



## **Response to Consultation Paper**

### *Legislative Proposals to Contain the Problem of Unsolicited Electronic Messages*

**Developed by the Hong Kong Anti-Spam Coalition**

## 1 Introduction

The Hong Kong Anti-Spam Coalition ("Coalition") welcomes this opportunity to provide feedback 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 in January 2006 ("Consultation Paper").

The Coalition states its general support for the Hong Kong Government's proposed Unsolicited Electronic Messages Bill ("UEM Bill") which it views as an effective contribution towards combating the problem of spam. The Government has also notably given due consideration to the anti-spam legislation enacted by other countries in the Asia-Pacific region and their subsequent experiences with it. The Coalition supports the decision to adopt an Opt-Out mechanism and believes that the proposed UEM Bill aids individuals and organisations by enabling them to differentiate legitimate commercial communications from spam.

With this general support in mind, the following comments are intended to draw attention to specific areas of the proposed UEM Bill that the Coalition believes could be further developed. We have also included some general background information about the Coalition.

## 2 The Hong Kong Anti-Spam Coalition

The Coalition was formed during the summer of 2003. It currently comprises a group of concerned industry participants, including the Hong Kong Internet Service Providers Association (HKISPA), the Asia Digital Marketing Association (ADMA) and business leaders from a number of prominent organisations such as MessageLabs, Microsoft and Time Warner.

The aims of the Coalition are to make a real difference to consumers, business and government by bringing together powerful local market knowledge and contacts to foster effective industry self-regulation, legislative solutions, information sharing and other global anti-spam best practices.

As leaders in their industries, the associations and companies which form the Coalition recognise that they must share the responsibility for dealing with spam. The Coalition's efforts thus far have focussed on the following areas:

- Discussion and development of industry best practices for commercial e-mail;
  - Evaluation of the extent of the spam problem in Hong Kong (and elsewhere in Asia) through both short and longer term projects;
  - Developing information highlighting the problem of spam vis-à-vis computer users in Hong Kong and identifying key elements of effective anti-spam legislation;
- Development and sponsorship of training programs to educate local IT professionals on the dangers of spam and how to avoid having their systems abused by spammers;
- Where possible, sharing of information that would facilitate enforcement action against high-volume spammers; and

Liaison with the Hong Kong Government in these areas.

### **3 The definition of “commercial unsolicited electronic messages” should only encompass messages where the primary purpose is commercial**

In paragraph 19 of the Consultation Paper, the Government has, in our view, rightly restricted the types of unsolicited electronic messages covered by the proposed UEM Bill to only commercial messages. Specifically, messages “the *primary purpose* of which is the commercial advertisement or promotion of a commercial product or server”.

However, the proposed legislative definition of a commercial electronic message, as set out in paragraph 29(c) of the Consultation Paper is inconsistent with the policy objective of paragraph 19. This is because the proposed definition provides that an electronic message is 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.*”.

The Coalition considers that the wider definition of paragraph 29(c) would encompass too broad a range of messages. For example, electronic messages with a subsidiary commercial purpose, such as an electronic invoice accompanied by a discount coupon usable for future purchases, would fall under such a definition. We are concerned that the UEM Bill would apply to many messages that recipients would not consider to be “commercial” if the definition remains as proposed.

We suggest that the legislative definition in paragraph 29(c) be aligned with the statement in paragraph 19 to only encompass messages whose clear, *primary* purpose is commercial in nature. This also brings the definition in line with section 3(2)(A) of the United States CAN-SPAM Act of 2003.

#### **4 Introduction of a procedure for reviewing Telecommunications Authority-issued enforcement notices on a merits basis**

The Coalition regards the enforcement notices issued by the Telecommunications Authority ("TA"), described under paragraphs 50-52 of the Consultation Paper, as a positive mechanism for dealing with certain violations of the proposed UEM Bill. They serve to notify organisations of non-compliance and provide such organisations with an opportunity to rectify the situation, while having the force of potential criminal penalties behind them to stress the importance of compliance.

