To:
Infocomm Development Authority of Singapore
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Singapore 038988
Attn: Mr Andrew Haire
Assistant Director-General (Telecom)

14 October 2005

By fax (65-62112116) and
by email (spamcontrol@ida.gov.sg)

Dear Sirs,

Response to Consultation Paper on Proposed Spam Control Bill

We are pleased to provide our comments on the proposed Spam Control Bill (the "Bill"). We submit these comments in our capacities as private individuals and not as lawyers. Our comments do not represent the official views of either our law firms or our clients.

We set out our comments as follows:

1. Meaning of "commercial electronic message" (section 4)

We note that the proposed definition of "commercial electronic message", in particular under section 3(1)(ii), includes a message that has the advertising or promotion of goods or services as its purpose, or as one of its purposes. However, it is common for companies and their staff (in particular, marketing staff) to include mentions of the company in question, and/or its goods and services, in their electronic mail signatures. An otherwise non-commercial electronic mail with such a signature may then be considered to be a commercial electronic message. We would therefore suggest that the word 'primary" be inserted, such that the proviso in section 3(1)(ii) reads: "it is concluded that the purpose, or one of the primary purposes, of the message is" (addition underlined).

Furthermore, section 3(4) deems "a person who knowingly allows his product or service to be promoted or advertised by a sender … to have authorised the sending by the sender of any electronic message that promotes or advertises that person's product or service." This opens the possibility of liability being imposed on a person who knows that his product or service is going to be promoted by a third party by way of unsolicited commercial electronic messages, and tries but fails to prevent the sending of such messages.

Accordingly, we propose the addition of the following sentence at the end of section 3(4): "It is hereby declared that a person who comes to know that his product or service has been or will be promoted or advertised by a sender, and who has taken reasonable steps to try to stop any electronic message from being sent but fails, does not authorise the sending by the sender of such electronic message."

2. Meaning of "electronic message" (section 4)

We note that IDA intends to extend the scope of electronic messages to include mobile messages. We submit that definition of "electronic message" in section 4 requires further refinement.

The current proposed definition provides that "an electronic message is a message sent through electronic mail or to a mobile telephone". While the intent is to exclude instant messages, fax messages and voice messages from the ambit of the Bill, such messages could fall within the current proposed definition if they are sent through certain types of services currently available.

For instance, a unified messaging system such as SingTel's FaxMail service converts faxes sent to a telephone number into graphic files that are sent to a designated e-mail address. Similarly, MSN's Mobile Messenger service allows instant messages to be forwarded to a mobile telephone. In both of these situations, the communication eventually received would constitute an "electronic message" under the current proposed definition.

We therefore suggest that section 4 be expanded to expressly define "send" to mean "the origination or transmission of an electronic message intended to reach an electronic address".

In addition, the definition of "electronic message" includes a "message sent … to a mobile telephone". We note that paragraph 3.9 of the Consultation Paper states that the Bill is intended to be technology-neutral, in relation to the technology used to access or receive electronic messages. Accordingly, we would suggest that a new definition for the term "mobile telephone" be inserted into section 2, with this definition being broad enough as to explicitly include converged devices such as PDAs and PDA-phones.

Finally, we also suggest that section 4(3) be amended to clarify that the "voice call" may be either in digital or analogue format, so as to cater for voice calls made using VOIP services (which may arguably constitute electronic messages, being in data packet form). This can be effected by inserting the words "(whether in analogue or digital form)" after the words "voice call".

3. Meaning of "unsolicited" (section 5)

We understand that in the previous consultation on the proposed spam legislation conducted by the IDA and the AGC, some respondents had raised the issue of whether a message sent to a person with whom the sender has a pre-existing relationship (such as a contractual relationship) would be considered an unsolicited message.

Our view is that an exception should be made for such messages, where it is clear from the nature of the message that it is being sent in good faith for legitimate purposes. Examples of such messages could be announcements on changes to a service currently being provided by the sender to the recipient, or even an announcement of a security vulnerability in a software that the recipient had licensed from the sender.

