

**Hong Kong Direct Marketing Association's Response to:
"Unsolicited Electronic Message Bill"**

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Summary of HKDMA's Position:

The HKDMA believes that legislation is an important part of the overall solution to the problem of SPAM; however it is not the only solution. Legislation with industry adherence to strong best practices, drafted through industry associations, and supported by a technological framework is the best solution for limiting the tide of unsolicited email, faxes and automated sales calls.

HKDMA would support legislation that, amongst other things, promoted an Opt-Out mechanism, as opposed to an Opt-in mechanism, and helped the consumer to better differentiate legitimate commercial communications from SPAM.

As legitimate marketers the members of the HKDMA are already adhering to the following best practices:

Notice: A marketer will state clearly what information they collect and what they intend to do with this information, including for marketing purposes

Choice: The consumer should have the right, at all times, to chose what they receive and when, and have the ability to unsubscribe from any or all communications.

Transparency: The marketer should be a clearly visible entity and should: "Say what they do, and do what they say".

The HKDMA will support legislation that promotes, supports, and regulates activities based on these three principles.

Summary of Comments on Proposed Legislation

Guiding Principles:

The HKDMA is supportive of all 6 of the Principles as they lay the ground work for a legislation that is balanced and pragmatic, protecting both the consumer's right to chose, and the rights of the marketers. The HKDMA is also supportive of Penalties and remedies that are proportionate to the severity of the offences; however these must be severe enough so as to act as a deterrent.

Scope of Coverage

While the HKDMA supports the fact that the legislation should cover a wide spectrum of commercial messages, we believe the definition is currently too broad, by including any message of which 'one of the purposes' is to promote goods and service etc, as in Part 1 Section 2 '**commercial electronic message**'.

This would also include newsletters whose primary purpose is to inform, but while at the same time they may carry small advertisements. We believe that the legislation should be focused on messages whose **primary purpose** is to promote and sell goods or services etc.

We also believe the proposed legislation **should** provide rights to the consumer to Opt-out of receiving **political, religious, or charitable communications** as well. Unsolicited Electronic Messages are unsolicited no matter what the content.

The HKDMA is supportive of the fact that the legislation will cover any message with a 'Hong Kong link', even if it originates outside of the HKSAR, and that the Government of the HKSAR is aware of the global implications of SPAM. However we are not clear as to how any extra-territorial application will be handled and how effective they will be.

The HKDMA is very supportive of the Opt-out approach as this protects the right of the consumer and at the same time does not unnecessarily impact the growth of e-marketing in Hong Kong

The HKDMA is supportive of the conditions under which unsubscribes must be provided and honored.

AREAS OF CONCERN WITHIN THE LEGISLATION

Consent

Under the initial proposal the Bill was to follow an **opt-out** approach, meaning a message could be sent unsolicited to a recipient but must contain full unsubscribe instructions, which must be honored once actioned. This was deemed to be in support of SMEs in Hong Kong.

However as the bill currently stands, consent as described under Part 1 Section 5, is explicit and requires affirmative action to show it as given, in other words an **opt-in** approach.

*For the purposes of this Ordinance, the registered user of an electronic address shall be treated as having given his consent to the sending of a commercial electronic message to that electronic address if the registered user or a person on his behalf—
(a) has, either in response to a clear and conspicuous request for consent or at his own initiative, given his consent to the sending of the message;*

While the HKDMA is a strong support of the consumers' right to chose the Bill is taking an approach that is in contradiction to initial discussions between CITB and the industry, and one that would hinder the growth of SMEs in Hong Kong.

Do not call registers

While the Bill does not immediately call for the establishment of a Do Not Email list, the HKDMA would not support its establishment as it would not only be costly to maintain and add undue financial burden to legitimate marketers, but it would also potentially provide spammers with a legitimate means to disregard the unsubscribe wishes of consumers who have not signed up to it.

If marketers are following the other areas of the legislation by honoring opt-outs then the Do Not Email Register would become irrelevant.

Exclusion of Hong Kong Link

Part 2 Section 7 2b "except where, the person who sends the message does not know or could not with reasonable diligence have ascertained that the message has a Hong Kong link;"

The HKDMA believes this exclusion is unnecessary, and could create a loophole for spammers to exploit.

Rights of Service Providers

The HKDMA is concerned that the legislation does not differentiate between service providers, other than telecommunication service providers, and the originators of email messages that could be considered as spam.

A number of the HKDMA's membership base provides hosted messaging delivery platforms to legitimate marketers. While they undertake every effort to ensure the communications their clients send to their end users are permission based, the current proposed legislation appears to also hold the technology service provider liable for any breach of the legislation.

We believe that it should be clearly stated that it is the "originator" of the message that is responsible for any breach of the proposed Bill, and not the telecommunications service provider or other such organizations that provide the infrastructure and technology to deliver such messages.

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