Given the seriousness of criminal penalties potentially arising from continuing contravention of an enforcement notice, the Coalition notes with concern that no procedure or recourse exists for organisations to dispute the correctness of a TA decision to issue an enforcement notice. The Consultation Paper only notes that an organisation may contest the issue of its compliance or non-compliance with such an enforcement notice, but not contest the actual issuing of the notice in the first place. Further, judicial review is of limited assistance as it would only examine the procedural fairness of the TA's decisions and not examine the substantive reasons for the decision.

The Coalition recommends a procedure be created which permits the review of enforcement notices on a merits basis. Such a procedure might provide a reasonable time for a merits-based review to occur after an enforcement notice is issued. Only when the review is resolved, or the period for filing a merits-based appeal has lapsed with no appeal, should criminal proceedings alleging a contravention of an enforcement notice be able to commence or - should the review find that an enforcement notice was not validly issued - be cancelled. Provision of such a mechanism would serve to increase the confidence of individuals and organisations in the validity of TA-issued enforcement notices and maintain the integrity of Guiding Principle 5.<sup>1</sup>

<sup>1</sup>Penalties and remedies should be proportionate to the severity of the offences": paragraph 17 of the Consultation Paper.

## **5 Explicit treatment of pre-existing relationships would be helpful**

Under paragraph 55(f), an exemption to requiring the provision of a functional unsubscribe facility is made where it would be inconsistent with the terms of an earlier agreement formed between the sender and recipient. The Coalition agrees with the principle that such exemption should be made where it would not make sense given the established relationship between the two parties.

One issue with the exemption is that each message must be reviewed to see if it falls under the exemption. However, certain classes of messages occur frequently in business. In particular, it is common for businesses to communicate with their pre-existing customer base. The Coalition believes that it should not be necessary to include a functional unsubscribe facility in every message sent in the context of a pre-existing business relationship.

Assistance in determining what messages should be considered to be sent in the context of a pre-existing business relationship can be found in the concept of a "transactional or relationship message" in section 3(17) of the United States CAN-SPAM Act of 2003. Examples of such messages include:

- those providing notification of changes in a product, or the recipient's status, or account balances or information with respect to membership, subscription, loans, accounts or comparable ongoing commercial relationships; and
- those concerning delivery of goods or services, including upgrades or updates, which the recipient is entitled to under the terms of previous transaction.

## **6 Exemption from complying with a do-not-call register when a recipient is on a register but also in a pre-existing business relationship with the sender**

Paragraphs 44 and 45 of the Consultation Paper empower the TA to set up various do-not-call registers which an e-marketer must comply with unless a person on that register has given their affirmative consent to be contacted by that e-marketer. The provision of affirmative consent is the only situation noted in the Consultation Paper where an e-marketer can legally contact a target recipient who otherwise could not be contacted due to their presence on the do-not-call register.

In accordance with the reasoning in section 5 for why messages between parties in pre-existing business relationships should be exempted from having to provide a functional unsubscribe facility, e-marketers should also be exempted from checking do-not-call registers if the message recipient is in a pre-existing business relationship. Adding this stipulation would facilitate legitimate electronic communication between parties where their business relationship with each other would make it burdensome and illogical to have to check for each other's presence on a do-not-call register.

## **7 A do-not-call register for e-mail addresses should not be set up**

Under paragraph 45 of the Consultation Paper, the TA will be empowered to set up registers as is appropriate. The same paragraph further notes that "for certain types of electronic addresses, a do-not-call register could be counterproductive", such as a do-not-email register. The Coalition wishes to emphasise its agreement that a do-not-email register should not be set up. This is because such a register would pose a substantial security risk by making available a list of valid e-mail addresses that, in addition to the list's legitimate uses, can be used by spammers for their illegal purposes.

## **8 The requirement to retain unsubscribe messages for 7 years is impractical and ineffective**

Paragraph 56(a) of the Consultation Paper specifies that a record of received unsubscribe messages must be retained for at least 7 years after receipt. One common concern about anti-spam legislation is that it will result in additional compliance costs. The Coalition believes that, under appropriately crafted legislation, compliance costs with anti-spam can be kept to negligible levels while still assisting in a tangible reduction in spam volumes. However, the retention requirement poses a very high compliance cost on entities in exchange for little benefit in combating spam.