We therefore suggest that a new section 5(4) be inserted as follows: "For the purposes of subsection (1), a recipient shall be treated as having consented to the receipt of the message, if he has a pre-existing relationship (whether contractual or otherwise) with the sender of the message, where, having regard to the content of the message and the way in which the message is presented, it is concluded that the primary purpose of the message is related to, and the message was sent as a result of, the pre-existing relationship."

We also propose that a new section 5(5) be inserted as follows, to permit persons to give consent by way of standing permissions: "For the purposes of subsection (1), a recipient shall be treated as having consented to the receipt of the message, if he had previously consented in general to the sender sending such messages to him, which consent he has not revoked, provided that the sender has made and has continued to make available a valid mechanism whereby the recipient may revoke such consent on reasonable terms."

4. Meaning of "transmission in bulk" (section 6)

We note that section 6 seeks to define the term "transmitted in bulk". However, sections 9 and 10 refer to "send" and grammatical variants thereof. We submit that the language used throughout the Bill should be consistent, that is, either "transmit" or "send" should be used in the Bill, but not both, so as to avoid uncertainty and ambiguity.

5. Unsubscribe facilities (section 9)

Section 9 requires unsolicited commercial electronic messages sent in bulk to provide for the prescribed unsubscribe facilities. We would suggest the following refinements to section 9.

First, the unsubscribe facility provided for in an unsolicited commercial electronic message should permit the recipient of the message to send an unsubscribe request using the same means by which the message was sent to him. For instance, if the message was sent to an electronic mail address, then the message should contain an electronic mail address that the recipient may use to submit an unsubscribe request. Similarly, if the message was sent to a mobile telephone, then a telephone number for unsubscribe requests should be stated. This would permit a recipient of unsolicited commercial electronic messages to send an unsubscribe request immediately upon receipt of the message. However, the sender of the unsolicited commercial electronic message should be permitted to also include additional unsubscribe facilities, if he so desires. The option for an Internet location address would therefore always be in addition to, and cannot be in lieu of, an electronic mail address or a telephone number, as the case may be.

Second, the proposed reference in section 9(1) to "a telephone number that a recipient may use to submit an unsubscribe request" leaves open the possibility of the unsubscribe facility being a telephone number that must be dialed for an unsubscribe request to be made orally. It should be made clear that such a telephone number must be capable of receiving electronic messages, so as to permit a recipient of unsolicited commercial electronic messages to send an unsubscribe request immediately upon receipt of the message. Similarly, the definition of "unsubscribe request" in section 2 should be refined to mean a request in the form of an electronic message.

Third, a recipient should be able to submit an unsubscribe request at no cost to himself. For instance, an unscrupulous marketer may stipulate a 1900 or 7xxxx number as the unsubscribe facility, with charges being levied on unsubscribe requests sent to such numbers. In the first place, a recipient who chooses to submit an unsubscribe request by SMS would already incur charges (albeit such charges being so low as to be probably *de minimis*). To impose further charges would be unfair and would deter recipients from sending unsubscribe requests. We should also point out that if an intending sender of unsolicited commercial electronic messages finds the cost of ensuring that unsubscribe requests can be sent at no cost to recipients to be prohibitive, then it is always open to him to refrain from sending such messages.

Fourth, we note that section 9(1)(c)(ii) requires the statement regarding the unsubscribe facility to be in the English language, and that where the statement is presented in two or more languages, then one of them must be English. We believe that this should be refined to specifically provide that where the unsolicited commercial electronic message contains any languages other than English, then the statement regarding the unsubscribe facility must be presented in English and all other languages used in the message. This would prevent the situation of a message being sent in Chinese characters, but with the statement regarding the unsubscribe facility being made in English and Malay.

Fifth, we note that section 9(4) sets out certain protections to prevent abuse of the information contained in unsubscribe requests. We would propose a refinement to expressly state that the

recipient of an unsubscribe request should not disclose the electronic address(es) from which the unsubscribe request originated and/or to which the unsubscribe request related to.

