



FACSIMILE

TO Communications and Technology Branch,
Commerce Industry and Technology Bureau
(Attention: Assistant Secretary (B))

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FROM Stephanie Yip

DATE March 20, 2006

OF PAGES (INCLUDING COVER) 9

COMMENTS

Dear Sir/Madam,

Please find enclosed the BSA submission in response to the Consultation Paper on Legislative Proposals to Contain the Problem of Unsolicited Electronic Messages. The original will be sent to you by post.

Thanks,

Stephanie

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Business Software Alliance

Submission in response to the Consultation Paper on Legislative Proposals to Contain the Problem of Unsolicited Electronic Messages

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1 Introduction

1.1 BSA welcomes the legislative proposals for the UEM Bill

The Business Software Alliance ("BSA") welcomes the opportunity to comment on the detailed legislative proposals for Hong Kong's Unsolicited Electronic Messages Bill ("UEM Bill") as set out in the Consultation Paper on Legislative Proposals to Contain the Problem of Unsolicited Electronic Messages ("Consultation Paper").

BSA wishes to express its overall support for the Hong Kong Government's legislative proposals for the UEM Bill. The Consultation Paper contemplates the establishment of a robust and pragmatic anti-spam regime that strikes a reasonable balance between the interests of different stakeholders. BSA supports the Government's preference for an opt-out regime coupled with strong anti-fraud measures, such as the prohibition on misleading subject headings, and commends the promising degree of harmonisation between the legislative proposals for the UEM Bill and the anti-spam laws of other jurisdictions in the Asia Pacific region.

BSA's comments in this submission are primarily intended to highlight aspects of the legislative proposals that the BSA believes would benefit from further consideration. Where BSA does not comment on a particular legislative proposal, it can be assumed that BSA supports the approach suggested in the Consultation Paper.

2 BSA's perspective on spam regulation

As the voice of the world's leading commercial software publishers and their hardware partners, BSA represents the interests of a number of stakeholders involved in the spam debate. BSA members interact with the spam issue as developers of anti-spam technologies, providers of hardware and networking solutions, email service providers and e-marketers. BSA is a strong supporter of legislative measures to control spammers and advocates a harmonised approach that ensures that illicit spammers are held accountable without imposing undue compliance costs on legitimate e-marketers.

BSA members include Adobe, Apple, Autodesk, Avid, Bentley Systems, Borland, Cadence Design Systems, Cisco Systems, CNC Software/Mastercam, Dell,

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Entrust, HP, IBM, Intel, Internet Security Systems, McAfee, Microsoft, PTC, RSA Security, SAP, SolidWorks, Sybase, Symantec, Synopsys, The MathWorks, and UGS.

3 The Hong Kong Government should strive for harmonisation wherever possible

BSA urges the Hong Kong Government to strive for harmonisation between the UEM Bill and enacted anti-spam regimes in the Asia Pacific region wherever possible. Many of BSA's members operate globally and are therefore subject to a multitude of anti-spam regimes. Not surprisingly, the inconsistencies between these regimes present major difficulties for developing global procedures, with the result that multi-nationals bear the burden of the extra-territorial operation of anti-spam regimes rather than the illegitimate spammers at whom these measures are targeted.

BSA refers the Hong Kong Government to the United States' CAN-SPAM Act of 2003 throughout this submission. In BSA's opinion, harmonisation with this regime is particularly desirable because the United States is a major trading partner of Hong Kong and many of BSA's members have their headquarters in that jurisdiction.

4 The proposed private right of action may lead to unproductive litigation (Paragraph 82(a) of the Consultation Paper)

BSA supports in principle the inclusion of a private right of action in the proposed UEM Bill. Our members' experience has been that, although government action is an essential ingredient of any response to the problem of spam, private organisations are also capable of substantial achievements when they shoulder the burden of civil legal action. However, BSA is concerned by the potential breadth of the private right of action contemplated in the Consultation Paper.

The Consultation Paper provides that any person who sustains pecuniary loss as a result of another's contravention of the UEM Bill is entitled to bring civil proceedings against the last mentioned person.¹ This approach casts the net very wide because almost every person who receives a message in contravention of the UEM Bill will be able to prove pecuniary loss in the form of additional storage costs. Consequently, individual spam recipients (in addition to internet service

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¹ Paragraph 82(a) of the Consultation Paper.

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providers ("ISPs"), email service providers and other intermediaries) will be able to bring civil proceedings against spammers.

In BSA's opinion, affording standing to individual spam recipients under the UEM Bill may encourage unproductive litigation with the potential to place an undue burden on the courts without the corresponding likelihood of a reduction in spam volumes. The losses suffered by individual spam recipients are likely to be minimal relative to other stakeholders and may not be sufficient to justify the initiation of court proceedings (both in terms of the cost of proceedings to the spam recipient and the burden of such litigation on Hong Kong's judiciary).

