



THE AMERICAN CHAMBER OF COMMERCE IN HONG KONG
Position Paper

**Submission in response to the Consultation Paper on
Legislative Proposals to Contain the Problem of Unsolicited Electronic
Messages issued by the Commerce, Industry and Technology Bureau**

The American Chamber of Commerce in Hong Kong welcomes the opportunity to provide input on the Hong Kong Government's legislative proposals to contain the problem of unsolicited electronic messages. These legislative proposals represent an important step toward enactment of an effective anti-spam regime for Hong Kong, which will consolidate the Government's efforts to build a dynamic IT economy and infrastructure in Hong Kong.

A consistent theme of this submission is that the Hong Kong Government should strive to harmonise its anti-spam legislation with the United States' CAN-SPAM Act of 2003 wherever possible. Such harmonisation will allow AmCham's members, and the countless other global businesses that have operations in Hong Kong, to implement in Hong Kong some of the procedures that they have developed to comply with the CAN-SPAM Act of 2003. It will serve the Hong Kong Government well, in terms of enhancing its regional competitiveness, to afford businesses these efficiencies in the anti-spam context.

Background

The American Chamber of Commerce in Hong Kong ("AmCham") is a volunteer and independent business organization, which was established in 1969 and now has a history of over 30 years. AmCham is one of the most dynamic and influential international economic organizations in the Asia-Pacific region, representing more than 3,200 member companies and enterprises from over 30 nations, with members from the United States, Europe and across Asia. Among them, there are large multinational corporations as well as small and medium-sized enterprises. The objectives and duties of AmCham include representing our diverse membership on issues of common interest and serving as an advocate with governments.

Paragraphs 19 and 29(c): The definition of commercial electronic message

AmCham does not support the definition of "commercial electronic message" that is set out in paragraph 29(c) of the Consultation Paper. That definition captures a range of messages that should not be targeted by Hong Kong's anti-spam regime because they are not truly 'commercial' messages. Only messages that have a *primary* commercial purpose should be regulated by Hong Kong's anti-spam regime.

To this end, AmCham urges the Hong Kong Government to replace its proposed definition of "commercial electronic message" with that found in section 3(2)(A) of the CAN-SPAM Act of

2003. In AmCham's opinion, the United States' definition of "commercial electronic mail message" strikes a reasonable balance between ensuring that the anti-spam regime targets messages that are widely regarded as 'spam' and leaving room for businesses to carry on their non-commercial activities without fear of falling foul of the anti-spam regime.

Paragraphs 31 - 35: Opt-out regime

AmCham commends the Hong Kong Government for its proposal to adopt an 'opt-out' anti-spam regime. An opt-out regime is appropriate for Hong Kong given the prevalence of small and medium enterprises within the jurisdiction and the need to harmonise Hong Kong's proposals with existing anti-spam legislation in the Asia Pacific region.

Paragraphs 44 - 45: Do-not-call registers

AmCham recognises the merit in the Hong Kong Government's proposal to empower the Telecommunications Authority to establish do-not-call registers, but counsels against the use of this power to establish a do-not-email registry. This is because do-not-email registries provide spammers with ready access to a list of valid email addresses that they would not otherwise have access to when sending emails in contravention of the anti-spam regime. That concern aside, AmCham believes that it is inappropriate to prohibit an e-marketer from sending a commercial electronic message to a recipient listed on a do-not-call register where the sender and the recipient have a pre-existing business relationship. Accordingly, AmCham recommends that the Hong Kong Government supplement the proposed 'affirmative consent' exception to the prohibition on sending messages to persons listed on a do-not-call register with an exception for "transactional or relationship messages". This term is defined in section 3(17) of the CAN-SPAM Act of 2003 to cover messages sent by an e-marketer in furtherance of a pre-existing business relationship between the sender and the recipient.

Paragraphs 50 - 52: Enforcement notices

AmCham believes that government action is an essential element of any effective anti-spam regime. This is because government action is capable of facilitating the swift and efficient resolution of contraventions of the regime, while sending a strong signal to the public that contravening conduct is not acceptable. The proposed enforcement notice regime led by the Telecommunications Authority bears these hallmarks.

