all those telephone and fax numbers to complete the registration process taking into account the design capacity of the system.

90. The Bills Committee considers that the public at large would probably want earlier commencement of those provisions and noted the pros and cons of providing a pre-registration period vis-à-vis allowing the registration of telephone and fax numbers from the commencement date of the opt-out regime. The Bills Committee considers an earlier commencement date preferable but has suggested that the Administration should ensure orderly registration through administrative arrangements.

Other issues considered by the Bills Committee

Liability of directors, partners, etc (clause 54)

91. Clause 54 sets out the rules for determining the liability of persons who are responsible for the internal management of a company, partnership or unincorporated body in cases where the company, partnership or unincorporated body has done any act or engaged in any conduct that constitutes an offence

under the Bill. In response to the suggestion of the Bills Committee, the Administration has agreed to move CSAs to clause 54 to make clear that an evidential burden, rather than a legal burden, will be imposed on those persons. The Bills Committee notes that the CSAs proposed would be consistent with the CSAs proposed to similar provisions in the Copyright (Amendment) Bill 2006.

Regulations (clause 56)

92. Clause 56 empowers the Secretary to make regulations for the purposes of the Bill. The Bills Committee has sought clarification on whether those regulations would be subsidiary legislation and whether there would be any consultation in preparing those regulations. The Administration has confirmed that those regulations would be subsidiary legislation. The Administration plans to consult the ITB Panel shortly on the draft regulations related to Part 2 of the Bill and certain other provisions related to the opt-out regime with a view to bringing the provisions into operation in around end of 2007.

Schedule 2: Consequential amendment to section 24(2) of the Telecommunications Ordinance (Cap. 106)

93. According to the Administration, the purpose of proposed new section 24(2)(a) of the Telecommunications Ordinance is to make clear that telecommunications officers and service providers who undertake acts prohibited by the current section 24 of the Ordinance but for the purpose of complying with any law, including the Bill, would not be considered as having committed an offence under section 24 of the Telecommunications Ordinance. Members have raised concern that the reference to "any law" in the proposed new section 24(2)(a) may render the scope of its application too broad, and suggest that the law or Ordinances to be covered in the proposed section should be stipulated clearly.

94. The Administration has responded that it currently does not envisage any specific laws other than the Telecommunications Ordinance and the Bill for which there might be a requirement for telecommunications officers to undertake activities that would contravene section 24 of the Telecommunications Ordinance. The original purpose for referring to "any law" is to cover possible law which may need to be included for the same purpose in future. Taking note of the Administration's response, the Bills Committee considers that any future requirements for other laws to be covered could be dealt with in subsequent legislative exercises and suggested that proposed new section 24(2)(a) should be amended to apply to the Telecommunications Ordinance and the Bill only. The Administration agrees to the suggestion and will move CSAs accordingly.

Service of notice

95. In response to the Bills Committee's suggestion, the Administration agrees to move CSAs to add a new clause 40A modelled on relevant provisions in the Broadcasting Ordinance to prescribe the manner in which a notice issued by TA under various provisions of the Bill may be served on the person concerned.

Committee Stage amendments

96. Apart from the CSAs discussed in the above paragraphs, the Administration will move other amendments to the Bill for the purposes of clarity, refinement or consistency. The Bills Committee does not object to those CSAs. A full set of the draft CSAs to be moved by the Administration is in **Appendix IV**.

Resumption of Second Reading debate on the Bill

97. The Bills Committee supports the resumption of the Second Reading debate on the Bill. The Administration has indicated that it will give notice for the resumption of the Second Reading debate on the Bill at the Council meeting to be held on 23 May 2007.

Undertakings made by the Administration

98. The Administration has made the following undertakings in the course of the deliberations of the Bills Committee --

- (a) to continue to monitor the problem of PTP interactive telemarketing calls to assess if they warrant regulation in future (paragraph 23 above refers);
- (b) to consult the ITB Panel on the draft codes of practice to be approved and issued for the purpose of providing practical guidance in respect of the application or operation of any provision of the future Unsolicited Electronic Messages Ordinance and any major subsequent amendments to the codes (paragraph 66 above refers); and
- (c) to state in the speech to be made by SCIT during the resumption of Second Reading debate on the Bill the point referred to (b) above, that a system is in place within the civil service for proper reporting of and investigation into suspected breaches of statutory

provisions by public officers (paragraph 39 refers), and the division of enforcement responsibility between OFTA and the Police (paragraph 64 above refers).