For these reasons, BSA recommends that the Hong Kong Government limits the proposed private right of action to ISPs and email service providers. These intermediaries have a clear interest in the legitimacy of online marketing channels and often have the necessary financial and technical resources to pursue spammers effectively. A limited private right of action of this kind has been adopted in the United States, and in the experience of our members, it has not had an adverse impact on the relevant court systems. To the contrary, industry and government in the United States have successfully collaborated in a number of actions.

Another way of addressing the threat of unproductive litigation would be to set a monetary threshold for the amount of pecuniary loss a person must suffer in order to be afforded standing under the proposed UEM Bill.

5 The requirement to retain unsubscribe requests is burdensome and unnecessary

(Paragraph 56(a) of the Consultation Paper)

BSA believes that the Government's proposal to require e-marketers to retain "unsubscribe messages" for at least 7 years after receipt is unduly burdensome for regulated entities and is unlikely to assist enforcement efforts. This is because illicit spammers can be expected to ignore any such retention requirement, while legitimate e-marketers, particularly small and medium enterprises, will face significant compliance costs in adhering to the proposed requirement. Furthermore, as a practical matter, it is not clear how a sender could comply with the proposed record retention requirement where a recipient submits an unsubscribe request using a web-based form provided by the sender. This method of submitting unsubscribe receipts is commonly provided by senders of commercial electronic messages.

The Hong Kong Government's proposal also appears to be without precedent among comparable jurisdictions in the Asia Pacific region; the United States,

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Australia, Singapore and New Zealand have not imposed, or do not intend to impose, any such record retention requirement on senders of commercial electronic messages. Indeed, even Hong Kong's own Personal Data (Privacy) Ordinance (Cap. 486) does not require data users to retain records of opt-out requests made by data subjects whose personal information has been used for direct marketing purposes.²

In the light of these observations, BSA opposes the enactment of a requirement for senders to retain records of unsubscribe requests for a period of 7 years after receipt. Regulated entities are capable of establishing their own systems to ensure, and if necessary, provide evidence of, their compliance with the anti-spam regime. BSA is strongly of the view that there is no need for legislative guidance from the Hong Kong Government on how to comply with unsubscribe requests. A statutory requirement of the kind proposed in the Consultation Paper is costly for senders and unlikely to aid the enforcement of the regime.

6 The commercial purpose of an unsolicited electronic message should be clear, not incidental

(Paragraphs 19 and 29(c) of Part III of the Consultation Paper)

BSA supports the Hong Kong Government's proposal to exclude messages of a non-commercial nature from the definition of commercial electronic message. However, there appears to be an inconsistency between the Government's policy position on when an unsolicited electronic message is taken to have a commercial purpose, and the legislative proposal that seeks to implement that stance.

According to the Consultation Paper, the Government's policy position is that the UEM Bill should "cover messages the *primary purpose* of which is the commercial advertisement or promotion of a commercial product or service."³ This position reflects the formulation in section 3(2)(A) of the US CAN-SPAM Act of 2003. Yet, in the concomitant legislative proposal "commercial electronic message" is defined to mean "any electronic message *at least one of the purposes of which* is to offer, advertise, promote or sponsor the provision of goods, facilities, services".⁴

There is a material difference between these two approaches to determining whether a message has a commercial purpose. The use of the words "*at least one of the purposes of which*" in the definition of commercial electronic message

² Section 34 of the Personal Data (Privacy) Ordinance (Cap. 486) regulates the use of personal data in direct marketing.

³ Paragraph 19 of Part III of the Consultation Paper (emphasis added).

⁴ Paragraph 29(c) of Part III of the Consultation Paper (emphasis added).

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means that an electronic message which has an incidental commercial purpose - such as an electronic message that contains a product recall notice coupled with an offer to provide a replacement product - would be covered by the proposed UEM Bill.

In BSA's opinion, the proposed UEM Bill should only apply to messages the *primary purpose* of which is the advertisement or promotion of goods or services. It would be inconsistent with the Government's commitment to facilitating the development of e-marketing as a legitimate marketing channel in Hong Kong⁵ to bring messages that have a non-commercial purpose or an incidental commercial purpose within the scope of the proposed UEM Bill.

7 Transactional and relationship messages should be presumed to fall within the private arrangements exemption to the requirement to include a functional unsubscribe facility

(Paragraph 55(f) of the Consultation Paper)

It is pleasing that the Government plans to address private arrangements regarding the receipt of commercial electronic messages as part of its anti-spam regime. BSA supports the Government's view that the statutory requirement for the provision of a functional unsubscribe facility should not void private arrangements between the sender and recipient.

However, as presently drafted, the scope of the 'private arrangements exemption' to the requirement of providing a functional unsubscribe facility requires a message by message analysis. In order to promote certainty for e-marketers, BSA believes that the proposed UEM Bill should contain a presumption that certain types of transactional or relationship messages are within the scope of the private arrangements exemption. Those sorts of messages are sufficiently common to justify the inclusion of a provision to clarify their status. The presumption would apply to commercial electronic messages commonly sent by organisations to their customers, including messages the primary purpose of which is to:

- (a) facilitate or complete a commercial transaction that the recipient has previously agreed to enter into with the sender; or
- (b) deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.