One concern that AmCham has with the proposed enforcement notice regime is that its members will not be able to challenge the Telecommunications Authority's decision to issue them with an enforcement notice on the basis that the Telecommunications Authority misapplied the law in issuing the notice. This type of challenge is quite different to the administrative law proceedings that the Consultation Paper contemplates in paragraph 52 and is made necessary by the fact that criminal sanctions follow a recipient's failure to comply with an enforcement notice.

To address this concern, AmCham suggests that recipients of enforcement notices be afforded an opportunity to have a merits-based review of the Telecommunications Authority's decision to issue an enforcement notice prior to the Telecommunications Authority being entitled to commence criminal proceedings against a particular recipient for its failure to comply with an enforcement notice.

Paragraph 55(f): Private arrangements exemption

AmCham supports the rationale behind the private arrangements exemption to the requirement to include a functional unsubscribe facility, but believes that the types of arrangements that would fall

within this exemption need to be set out more in more detail in the proposed legislation. Specifically, AmCham recommends that the Hong Kong Government state that “transactional or relationship messages” - messages sent in furtherance of a pre-existing business relationship between the sender and the recipient - are deemed to fall within the private arrangements exemption to the requirement to include a functional unsubscribe facility. The Hong Kong Government’s adoption of this recommendation would go a long way toward achieving harmonisation with the anti-spam regime in the United States.

AmCham refers the Commerce, Industry and Technology Bureau (“CITB”) to section 3(17) of the CAN-SPAM Act of 2003 for a definition of “transactional or relationship message”.

Paragraph 56(a): Requirement to retain unsubscribe requests

It is unnecessary for the Hong Kong Government to oblige e-marketers to keep records of unsubscribe requests for a period of 7 years after receipt. In AmCham’s experience, regulated entities will develop their own systems for complying with unsubscribe requests and this is not an area where legitimate e-marketers need legislative guidance. Indeed, the proposed record retention requirement is likely to impose burdensome compliance costs on legitimate e-marketers, particularly given its uncertain application to the situation where an unsubscribe request is submitted using a web-based form. The proposed record retention requirement also represents an unjustified departure from anti-spam regimes enacted in the region - neither the CAN-SPAM Act of 2003 nor Singapore’s proposed Spam Control Bill require senders to keep records of unsubscribe requests that they receive. Thus, in the interests of regional harmonisation, and minimising compliance costs for small and medium enterprises, AmCham urges the Hong Kong Government to omit the proposed requirement to retain unsubscribe requests from its anti-spam legislation.

Paragraph 57 and 58(e): Affirmative consent

AmCham is concerned that its members will struggle to comply with the proposed anti-spam legislation unless the concept of ‘affirmative consent’ is defined. Legitimate e-marketers need certainty as to when they are able to recommence sending commercial electronic messages to a recipient that has previously opted-out of receiving such messages. It is also important from the point of view of giving effect to consumer choice that the concept of ‘affirmative consent’ is defined.

AmCham refers the CITB to section 3(1) of the CAN-SPAM Act of 2003 as an example of how the concept of ‘affirmative consent’ might be defined in Hong Kong’s proposed anti-spam legislation.

Paragraph 82(a): Private right of action

Enforcement is a critical component of attacking the spam problem. Internet service providers and law enforcement agencies around the world currently invest considerable time and effort to locate and pursue spammers on behalf of their customers and users. As such, AmCham welcomes the Hong Kong Government’s proposal to enact a private right of action in addition to the government enforcement regime led by the Telecommunications Authority.

However, AmCham is concerned that the private right of action proposed in the Consultation Paper will lead to unintended and unfortunate consequences when it is utilised by consumers. These consequences may include a flurry of litigation by consumers who have suffered minimal loss as a result of contraventions of the anti-spam regime. In AmCham’s opinion, government and industry are best placed to take enforcement action on behalf of consumers and in the interest of consumers. There is no need to afford consumers a private right of action in order for spammers to be held to account.

AmCham has observed the successful implementation of a joint government and industry enforcement regime in the United States. AmCham recommends that the Hong Kong Government consider taking a similar approach by limiting the proposed private right of action to internet service providers, email service providers and other intermediaries that operate in e-marketing channels.

Alternatively, the Hong Kong Government could consider specifying a threshold amount of pecuniary loss that an individual or organisation must suffer in order to be entitled to bring proceedings under the proposed private right of action.

Conclusion

AmCham looks forward to working with the CITB to refine the Hong Kong Government's legislative proposals and would be happy to answer any queries that members of the Bureau may have.