Advice Sought

99. Members are invited to note the deliberations of the Bills Committee.

Council Business Division 1
Legislative Council Secretariat
10 May 2007

Bills Committee on Unsolicited Electronic Messages Bill

Membership list

Chairman

Hon Howard YOUNG, SBS, JP

Members

Hon James TO Kun-sun

Hon SIN Chung-kai, JP

Hon Jasper TSANG Yok-sing, GBS, JP

Hon Emily LAU Wai-hing, JP

Hon Andrew LEUNG Kwan-yuen, SBS, JP

Hon WONG Ting-kwong, BBS

Hon Ronny TONG Ka-wah, SC

(Total: 8 members)

Clerk

Ms Anita SIT

Legal Adviser

Ms Connie FUNG

Date

2 August 2006

Bills Committee on Unsolicited Electronic Messages Bill

**List of individuals/organizations that have made oral presentation/
written submissions to the Bills Committee**

Oral presentation

1. Business Software Alliance *
2. Civic Party *
3. Consumer Council *
4. Doctor First Centre Ltd.
5. Hong Kong Computer Society *
6. Hong Kong Direct Marketing Association *
7. Mail Prove Limited
8. Professional Information Security Association *
9. The American Chamber of Commerce in Hong Kong *
10. The British Computer Society (Hong Kong Section)
11. The Hong Kong Call Centre Association *
12. The Hong Kong CAS/COM Joint Chapter of The Institute of Electrical and Electronics Engineers *
13. Tseung Kwan O District Environment Concern Group *

Written submissions

14. Mr Edward BROOK
15. 周文先生
16. 張國衡先生

17. 趙祥貴先生
18. Miss CHUI
19. Mr Paul GARDINER
20. 江燦良先生
21. Mr YIP Ming
22. Asia Digital Marketing Association
23. CIGNA Worldwide Life Insurance Company Limited
24. CIGNA Worldwide General Insurance Company Limited
25. Communications Association of Hong Kong
26. Hong Kong Anti-Spam Coalition
27. Hong Kong CSL Limited
28. New World PCS Limited
29. Hong Kong General Chamber of Commerce
30. PCCW-HKT Telephone Limited
31. Stevenson, Wong & Co.
32. Wharf T&T Limited

* Organizations which have also given written submissions

UNSOLICITED ELECTRONIC MESSAGES BILL

COMMITTEE STAGE

Amendments to be moved by the Honourable WONG Ting-kwong, BBS

<u>Clause</u>	<u>Amendment Proposed</u>
6	<p>(a) In the heading, by deleting “Exclusions” and substituting “Exemptions”.</p> <p>(b) By deleting subclause (1) and substituting— “(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”.</p>

Schedule 1 By deleting ;the Schedule and substituting—

“SCHEDULE 1
EXEMPTIONS [s.6]

1. 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 column 1 in Table 1 are exempt from the application of this Ordinance to the extent, if any, specified in column 2 of that item.

(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

	Column 1	Column 2
Item	Description of exempt matter	Extent of exemption
1.	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.	The matters described in Items 1 and 2 are exempt from the application of the Ordinance to the extent that the messages involve person-to-person interactive communications made pursuant to a previous or current business or client relationship between the caller and the recipient.
2.	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.

Where the person-to-person interactive communications involved are made otherwise than pursuant to any such relationship between the caller and the recipient, sections 7 and 12 of the Ordinance shall apply.

