

Hong Kong Direct Marketing Association's Review of OFTA'S Public Consultation on:

“Legislative Proposals to Contain the Problem of Unsolicited Electronic Messages”

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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:

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”.

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 that there is confusion as to the definition of what will be considered a commercial message. This confusion lies primarily in the contradiction between paragraphs 19 and 29(c).

Paragraph 19 defines commercial messages as those who *primary purpose* is the commercial advertisement or promotion of a commercial product or service.

However paragraph 29 (c) defines an email as commercial if “*at least one of the purposes* . . . is to offer, advertise, promote, or sponsor the provision of goods, facilities, services, land or a business or investment opportunity, 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

Do not call registers

While the legislation 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

Paragraph 55 item (d) “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 and the originators of email messages that could be considered as spam.

A number of the HKDMA’s membership base provide hosted email 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 and not the service provider that is responsible for the breach of the proposed legislation.

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