Sixth, and on a related note to the above point, we would propose that a new section 9(6) be inserted, to expressly provide that the sender of unsolicited commercial electronic messages cannot attach any conditions to the sending of an unsubscribe request. For instance, it should be expressly provided that the sending of an unsubscribe request cannot be made conditional upon the sender of that unsubscribe request consenting to disclosure of his particulars.

Finally, we submit that section 9(3) should be expanded and/or rephrased, so as to expressly state that the sender and the person who authorised the sending of the unsolicited commercial electronic message in question are indefinitely prohibited from sending further unsolicited commercial electronic messages to the electronic address in question, until and unless they obtain affirmative consent from the recipient in question to receive such messages.

6. Labelling and other requirements (section 10)

Section 10(1)(d) requires an unsolicited commercial electronic message to contain "an accurate and functional electronic mail address or telephone number by which the sender can be readily contacted". For reasons already set out above, we would suggest that where the message was sent to an electronic mail address, then it should contain an accurate and functional electronic mail address. Similarly, where the message was sent to a mobile telephone, a telephone number should be stated. Of course, the foregoing should be minimum requirements and the sender should be permitted to include additional avenues by which he may be contacted if he so desires.

7. Aiding, abetting, etc. (section 13)

We note that under section 13(1)(a) read with section 14(iii), a person who "counsels" a contravention of sections 9, 10 or 12 will be liable to action in respect of such contravention. In this regard, we believe that a new section 13(3) should be inserted, to explicitly exclude from the meaning of such "counsel" any professional advice given in good faith that a particular act would not constitute a contravention of sections 9, 10 and/or 12.

We would propose the following wording for this new section: "A person does not counsel a contravention of section 9, 10 or 12 merely because he, acting in good faith in his capacity as a professional adviser, advises another person that the other person's actions or proposed actions would not or are not likely to contravene section 9, 10 or 12."

We also think that the wording of section 13(1)(c), in particular the words "knowingly concerned in", may be overly broad. For instance, if a marketing executive in a company knowingly lets his marketing manager (ie. his boss) use his computer to send spam that does not comply with the various prescribed requirements, then he has arguably acted in breach of section 13(1)(c) in his own right. That would render him personally liable in a civil action under section 14. We believe that this is an undesirable result that does not appear to be intended, and accordingly we submit that the necessary amendments should be made to section 13 to prevent such possibilities.

Furthermore, we submit that section 13(2) should be amended to include references to aiding, abetting, counseling or procuring, by inserting the words ", and does not aid, abet, counsel or procure, a contravention of," after the word "contravene" and before the word "section" in the first line.

8. Civil action (section 14)

Section 14 provides that civil actions may be commenced by a recipient of non-compliant electronic messages, or "any person who has suffered loss or damage as a result of any transmission of [non-compliant] electronic messages". This seems to suggest that a person who did not actually receive non-compliant messages, but who seeks to commence an action under section 14, must prove that he has suffered loss or damage so as to establish his *locus standi* to commence action.

If that is the intended effect, then our view is that it would present an obstacle to potential claimants with otherwise-valid claims. After all, the difficulties of proving or quantifying damages or losses resulting from spam are well-known. That is why statutory damages are available as a remedy.

To require proof of damage as a pre-requisite for the right to commence action would be to effectively re-introduce the requirement for damages at the earlier, threshold stage of *locus standi*. It may also prejudice the plaintiffs' subsequent ability to prove damages (that is, after liability has been established), and is inconsistent with established legal principles by placing the question of damages before liability.

We therefore submit that section 14 should be re-examined and the language used amended, such that a plaintiff who has been affected by the sending of electronic messages in violation of the Bill is not required to prove that he has suffered damages or losses before he is entitled to commence an action.

We also note that section 14 provides for the right to commence civil action in relation to the sending of electronic messages in contravention of sections 9 or 10. However, section 9(4) relates to conduct subsequent to the transmission of the unsolicited commercial electronic messages, viz. unauthorised disclosure of information contained in an unsubscribe request. Accordingly, section 14 should be rephrased appropriately, so as to create a right to commence civil action in relation to disclosures of information in contravention of section 9(4).