- | | | |
|----|---|----------------|
| 3. | Television programme services, whether or not licensed under the Broadcasting Ordinance (Cap. 562). | Not applicable |
| 4. | Sound broadcasting services, whether or not licensed under the Telecommunications Ordinance (Cap. 106). | Not applicable |

TABLE 2
MATTERS EXEMPTED FROM APPLICATION
OF PART 2 OF ORDINANCE

	Column 1	Column 2
Item	Description of exempt matter	Conditions to which exemption is subject
1.	Any commercial electronic message	The exemption is subject

sent to a person that meets the following conditions—

- (a) 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);
- (b) the information is communicated to the sender by that person either directly or in consequence of the conduct of that person;
- (c) the message would not have been sent but for the communication of that information; and
- (d) the message is of a kind that the person would normally expect to receive as a result of the communication of that information.

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.

2. Any electronic message the primary purpose of which is—
- (a) to facilitate, complete or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;
 - (b) to provide warranty information, product recall

Not applicable

information or safety or security information with respect to a commercial product or service purchased or used by the recipient;
or

- (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.

- | | | |
|----|---|----------------|
| 3. | Any electronic message the primary purpose of which is to provide— <ul style="list-style-type: none">(a) notification concerning a change in the terms or features of;(b) notification of a change in the recipient's standing or status with respect to; or(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. | Not applicable |
|----|---|----------------|

4. Any electronic message the primary purpose of which is to provide information directly related to an employment relationship or a related benefit plan in which the recipient is currently involved, participating or enrolled. Not applicable”.

UNSOLICITED ELECTRONIC MESSAGES BILL

COMMITTEE STAGE

Amendments to be moved by the Secretary for Commerce, Industry and Technology

<u>Clause</u>	<u>Amendment Proposed</u>
1	<p>(a) By adding –</p> <p>“(1A) Subject to subsection (2), this Ordinance shall come into operation on the day on which it is published in the Gazette.”.</p> <p>(b) In subclause (2), by deleting “This Ordinance” and substituting “Part 2, sections 30, 30A, 31, 35, 36 and 52A and sections 1(2) and 2(2) and Table 2 of Schedule 1”.</p>
2	<p>(a) In subclause (1) –</p> <p>(i) by deleting the definition of “do-not-call register” and substituting –</p> <p>““do-not-call register” (拒收訊息登記冊) means a register established and kept under section 30 (<i>Authority may establish do-not-call registers</i>);”;</p> <p>(ii) in the definition of “enforcement notice”, by deleting “issued under section 35” and substituting “under section 35(1)”;</p> <p>(iii) by deleting paragraph (c) of the definition of “organization” and substituting –</p> <p>“(c) a partnership or other unincorporated body of persons, whether formed or established in Hong</p>

Kong or elsewhere;”;

- (iv) by deleting paragraph (d) of the definition of “registered user” and substituting –

“(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;”;

- (v) by adding –

““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;”.

- (b) By adding –
- “(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.”.

(c) In subclause (3), by deleting “, associations, societies”.

(d) By adding –

“(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.”.

5 (a) By deleting subclause (1) and substituting –

“(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.”.

- (b) By deleting subclause (2)(b) and substituting –

“(b) has not, within a reasonable period of time prior to the sending of the message, withdrawn that consent.”.

New By adding –

“5A. Application

- (1) This Ordinance binds the Government.
- (2) Neither the Government nor any public officer in the officer’s capacity as such is liable to be prosecuted for an offence against this Ordinance.”.

- 6 (a) In the heading, by deleting “**Exclusions**” and substituting “**Exemptions**”.

- (b) By deleting subclause (1) and substituting –

“(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.”.

- 7(1) In the Chinese text, by deleting paragraph (c) and substituting –
“(c) 該訊息載有規例所指明的資料(如有的話)，並符合規例所指明的條件(如有的話)；及”.
- 8 (a) In subclause (1), by adding –
“(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;”.
- (b) In subclause (3), by deleting “7” and substituting “3”.
- 10 (a) In the heading, in the Chinese text, by deleting “拒收登記冊” and substituting “拒收訊息登記冊”.
- (b) In subclauses (1), (2) and (3), in the Chinese text, by deleting “拒收登記冊” and substituting “拒收訊息登記冊”.
- 14(3) By deleting “or recklessly”.
- 15(3) By deleting “or recklessly”.
- 16(3) By deleting “or recklessly”.
- 17(3) By deleting “or recklessly”.

