

MEMORANDUM OF UNDERSTANDING ON MUTUAL  
ENFORCEMENT ASSISTANCE IN COMMERCIAL EMAIL  
MATTERS AMONG THE FOLLOWING AGENCIES OF THE  
UNITED STATES, THE UNITED KINGDOM, AND AUSTRALIA: THE  
UNITED STATES FEDERAL TRADE COMMISSION, THE UNITED KINGDOM'S  
OFFICE OF FAIR TRADING, THE UNITED KINGDOM'S INFORMATION  
COMMISSIONER, HER MAJESTY'S SECRETARY OF STATE FOR TRADE  
AND INDUSTRY IN THE UNITED KINGDOM, THE AUSTRALIAN  
COMPETITION AND CONSUMER COMMISSION, AND THE AUSTRALIAN  
COMMUNICATIONS AUTHORITY

The U.S. Federal Trade Commission ("FTC"), Her Majesty's Secretary of State for Trade and Industry in the United Kingdom ("Secretary of State"), the Office of Fair Trading in the United Kingdom ("OFT"), the United Kingdom's Information Commissioner, the Australian Competition and Consumer Commission ("ACCC"), and the Australian Communications Authority ("ACA"),

RECOGNISING that the convenience and efficiency of electronic mail are threatened by the extremely rapid growth in the volume of unsolicited commercial email which often contains deceptive content or material that many recipients may consider offensive in nature;

RECOGNISING the challenges posed by the proliferation of commercial email in each Participant's country, and desiring to improve the effectiveness of the enforcement of certain provisions of the Commercial Email Laws of their respective countries while also recognizing the importance of freedom of expression;

RECOGNISING that the Commercial Email Laws and the methods of enforcing such laws differ substantially among the countries, in particular as to the role played by local and/or regional enforcement authorities;

RECOGNISING that there is a need to ensure that appropriate local and/or regional enforcement authorities with whom Evidence is shared under this Memorandum are made fully aware of the terms of this Memorandum and are encouraged to cooperate with the Participants in so far as they are permitted to do so by their respective national laws, enforcement policies and other important interests, consistent with the terms of this Memorandum;

RECOGNISING that the laws of their respective countries contain certain restrictions on international law enforcement assistance, including information disclosure, and that nothing in this Memorandum requires the Participants to provide assistance if such assistance is prohibited by their respective national laws, enforcement policies and other important interests;

RECOGNISING that the FTC, the OFT, and the Secretary of State want to build upon the mutual enforcement assistance provided for in the MEMORANDUM OF

UNDERSTANDING ON MUTUAL ENFORCEMENT ASSISTANCE IN CONSUMER PROTECTION MATTERS BETWEEN THE FEDERAL TRADE COMMISSION OF THE UNITED STATES OF AMERICA AND HER MAJESTY'S SECRETARY OF STATE FOR TRADE AND INDUSTRY AND THE DIRECTOR GENERAL OF FAIR TRADING IN THE UNITED KINGDOM dated October 31, 2000;

RECOGNISING that the FTC and the ACCC want to build upon the mutual enforcement assistance provided for in the AGREEMENT BETWEEN THE FEDERAL TRADE COMMISSION OF THE UNITED STATES OF AMERICA AND THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION ON THE MUTUAL ENFORCEMENT ASSISTANCE IN CONSUMER PROTECTION MATTERS dated July 17, 2000; and

RECOGNISING that the OFT, the Secretary of State, and the ACCC want to build upon the cooperation provided for in the COOPERATION ARRANGEMENT BETWEEN THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION, THE COMMERCE COMMISSION IN NEW ZEALAND AND HER MAJESTY'S SECRETARY OF STATE FOR TRADE AND INDUSTRY AND THE OFFICE OF FAIR TRADING IN THE UNITED KINGDOM REGARDING THE APPLICATION OF THEIR COMPETITION AND CONSUMER PROTECTION LAWS dated October 16, 2003,

HAVE REACHED THE FOLLOWING UNDERSTANDINGS:

**I: Definitions**

For the purposes of this Memorandum,

- A. "Commercial Email Laws" means
1. in the case of the United States: (a) the CAN-SPAM Act of 2003; and (b) any other laws enforced by the Federal Trade Commission that would prohibit unfair or deceptive acts or practices in connection with commercial email, including Section 5 of the Federal Trade Commission Act;
  2. in the case of the United Kingdom: (a) the Privacy and Electronic Communications (EC Directive) Regulations 2003, the Data Protection Act 1998, and the Electronic Commerce (EC Directive) Regulations 2002; and (b) any other laws enforced by the Office of Fair Trading that would prohibit unfair or deceptive acts or practices in connection with commercial electronic communications, as listed in Annex A to this Memorandum; and
  3. in the case of Australia: (a) Parts IVA, V, and VC of the Trade Practices Act of 1974; (b) the Spam Act 2003; and (c) the Telecommunications Act 1997;

as well as any amendments thereto, and such other laws or regulations as the Participants may from time to time decide in writing to be a Commercial Email Law for purposes of this Memorandum. The FTC, the Secretary of State, the ACCC and the ACA should promptly notify the other Participants of any relevant amendments to their Commercial Email Laws.

