

An Overview to the Unsolicited Electronic Messages Ordinance (“UEMO”)

-

To effectively contain and regulate the issues regarding unsolicited electronic messages, including those business-soliciting pretexts and uninvited fax advertisements, the UEMO and the Unsolicited Electronic Messages Regulations (“UEMR”) were enacted in 2007 and came into force in two phases.

The first phase, concerning Part 3 of the UEMO (use of unscrupulous practices to reach out to more recipients) and Part 4 (fraud and other illicit activities in relation to sending commercial electronic messages), commenced on 1st June 2007. The second phase, mainly concerning Part 2 of the UEMO on rules of sending commercial electronic messages (e.g. the requirement to provide sender information, to honour unsubscribe requests as well as the do-not-call registers (“DNCs”)), commenced on 22nd December 2007.

Scope of UEMO

The UEMO regulates the sending of “commercial electronic messages” with a “Hong Kong link”. “Commercial electronic messages” are defined as electronic messages with purposes to offer or supply goods, services, facilities, land, business opportunity or advertise or promote a supplier of goods, services, facilities, land, business opportunity etc, in the course of or in the furtherance of any business.

A “Hong Kong link” refers to those electronic messages which are:-

- a. originated in Hong Kong (i.e. sent off by someone physically present in Hong Kong, or otherwise by a Hong Kong entity);
- b. received in Hong Kong (irrespective of nationality of the recipient); or
- c. sent to a Hong Kong telephone or fax number (irrespective of whether the number is being used in Hong Kong or has been roamed outside of Hong Kong).

Exceptions are extended to certain messages, including person-to-person telemarketing calls and sound broadcasting or television programme services.

Compliance with UEMO when using commercial electronic messages – perspective for the industry

Part 2 of UEMO governs the sending of commercial electronic messages. While preparing the contents of the message, senders should **include the sender's information** for potential recipients to effectively identify who the senders are. The sender's information should be valid for at least 30 days after the message is sent off. Senders should also **provide unsubscribe facility, in "clear and conspicuous manner"**, in which the senders should be capable of receiving unsubscribe requests within 30 days after the message is being sent off. The unsubscribe request should be available free of charge and convenient for recipients to use. The **unsubscribe requests should be honoured** by senders upon 10 days of receipt and that record of unsubscribe requests should be retained for at least 3 years.

Additionally, Part 3 of UEMO prohibits the use of automated means or address-harvesting software. In the course of preparing a target address list, the sender shall ensure that:-

- a. no **address harvesting software** are used in facilitating the sending of messages;
- b. no **automated means** should be used when obtaining addresses (e.g. dictionary software in generating potential emailing lists);
- c. no addresses are coming from a harvested list; and
- d. no messages are sent to addresses from which **unsubscribe request has been received**, or which the electronic address was listed in the **DNCs**.

Part 4 of UEMO provides a maximum penalty of 10 years imprisonment for **fraud and illicit activities related to transmission of commercial electronic messages**. Senders should refrain from initiating transmission of multiple commercial electronic messages with **intent to deceive or mislead recipients** or **use falsified headers** in the electronic messages. Registrants who used **information that falsifies the identity** of the actual registrant would also attract criminal liability pursuant to section 25 of UEMO. Under this part, multiple commercial electronic messages denotes the transmission of more than 100 commercial electronic messages during a 24-hour period, or more than 1000 commercial electronic messages during a 30-day period.

Management Responsibilities

The UEMO provides that employers and principals are vicariously liable to acts done by their fellow employees and agents. Any act done or conduct engaged in by an employee shall also be treated as done or engaged in by his employer as well as by him, in disregard of the employer's knowledge or approval. Companies and organizations should bear in mind that any act done or conduct engaged in by an agent or an outsourced third-party will be treated as done or engaged in by the principal.

Furthermore, the directors of the company, partners in the partnership or officer in an organization who is responsible for internal management of the organization shall be presumed to have done the act of the organization where the act done constitutes an offence under the UEMO.

The Do-Not-Call Registers ("DNCs") – perspective of recipients

By registering his telephone or fax numbers to the DNCs, the registrant has in effect opted out from receiving further commercial electronic messages at his telephone or fax number from all senders. Senders are prohibited from sending further commercial electronic messages to these registrants who are listed in the DNCs for 10 working days or more, unless they otherwise obtain specific consents from the registers user of the telephone or fax number.

The Office of Telecommunications Authority ("OFTA") has set up three DNCs for **Fax**, **Short Message** (for Short Messaging Service (SMS) and Multimedia Messaging Service (MMS) messages) and **Pre-recorded call** (for pre-recorded voice, sound, video and image messages) respectively.

Currently there are no registers for email addresses. Alternatively, an **unsubscribe request** could be made and sent to electronic messages senders so that no further messages would be received from these senders. Senders are bound by law to honour these requests and to cease sending off messages 10 working days after receipt of a request. The unsubscribe requests must also be kept by individual senders for a minimum period of 3 years.

Information obtained from the unsubscribe requests or the DNCs should only be used for compliance with the UEMO and UEMR. Those who fail to comply with such requirement will be subject to penalty under the UEMO, with a 5-year maximum term of imprisonment.

Complaints and Penalties

Complaints and suspected breaches of the UEMO and UEMR may be reported to the OFTA for enforcement actions. The online report form is available at the OFTA website www.ofta.gov.hk/en/eng_help/uem.html. The OFTA is responsible for the service of enforcement notice to the relevant bodies should contravention of UEMO and UEMO be discovered.

For first conviction of any contravention under Part 2 (rules regarding sending commercial electronic messages), there is liability for a fixed penalty up to HK\$100,000 which would be raised up to HK\$500,000 for the second and subsequent convictions. For contravention of Part 3 provisions (use of unscrupulous techniques in reaching out recipients), there will be a fine of up to HK\$1,000,000 and imprisonment up to 5 years for conviction on indictment. Contravention of Part 4 provisions (fraud and illicit activities) attracts a maximum term of imprisonment for 10 years, for conviction on indictment.

Prepared in March 2008.

For further enquiries, please contact Grace Chu <gchu@fclklaw.com.hk>, Arthur Hong <ahong@fclklaw.com.hk>.