- 18(3) By deleting “or recklessly”.
- 21(1) (a) By deleting “knowingly or recklessly”.
(b) In paragraph (b), by adding “knowingly” before “initiates”.
- 23 (a) In subclause (1)(b), by deleting “or recklessly”.
(b) In subclause (2), by deleting “knowingly”.
- 24 (a) In subclause (1) –
(i) in paragraph (a), by deleting “knowingly”;
(ii) in paragraph (b), by deleting “or recklessly”.
(b) In subclause (2), by deleting “knowingly”.
- 25(1)(b) By deleting “or recklessly”.
- 26 In the definition of “specified offence”, by adding “or Part 7 (*miscellaneous*)” before the full stop.
- 27 By deleting “Ordinance” and substituting “Part”.
- 28 By deleting subclause (10) and substituting –
“(10) A code of practice approved under this section
and a notice published under subsection (3) or (7) are not
subsidiary legislation.”.
- 29(5)(b) By deleting “(*Appeal Board established*)”.

- 30
- (a) In the heading, in the Chinese text, by deleting “拒收登記冊” and substituting “拒收訊息登記冊”.
 - (b) By deleting subclause (1) and substituting –
 - “(1) The Authority may establish and keep one or more registers 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.”.
 - (c) In subclause (2), in the Chinese text, by deleting “拒收登記冊” and substituting “拒收訊息登記冊”.
 - (d) In subclause (3), in the Chinese text, by deleting “拒收登記冊” and substituting “拒收訊息登記冊”.
 - (e) In subclause (4), by deleting “A do-not-call” and substituting “Without limiting the generality of subsection (1), a do-not-call”.
 - (f) In subclause (5) –
 - (i) by deleting “pursuant to subsection (1)”;
 - (ii) in the Chinese text, by deleting “拒收登記冊” and substituting “拒收訊息登記冊”.
 - (g) By deleting subclause (6).
 - (h) In subclause (7)(a), in the Chinese text, by deleting “拒收登記冊” and substituting “拒收訊息登記冊”.
 - (i) By adding –
 - “(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.”.

(j) By deleting subclause (8).

New

By adding –

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

(1) Without limiting the generality of section 30(1) (*Authority may establish 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 its being made available under section 31 (*access to do-not-call registers*).”.

31 By deleting the clause and substituting –

“31. Access to do-not-call registers

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

(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 By deleting the clause.

33 By deleting the clause and substituting –

“33. Authority may issue directions to telecommunications service providers

(1) Subject to subsections (2) and (3), the Authority may, by notice in writing served on a telecommunications service provider, issue directions to the telecommunications service provider requiring it to –

(a) take such action as the Authority considers necessary for the purpose of assisting the Authority to determine whether to commence an investigation into a contravention or suspected

contravention of a provision of this Ordinance;

- (b) take such action as the Authority considers necessary for the purpose of assisting or enabling the Authority to investigate a contravention or suspected contravention of a provision of this Ordinance; or
- (c) provide information to the Authority for the purpose of assisting or enabling the Authority to establish, operate or administer a do-not-call register,

and the telecommunications service provider shall give effect to such directions before a date specified in the notice, being a date reasonable in all the circumstances of the case.

(2) No directions shall be issued to a telecommunications service provider under subsection (1) in relation to a matter for which the Authority may serve a notice on the telecommunications service provider under section 34 (*Authority may obtain information or documents relevant to investigation*) or section 35 (*Authority may issue enforcement notice*).

(3) No directions shall be issued to a telecommunications service provider 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.

33A. 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 on a telecommunications service provider under subsection (1) shall not exceed –

- (a) \$50,000 for the first occasion on which a financial penalty is so imposed;
- (b) \$100,000 for the second occasion on which a financial penalty is so imposed; and
- (c) \$200,000 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.”.