- B. “Evidence” means information, testimony, statements, documents or copies thereof, or other things, that are lawfully obtained in anticipation of or during the course of an investigation or proceeding under the Participants’ respective Commercial Email Laws.
- C. “Participant” means
  - 1. in the case of the United States, the FTC;
  - 2. in the case of the United Kingdom, the Secretary of State, the OFT, or the Information Commissioner, acting with respect to their respective enforcement responsibilities under the Commercial Email Laws as here defined; and
  - 3. in the case of Australia, the ACCC or the ACA acting with respect to their respective enforcement responsibilities under the Commercial Email Laws as here defined.
- D. “Person” means any natural person or legal entity, including corporations, unincorporated associations, partnerships, or bodies corporate existing under or authorized by the laws of: (i) the Territories (as defined below) of the United States, the United Kingdom, or Australia; or (ii) other sovereign states.
- E. “Request” means a request for assistance under this Memorandum.
- F. “Requested Participant” means the Participant from which assistance is sought under this Memorandum, or which has provided such assistance.
- G. “Requesting Participant” means the Participant seeking or receiving assistance under this Memorandum.
- H. “Spam Violations” means conduct prohibited by a country’s Commercial Email Laws that is substantially similar to conduct prohibited by the Commercial Email Laws of the other countries, including, but not necessarily limited to:
  - 1. sending commercial email containing deceptive content;
  - 2. sending commercial email without providing the recipient with a means, such as a valid email address or an Internet based mechanism, to request that such communications cease;

3. sending commercial email that contains misleading information about the message initiator, or fails to disclose the sender's address; or
  4. sending commercial email, when the recipient has specifically requested the sender not to do so.
- I. "Territory" means:
1. in the case of the United States: the United States, its States, its Territories, and the District of Columbia;
  2. in the case of the United Kingdom: the United Kingdom, its Overseas Territories and Crown Dependencies; and
  3. in the case of Australia: Australia, its States, and its Territories.

## **II: Object and Scope of Assistance**

- A. The Participants recognize that it is in their common interests to share Evidence that will: facilitate effective enforcement against Spam Violations; avoid unnecessary duplication; facilitate sequential, simultaneous or coordinated investigations of Spam Violations or suspected Spam Violations; facilitate research and consumer and business education; promote a better understanding by each of economic and legal conditions and theories relevant to enforcement against their respective Spam Violations and related activities; and keep each other informed of developments in their respective countries having a bearing on this Memorandum.
- B. In furtherance of this common interest, and subject to Paragraph IV, the Participants intend to use best efforts to exchange and provide appropriate information in relation to: consumer and business education; investigations and research in relevant areas, including the practices of address harvesting and dictionary attacks; speeches; research papers; journal articles; compliance education programs; self regulatory and technical enforcement solutions; amendments to relevant legislation; and staffing and resource issues, including the possibility of staff exchanges and visits.
- C. Subject to Paragraphs II.F and IV, the Participants intend to use best efforts to assist one another and to cooperate on a reciprocal basis
1. in providing or obtaining Evidence that could assist in determining whether a Person has committed or is about to commit a Spam Violation; or

2. in facilitating the administration or enforcement against Spam Violations.
- D. Subject to Paragraph IV, the Participants intend to use their best efforts to inform each other as soon as practicable about Spam Violations occurring or originating in the Territory of the United States, the United Kingdom, or Australia, or that affect consumers in the Territory of the United States, the United Kingdom, or Australia.
- E. Subject to Paragraph IV, assistance contemplated by this Memorandum includes, but is not limited to:
1. using best efforts to disclose, provide, exchange, or discuss Evidence in the possession of any Participant;
  2. using best efforts to cooperate in the detection and investigation of Spam Violations;
  3. using best efforts to obtain, or arrange the obtaining of Evidence at the request of a Participant, including
    - a. taking the testimony or statements of Persons or otherwise obtaining information from Persons;
    - b. obtaining documents, records or other forms of documentary Evidence; or
    - c. locating or identifying Persons or things;
  4. using best efforts to assist in service of process;
  5. using best efforts to share appropriate information provided in complaints by users; and
  6. in appropriate cases, coordinating enforcement against cross-border Spam Violations.
- F. The Participants recognize that it is not feasible for a Participant to offer assistance to the other Participants for every Spam Violation. Accordingly, the Participants intend to use best efforts, subject to Paragraph IV, to seek and provide cooperation focusing on those Spam Violations most serious in nature, such as those that are causing or may cause injury (financial or otherwise) to a significant number of consumers, and those otherwise affecting particularly large numbers of consumers.
- G. Nothing in this Memorandum is intended to prevent a Participant from seeking assistance from or providing assistance to another Participant pursuant to other agreements, treaties, arrangements, or practices.

