



THE AMERICAN CHAMBER OF COMMERCE IN HONG KONG Position Paper

Submission in Response to the Unsolicited Electronic Messages Bill

The American Chamber of Commerce in Hong Kong (“AmCham”) welcomes this further opportunity to provide input on the Hong Kong Government’s legislative effort to contain the problem of unsolicited electronic messages.

AmCham has closely reviewed the Unsolicited Electronic Messages Bill (“Bill”) and is pleased to see that the Hong Kong Government has adopted some of the recommendations it made in response to the Consultation Paper on Legislative Proposals to Contain the Problem of Electronic Messages (“Consultation Paper”). These include AmCham’s recommendation to introduce a definition of “affirmative consent” and a merits-based review of the Telecommunications Authority’s decision to issue an enforcement notice.

Yet, in its submission in response to the Consultation Paper, AmCham expressed a number of other concerns with the Hong Kong Government’s proposed legislative approach and these have not been addressed in the Bill. In this submission, AmCham reiterates those concerns and outlines a number of solutions for the Legislative Council’s consideration. AmCham urges the Legislative Council to adopt these solutions which we believe achieve the dual objectives of harmonizing Hong Kong’s anti-spam legislation with the United States’ CAN-SPAM Act of 2003, and fostering the development of a dynamic IT economy and infrastructure in Hong Kong.

Background

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 around 1,900 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.

Clause 2: The definition of commercial electronic message

AmCham remains concerned that the definition of “commercial electronic message” in clause 2 of the Bill is too broad. That definition encompasses messages which are neither truly “commercial” in nature nor widely regarded as spam.

To better target the types of messages that are properly the subject of anti-spam legislation, AmCham proposes that commercial electronic message be defined in a manner similar to how “commercial electronic mail message” is defined in section 3(2)(A) of the United States’ CAN-SPAM Act of 2003. That definition is limited to messages that have a *primary* (and not merely incidental) commercial

purpose. 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.

Clauses 8(2) and 30(2): The need to accommodate pre-existing business relationships

AmCham is disappointed that the private arrangements exemption mentioned in paragraph 55(f) of the Consultation Paper does not appear to have been included in the Bill. This shortcoming raises the more general issue of why it is important to accommodate pre-existing business relationships in the Bill.

Pre-existing business relationships are important in the spam context because their presence justifies exempting senders from some of the requirements of anti-spam legislation. In situations where these relationships exist, recipients of commercial electronic messages have chosen to, and indeed expect to, receive transactional or relationship messages from the sender. AmCham considers that senders should not be required to include a functional unsubscribe facility within commercial electronic messages where those messages are sent in furtherance of a pre-existing business relationship between the sender and recipient. Similarly, AmCham considers that senders should not be prohibited from sending a commercial electronic message to a person listed in a do-not-call register where there is a pre-existing business relationship between the sender and the person listed on the register.

AmCham considers that there are two ways of addressing these situations in the Bill, so as to not hamper reasonable business practices. The most comprehensive solution would be to amend the definition of commercial electronic message to exclude transactional or relationship messages (as that term is defined in section 3(17) of the United States' CAN-SPAM Act of 2003). Alternatively, the Hong Kong Government could introduce specific exceptions to clauses 8 and 10 of the Bill to address the situations identified in the preceding paragraph.

Clause 8(3): Requirement to retain unsubscribe requests

AmCham strongly urges the Hong Kong Government to remove the requirement in clause 8(3) of the Bill for recipients of unsubscribe requests to retain those requests for at least 7 years after receipt. Such a requirement is not workable for some business sectors, imposes burdensome compliance costs on legitimate e-marketers (particularly small and medium-sized ones), and is unnecessary because regulated entities will develop their own systems for complying with the legislation. AmCham also notes that the proposed record retention requirement is out of step with other anti-spam regimes in the region (including the United States' CAN-SPAM Act of 2003 and Singapore's proposed Spam Control Bill).

Clause 30(2): Do-not-call registers

AmCham notes that, under clause 30(2) of the Bill, the Telecommunications Authority has the power to set up a do-not-call register containing email addresses.

AmCham remains concerned regarding the establishment of a do-not-email register. The clause 32(3) prohibition on the misuse of electronic addresses on do-not-call registers is unlikely to deter spammers who are likely to use a do-not-email register as a source of valid email addresses that can be used in their illegal activities.

Clause 44: Enforcement notices

AmCham welcomes the Government's proposal to enact a merits-based review procedure for enforcement notices issued under the proposed legislation. However, clause 44(3) (which provides that lodging an appeal notice does not suspend the operation of an enforcement notice unless the Appeal Board orders otherwise) requires further consideration to avoid the undesirable situation whereby

criminal proceedings are commenced against a person who has contravened an enforcement notice while awaiting the outcome of a merits-based review of that notice.

To this end, AmCham recommends that clause 44 of the Bill be amended to provide that the relevant authority can only commence criminal proceedings alleging failure to comply with an enforcement notice upon (i) expiry of the 14 day period allowed for lodging a notice of appeal, or (ii) completion of a merits-based review establishing the correctness of the Telecommunications Authority's decision.

Clause 52(1): Private right of action

AmCham remains concerned that the private right of action set out in clause 52(1) of the Bill is too broad and will have unintended and unfortunate consequences when it is exercised by consumers. In particular, AmCham is concerned that the proposed private right of action may result in a flurry of unproductive litigation that would place an undue burden on Hong Kong's judiciary.

AmCham's preferred solution to this problem is based on an approach that has been successfully implemented in the United States. In that jurisdiction, only internet service providers (in addition to government enforcement agencies) are permitted to commence civil proceedings against spammers. AmCham considers that it would be appropriate to adopt a similar approach in Hong Kong and proposes that the private right of action be limited to internet service providers, email service providers and other intermediaries operating in e-marketing channels. AmCham considers that these intermediaries are capable of effectively locating and pursuing spammers on behalf of themselves and consumers in such a way that does not place an undue burden on the judiciary.

An alternative method of addressing the threat of unproductive litigation by consumers would be to impose a threshold on the amount of pecuniary loss an individual or organization 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 Hong Kong Government as it further refines the Bill and would be happy to answer any queries that arise from this, or our past, submission.