- 34
- (a) In subclause (1), in the Chinese text, by deleting “(但不限於)” and substituting “但不限於”.
 - (b) In subclause (3) –
 - (i) by adding “, on application by the Authority” after “a magistrate may”;
 - (ii) in paragraph (a), by deleting “and” at the end;
 - (iii) in paragraph (b), by deleting “notice,” and substituting “notice; and”;
 - (iv) by adding –
 - “(c) after considering the representations, if any, made by the Authority or the person on the hearing of the application,”.
 - (c) By adding –
 - “(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 –

- (a) where the person is an individual, either in person or through a counsel or solicitor; or
- (b) where the person is an organization, either through a counsel or solicitor or through –
 - (i) in the case of a Hong Kong company or other company or body corporate, any of its directors or other officers;
 - (ii) in the case of a partnership, any of its partners; and
 - (iii) in the case of any other organization, any of its officers.”.
- (d) By deleting subclauses (5) and (6).

New

By adding –

“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.”.

37

- (a) In subclause (1)(b) –
- (i) by deleting “38” and substituting “38(1)”;
 - (ii) in subparagraph (ii), in the Chinese text, by deleting “扣留任何在該處所或地方之內或之上發現的人的期間內，扣留該人” and substituting “的期間內，扣

留任何在該處所或地方之內或之上發現的人”。

- (b) By deleting subclause (2).
- (c) In subclause (3) –
 - (i) by deleting “this section” and substituting “a warrant issued under section 38(1) (*power of magistrate to issue search warrant*)”;
 - (ii) by adding –
 - “(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);”.
- (d) By adding –
 - “(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.”.
- (e) In subclause (6), by adding “enactment or rule of” before “law”.
- (a) By renumbering the clause as clause 38(1).

(b) By adding –

“(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(1)

- (a) In paragraph (a), by deleting “this Ordinance” and substituting “section 37 (*powers of entry, search, arrest, etc.*)”.
- (b) In paragraph (b), by adding “under that section” after “authorized officer”.
- (c) In paragraph (c), by deleting “this Ordinance” and substituting “that section”.

40

By adding –

“(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.”.

New

By adding –

“40A. Service of notices for purposes of sections 33, 33A, 34 and 35

(1) A specified notice 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 organization shall be deemed to have a usual place of business at its principal office or any other place at which it carries on business.

(3) In this section, “specified notice” (指明通知) means a notice under –

- (a) section 33 (*Authority may issue directions to telecommunications service providers*);
- (b) section 33A (*Authority may impose financial penalties*);
- (c) section 34 (*Authority may obtain information or documents relevant to investigation*); or
- (d) section 35 (*Authority may issue enforcement notice*).”.

- 42
- (a) By deleting “(Appeal Board established)” wherever it appears.
 - (b) In the definition of “presiding officer”, by deleting “section 45(1)(a) (*procedure on appeal*)” and substituting “section 45 (*composition of Appeal Board for purposes of appeal*)”.

- (c) By adding –
 ““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);”.

43

- (a) By deleting subclause (2) and substituting –
 “(2) 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.”.
- (b) By deleting subclauses (3) and (4).
- (c) By deleting subclause (5) and substituting –
 “(5) The Chief Executive shall appoint a panel of persons, not being public officers, whom he considers suitable for selection under section 45(1)(b) (*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.”.

45

By deleting the clause and substituting –

**“45. Composition of Appeal Board
 for purposes of appeal**

- (1) For the purposes of an appeal, the Appeal Board shall consist of –
- (a) a presiding officer, who shall preside at the hearing of the appeal; and

(b) 2 panel members 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.

(7) If the term of appointment of the presiding officer or a panel member selected 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

(1) 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.

(2) A party to an appeal shall be entitled to be heard –

- (a) where the party is an individual, either in person or through a counsel or solicitor; or
- (b) where the party is an organization, either through a counsel or solicitor or through –
 - (i) in the case of a Hong Kong company or other company or body corporate, any of its directors or other officers;
 - (ii) in the case of a partnership, any of its partners; and
 - (iii) in the case of any other organization, any of its officers.

(3) 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 (2).