- H. This Memorandum is intended to be used solely for the purpose of law enforcement assistance among the Participants. The provisions of this Memorandum are not intended to give rise to a right on the part of any private person to obtain, suppress, or exclude any Evidence.
- I. Nothing in this Memorandum is intended to compel a Person to provide Evidence in violation of any legally applicable right, privilege or restriction.
- J. Nothing in this Memorandum is intended to affect any right of a Participant to seek Evidence on a voluntary basis or otherwise lawful basis from a Person located in the Territory of the United States, the United Kingdom or Australia, nor is it intended to preclude any such Person from voluntarily providing Evidence to a Participant.
- K. The Participants also intend to use best efforts to promote the wide attendance of government agencies around the world with spam enforcement authorities at the meeting on spam enforcement issues in London in October of 2004, to encourage appropriate subsequent meetings of this nature, and to encourage multi-lateral enforcement cooperation among these agencies with regard to unsolicited commercial email.

### **III: Requests for Assistance**

- A. Requests to the FTC should be addressed to: Associate Director, Division of International Consumer Protection, FTC.

Requests to United Kingdom Participants should be addressed to the Compliance Manager, Information Commissioner's Office (ICO) and/or the Director of the Consumer Affairs Division in the Office of Fair Trading (OFT), acting on behalf of the OFT's Chairman. The ICO intends to pass Requests on to the Secretary of State or the Office of Fair Trading if the Request relates to legislation for which the Secretary of State or the Office of Fair Trading has enforcement responsibilities. If the ICO passes on a Request to the Secretary of State or the Office of Fair Trading in this way, the Secretary of State or the Office of Fair Trading becomes the Requested Participant for the purposes of this Memorandum, and the ICO should inform the Requesting Participant in writing that the Request has been passed on. The OFT would follow a similar procedure if contacted first.

Requests to Australian Participants should be addressed to the Manager, Anti Spam Team, ACA and/or the Chief Executive Officer of the ACCC. The ACA intends to pass Requests on to the ACCC if the Request relates to legislation for which the ACCC has enforcement responsibilities. If the ACA passes on a Request to the ACCC in this way, the ACCC becomes the Requested Participant for the purposes of this Memorandum, and the

ACA should inform the Requesting Participant in writing that the Request has been passed on. The ACCC would follow a similar procedure if contacted first.

B. Requests should include:

1. if known, the identification of the Persons subject to any investigation or proceeding;
2. a general description of the subject matter and nature of any investigation or proceeding to which the Request relates;
3. where applicable, a description of the Evidence sought;
4. where applicable, the identity and location of any Person who is to be served with process;
5. where applicable, a description of the action that the Requesting Participant is requesting that the Requested Participant take;
6. where applicable, a description of procedural or evidentiary requirements bearing on the manner in which the Requesting Participant desires the Request to be executed;
7. requirements, if any, for confidential treatment of the Request or its contents; and
8. any other information that the Requesting Participant believes would be helpful in facilitating review or execution of a Request.

C. Requests may also be submitted by completing the International Consumer Protection and Enforcement Network (ICPEN) Information Request Pro Forma.

D. The Participants intend to consult with each other regarding a Request in order to work out details regarding the manner and timing of carrying out the Request.

**IV: Limitations on Assistance**

A. Consistent with its national laws, international obligations, enforcement policies and other important interests, a Participant should use its best efforts to provide assistance in response to a Request. The Requested Participant may decline to provide assistance.

B. Notwithstanding any other provision of this Memorandum, a Participant should not communicate information to the other Participants if such communication is prohibited by the laws of the Participant possessing the

information or would be incompatible with that Participant's important interests.

- C. Before denying a Request, the Requested Participant should consult with the Requesting Participant to determine whether assistance may be given in part, subject to specified terms and conditions. If a Request is denied, the Requested Participant should provide the Requesting Participant with a written explanation of the basis for refusal.
- D. The determination as to whether to grant a Request in whole or in part rests with: (i) the Associate Director, Division of International Consumer Protection, in the case of the FTC, (ii) either the Secretary of State (or a person acting on his or her behalf), the OFT, or the Information Commissioner (or a person acting on his or her behalf), or (iii) the Chief Executive Officer of the ACCC or the ACA; dependent upon who is the Requested Participant in the case in question.