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⁵ Paragraph 14 of Part II of the Consultation Paper.

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The definition of "transactional or relationship message" in section 3(17) of the US CAN-SPAM Act of 2003 provides useful guidance as to the types of messages that BSA envisages would fall within the presumption recommended above.

BSA notes that it otherwise supports the exemptions to the requirement to include a functional unsubscribe facility as set out in paragraphs 55(d) and (e) of the Consultation Paper. These exemptions are in line with those enacted in Australia.

8 There should be an opportunity for a merit-based review of the decision to issue an enforcement notice

(Paragraph 52 of the Consultation Paper)

BSA supports the Government's proposal for the Telecommunications Authority ("TA") to issue enforcement notices addressing non-compliance with the regime. Enforcement notices are a constructive way of notifying organisations of their non-compliance and encouraging them to develop systems to avoid repeat contraventions.

However, BSA is concerned that the proposed UEM Bill only provides for judicial review (and not a merit-based review) of the TA's decision to issue an enforcement notice. Judicial reviews are typically only concerned with the way in which the decision maker makes its decision, whereas merit-based reviews consider the correctness of the decision itself. Given that criminal penalties could attach to a failure to comply with an enforcement notice, BSA members believe there should be a high degree of confidence in the correctness of the TA's decision to issue the notice.

One way of accommodating a merit-based review of the TA's decision within the enforcement framework proposed by the Hong Kong Government would be to permit recipients of enforcement notices to seek a merit-based review within a specified period of the date of the enforcement notice. It would only be upon (i) expiry of that specified period or (ii) completion of a merit-based review establishing the correctness of the TA's decision that criminal proceedings alleging failure to comply with an enforcement notice could be commenced.

9 The concept of 'affirmative consent' requires further elucidation

(Paragraphs 57 and 58(e) of the Consultation Paper)

In the proposed UEM Bill, the concept of 'affirmative consent' is central to a sender's ability to send a person commercial electronic messages after that person

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has previously opted-out of receiving messages from that sender. However, the concept of 'affirmative consent' is not defined in the proposed UEM Bill.

The experience of BSA members in other jurisdictions that have adopted anti-spam legislation has made it clear that the concept of 'consent' is a nebulous one in the spam context. It is important that the proposed UEM Bill carefully elucidates what 'affirmative consent' involves if it is to provide e-marketers with the certainty that they require to operate efficiently. In this regard, section 3(1) of the US CAN-SPAM Act of 2003 provides useful drafting guidance.

10 Do-not-call registers

(Paragraphs 44 and 45 of the Consultation Paper)

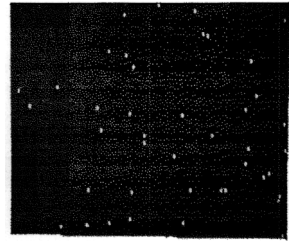
The UEM Bill empowers the TA to set up various do-not-call registers which an e-marketer must consult unless a person on that register has given their affirmative consent to be contacted by that e-marketer. BSA recognises the merit in the TA establishing a do-not-call register for telephone numbers, but opposes the establishment of a do-not-email register for email addresses. This is because there is a real possibility that a do-not-email register would serve as a directory of valid email addresses for illicit spammers who would use it to send emails in contravention of Hong Kong's anti-spam regime. We note that under paragraph 45 of the Consultation Paper, it is stated that "for certain types of electronic addresses, a do-not-call register could be counterproductive", such as a do-not-email register. BSA wishes to emphasise its agreement that a do-not-email register should not be set up.

Importantly, BSA is of the view that e-marketers should be exempted from checking do-not-call registers if the message recipient is in a pre-existing business relationship with the e-marketer. This would be consistent with the rationale for exempting e-marketers from providing functional unsubscribe facilities in circumstances where parties have pre-existing business relationships, as currently proposed under the UEM Bill. Where there is an existing business relationship, to require e-marketers to consult do-not-call registers would be unduly burdensome and would hinder legitimate electronic communications.

Finally, BSA welcomes the consistent application of penalties to the UEM Bill's prohibition on transmitting commercial electronic messages to persons listed on a do-not-call register, and the more general prohibition on sending commercial electronic messages to persons who have opted-out of receipt of the same.

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11 Conclusion

BSA wishes to reiterate its view that the proposed UEM Bill bears the hallmarks of what BSA believes will be a robust and pragmatic anti-spam regime for Hong Kong. Addressing the concerns raised in this submission will further strengthen the proposed regime.

BSA thanks the Communications and Technology Branch of the Commerce, Industry and Technology Bureau for its consideration of this submission, and welcomes the opportunity to discuss the points we have raised.

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