(4) 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.

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

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

- 46 (a) In subclause (1)(b)(i), by deleting “information or”.
- (b) In subclause (4), by deleting “the rules” and substituting “any rules”.
- 51 By deleting paragraph (b) and substituting –
- “(b) generally for regulating the practice and procedure of the Appeal Board.”.
- 52 (a) In subclause (1), by deleting “(whether or not he has been convicted of an offence in relation to the contravention)”.
- (b) By adding –
- “(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.”.

- (c) In subclause (4) –
 - (i) by adding “enactment or rule of” before “law”;
 - (ii) by deleting “mentioned” and substituting “referred to”;
 - (iii) in the Chinese text, by deleting “或授予” and substituting “或”.
- (d) In subclause (5), by deleting “mentioned” and substituting “referred to”.
- (e) In subclause (7), in the Chinese text, by deleting “任何人根據任何其他成文法則或法律規則而獲賦予或委予” and substituting “根據任何其他成文法則或法律規則賦予或施加於任何人”.

New

By adding –

“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 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 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.”.

54

- (a) In subclause (1) –
- (i) by deleting “a company or a partnership” and substituting “an organization”;
 - (ii) by deleting “he proves” and substituting “there is evidence showing”;
 - (iii) in paragraph (a), by deleting “case of the company” and substituting “case of a Hong Kong company or other company or body corporate (“the company”)”;
 - (iv) in paragraph (b) –
 - (A) in the English text, by deleting “case of the” and substituting “case of a”;
 - (B) in subparagraph (ii), by deleting the full stop and substituting “; and”;
 - (v) by adding –
 - “(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.”.

(b) By deleting subclause (2).

(c) By deleting subclause (3) and substituting –

“(3) A person charged with an offence under this Ordinance by virtue of subsection (1) is taken 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 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.”.

Schedule 1 By deleting the Schedule and substituting –

“SCHEDULE 1

[s. 6]

EXEMPTIONS

1. 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

Item	Description of exempt matter
1.	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.
2.	<p>Voice, sound, image or video messages, or messages combining text, voice, sound, images or video, that involve –</p> <ul style="list-style-type: none"> (a) person-to-person interactive communications between a caller and a recipient; and (b) a pre-recorded or synthesized (machine-generated or simulated) element, <p>whereby the pre-recorded or synthesized element is activated in response to information communicated by the caller.</p>
3.	Television programme services, whether or not licensed under the Broadcasting Ordinance (Cap. 562).
4.	Sound broadcasting services, whether or not licensed under the Telecommunications Ordinance (Cap. 106).

TABLE 2
MATTERS EXEMPTED FROM APPLICATION
OF PART 2 OF ORDINANCE

Item	Column 1 Description of exempt matter	Column 2 Conditions to which exemption is subject
1.	<p>Any commercial electronic message sent to a person that meets the following conditions –</p> <ul style="list-style-type: none"> (a) 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); (b) the information is communicated to the sender by that person either directly or in consequence of the conduct of that person; (c) the message would not have been sent but for the communication of that information; and (d) the message is of a kind that the person would normally expect to receive as a result of the communication of that information. 	<p>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.</p>

2. Any electronic message the primary purpose of which is – Not applicable.
- (a) to facilitate, complete or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;
 - (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
 - (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.
3. Any electronic message the primary purpose of which is to provide – Not applicable.
- (a) notification concerning a change in the terms or features of;
 - (b) notification of a change in the recipient's standing or status with respect to; or
 - (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.

4. Any electronic message the primary purpose of which is to provide information directly related to an employment relationship or a related benefit plan in which the recipient is currently involved, participating or enrolled. Not applicable.”.

- Schedule 2
- (a) In section 1(2), in the proposed section 24(2)(a), by deleting “any other law” and substituting “the Unsolicited Electronic Messages Ordinance (of 2007)”.
 - (b) In section 2, by deleting everything after “item 1,” and substituting –
“by repealing “Telephone Ordinance (Cap. 269)” and substituting “Unsolicited Electronic Messages Ordinance (of 2007)”.”.