**V: Confidentiality**

- A. Unless otherwise discussed by the Participants, each Participant should, to the fullest extent possible and consistent with its laws, use its best efforts to maintain the confidentiality of any information communicated to it in confidence by another Participant under this Memorandum.
- B. The Requesting Participant may, however, subject to Paragraph IV, communicate such confidential information to other law enforcement agencies within its jurisdiction (having first obtained assurances that best efforts will be used to ensure the maintenance of confidentiality) for the purpose of enforcement against Spam Violations; any such onward sharing of information with other agencies is subject to the consent of the Requested Participant.
- C. Each Participant should oppose, to the fullest extent possible consistent with its laws, any application by a third party for disclosure of such confidential information.
- D. Notifications and consultations pursuant to Paragraphs II and III of this Memorandum and other communications between or among the Participants in relation thereto should be deemed to be confidential, unless otherwise decided by the Participants.
- E. Nothing in this Memorandum prevents disclosure to third parties if such disclosure is required by the law of the Requesting Participant. The Requesting Participant should use its best efforts to notify the Requested Participant at least ten days in advance of any such proposed disclosure, or, if such notice cannot be given, then as promptly as possible.

## **VI: Changes in Commercial Email Laws**

In the event of a significant modification to a Participant's Commercial Email Laws, the Participants should use their best efforts to consult promptly, and, if possible, prior to the entry into force of such enactments, to determine whether this Memorandum should be amended.

## **VII: Return of Evidence**

The Requesting Participant should use its best efforts to keep Evidence shared until the conclusion of the investigation or proceeding specified in the Request and should use its best efforts to return such Evidence at that time if the Requested Participant makes a written request for the retention and return of such Evidence at the time the Evidence is shared.

## **VIII: Costs**

Unless otherwise decided by the Participants, the Requested Participant should pay all costs of executing a Request. When the costs of providing or obtaining information under this Memorandum are substantial, the Requested Participant may require the Requesting Participant to undertake to pay those costs as a condition of proceeding with the Request. In such an event the relevant Participants intend to consult on the issue at the request of either Participant.

## **IX: Duration of Cooperation**

- A. This Memorandum will come into effect on the date that the final Participant to sign this Memorandum executes a signature.
- B. Assistance under this Memorandum should be available in investigations or proceedings concerning Spam Violations occurring before as well as after this Memorandum takes effect.
- C. A Participant should endeavor to provide the other Participants with 30 days' written notice before ending its cooperation under this Memorandum. However, prior to ending this Memorandum, a Participant should use its best efforts to consult with the other Participants.
- D. On cessation of this Memorandum, the Participants should use their best efforts, in accordance with Paragraph V, to maintain the confidentiality of any Request and Evidence communicated to them in confidence by the other Participants under this Memorandum prior to its termination; and to return, in accordance with the provisions of Paragraph VII, any Evidence obtained from the other Participants under this Memorandum.

**X: Review of Memorandum**

The Participants intend to consult and review the Memorandum on an annual basis regarding the cooperation, coordination and enforcement assistance undertaken among the Participants for the prior 12-month period. During the annual review, the Participants intend to discuss how the scope of this Memorandum may be expanded as a result of investigations and research initiatives in the prior 12-month period.

**XI: Legal Effect**

This Memorandum is not intended to create binding obligations under international law or under the domestic laws of the Participants.

**XII: Miscellaneous**

Signatures to this Memorandum may be circulated by facsimile and any facsimile signature shall have the same effect as an original.

Approved on this \_\_\_\_\_ day of \_\_\_\_\_ 2004

\_\_\_\_\_  
Timothy J. Muris  
Chairman  
U.S. Federal Trade Commission

\_\_\_\_\_  
Patricia Hewitt  
Her Majesty's Secretary of State for  
Trade and Industry in the United  
Kingdom

\_\_\_\_\_  
Robert Horton  
Chairman  
Australian Communications Authority

\_\_\_\_\_  
John Vickers  
Chairman on behalf of the UK Office of  
Fair Trading

\_\_\_\_\_  
Graeme Samuel  
Chairman  
Australian Competition and Consumer  
Commission

\_\_\_\_\_  
Richard Thomas  
UK Information Commissioner

## **Annex A**

Commercial Email Laws, in relation to the United Kingdom, also include:

### **OFT**

Control of Misleading Advertisements Regulations 1988 (amended 2000)

Consumer Protection (Distance Selling) Regulations 2000

Ecommerce Regulations 2002

Unfair Terms in Consumer Contracts Regulations (amended 2001)

**On their own or when enforced under Part 8 of the Enterprise Act 2002**