9. Injunction and damages for civil action (section 15)

Section 15(3)(b)(ii) provides for an aggregate cap on statutory damages in the sum of S$1 million, unless the plaintiff is able to establish actual loss exceeding that sum. The presently proposed wording seems to suggest that if a plaintiff who has opted for statutory damages can prove actual loss exceeding S$1 million, then the only applicable cap on the statutory damages that the court can award would be the cap in section 15(3)(b)(i) of S$25 per non-compliant electronic message.

We suggest that it may be desirable to provide for an aggregate cap under section 15(3)(b)(ii) even if the plaintiff establishes actual loss exceeding S$1 million, such as 2 times the actual loss proven by the plaintiff.

We should also point out certain ambiguities in the wording of section 15(3)(b). Firstly, the reference in section 15(3)(b)(i) to "$25 for each electronic message transmitted" does not explicitly state whether this refers only to electronic messages that do not comply with the requirements of the Bill. We submit that this should be the case, in which event a provision similar to sections 8 and 11 (in relation to Parts II and III respectively) should be inserted in relation to Part IV.

Secondly, the reference to "actual loss" in section 15(3)(b)(ii) is ambiguous. It is not clear whether this is a reference to loss that the court determines would have been recoverable by the plaintiff under the general law applicable to such actions, if the plaintiff had elected damages under section 15(1)(b) instead of statutory damages under section 15(1)(c). We therefore think that this reference to "actual loss" should be clarified, or the term defined.

10. Code of practice (section 17)

We note that section 17(1) provides that Internet access service providers and telecommunications service providers may issue a code of practice. This is consistent with paragraph 3.47 of the Consultation Paper, which describes the issuance of such a code of practice as being "voluntary".

However, section 17(2) makes it mandatory for all Internet access service providers and telecommunications service providers to comply with such a code of practice that is approved by the IDA. We submit that the requirement for mandatory compliance with the code of practice under section 17(2) is inconsistent with the "voluntary" nature of section 17(1).

Furthermore, it is not clear when a code of practice would be deemed to have been issued. For instance, it is not clear whether the assent of all Internet access service providers and telecommunications service providers in Singapore are required for the valid issuance of a code of practice. This is particularly important if compliance with the code of practice is to be mandatory.

Our view is that if any code of practice is to be truly voluntary, then section 17(2) should be amended such that it does not require all Internet access service providers and telecommunications service providers to comply with such a code. However, to encourage service providers to comply with the code, it may be desirable to provide for some incentives for compliance.

An example of such an incentive would be to amend section 13(2) such that once any code of practice has been issued and approved by the IDA, section 13(2) would apply only to those service providers who have signed up to and comply with the code. This would preserve the ability of a service provider who does not comply with the code to prove that he has not contravened, or aided, abetted, counseled or procured a contravention of, section 9, 10 or 12.

Finally, the term "telecommunications service provider" is not defined in the Bill. It is therefore not clear whether it should be equivalent to "telecommunication licensee" as defined in the Telecommunications Act, "network service provider" under the Copyright Act, or some other definition.

11. Other matters

We note that the Bill only provides for civil actions against persons responsible for or connected with the transmission of electronic messages in contravention of the requirements of the Bill. It does not create any criminal offences for such conduct.

Our view is that, given the cost of civil litigation and the uncertainty of damages that may be recovered even if the action is successful, it may be desirable to have criminal offences for the more egregious types of unlawful conduct. Examples of such egregious misconduct include electronic messages falling within sections 3(1)(x) to (xii), and electronic messages with deliberately misleading subject titles and/or header information.

We note that in the US, where the CAN-SPAM Act creates certain criminal offences, a large proportion, if not the bulk, of enforcement actions have been criminal prosecutions. We therefore urge the IDA and the AGC to reconsider the appropriateness of criminal offences in the appropriate cases.

Conclusion

We hope that the IDA and the AGC will find the above comments helpful, in your work on the proposed Spam Control Bill. We would be happy to provide any further assistance that may be required. Please do not hesitate to contact either of the undersigned should that be so.

Yours faithfully,

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