Small- and medium-sized enterprises in particular will face significant compliance costs in storing and maintaining potentially thousands or millions of unsubscribe messages for a protracted period of time. This represents a barrier to developing e-marketing as a legitimate promotion channel. Further, it is uncertain how this requirement would be met in the vast majority of cases where a person submits an unsubscribe request via a web-based user interface, rather than through sending an actual unsubscribe message (such as an e-mail).

The benefits gained from the retention requirement are questionable because the retention of unsubscribe requests is not likely to aid the enforcement of the anti-spam regime. Entities should be able to determine their own processes which deal with the fulfilment of unsubscribe requests. They should also decide for themselves how they can best demonstrate compliance with unsubscribe requests to enforcement authorities if necessary. Therefore, companies can implement such processes according to their resources and the extent to which they engage in e-marketing. Additionally, this requirement will simply be ignored by entities who intentionally engage in spamming, so imposing this requirement will not deter spammers, but will needlessly burden entities conducting legitimate e-marketing.

Further, unlike the other measures presented in the proposed UEM Bill, we are not aware of any other country which has enacted a retention of unsubscribe messages requirement, let alone one which extends over a period of 7 years. This will add to the burden of legitimate foreign businesses seeking to communicate with Hong Kong residents because they would need to adopt procedures specific to Hong Kong when conducting international business. Therefore, the Coalition discourages the inclusion of this requirement in the UEM Bill.

## **9 Interaction between do-not-call registers and company-specific opt-out databases**

Some members of the Coalition have experience with operating with do-not-call registers in other countries. Their experience has been that some companies have attempted to add, to the do-not-call register, the contact details of any person from whom they receive an opt-out request, instead of maintaining their own opt-out database. This behaviour is inappropriate because a business receiving an unsubscribe request should not assume that the person wishes to opt-out of receiving communications from all businesses who are bound to respect the do-not-call register (which would be the effect of adding the person to the do-not-call register). We recommend that the TA take this improper use of the do-not-call register into account when setting up such registers.

Note that e-marketers should still be permitted to determine how they will internally deal with fulfilling unsubscribe requests, as we have recommended in section 8.

## **10 "Affirmative consent" requires a definition**

Paragraphs 57 and 58(e) of the Consultation Paper allow commercial electronic messages to be sent to a recipient who has previously opted-out

if they have given their "affirmative consent" to receive such message. No definition of "affirmative consent" is provided in the Consultation Paper. Ascertaining when "consent" is received is not a clear proposition, as indicated by the definitions of the concept in various sections of anti-spam legislation in other countries. It is also unclear what effect the word "affirmative" has on the consent requirement.

Providing a definition of what precisely constitutes affirmative consent is important for senders of commercial electronic messages. They need to understand when they are legally entitled to resume sending messages to persons who previously declared they did not wish to receive any further messages. To this end, section 3(1) of the United States CAN-SPAM Act of 2003 may be considered in drafting a suitable definition.

## **11 Providing a private right of action for all who suffer pecuniary loss due to spam may result in undue litigation**

The Coalition believes that the provision of a right for private parties to engage in civil litigation - as set out in paragraph 82(a) of the Consultation Paper - is a constructive and effective complement to the actions that the Hong Kong Government may take in enforcing anti-spam legislation.

One issue with how paragraph 82(a) has been written is that it casts too wide a net on persons entitled to the private right of action. Since it permits anyone who sustains pecuniary loss to claim damages for such loss, anyone who receives even a single unsolicited commercial electronic message in contravention of the proposed UEM Bill will be entitled to lodge a civil claim against the sender of such a message. This is because pecuniary loss can always be demonstrated by the increased storage and data download costs sustained in the receipt of an electronic message (even though the loss may be very small in each instance).

The result is that a proliferation of counter-productive litigation may occur. Increased litigation places a needless and undue burden on the judiciary system, hampering the efficiency of the general economy, which is an effect in opposition to the legislative objective expressed in paragraph 11(d) of the Consultation Paper.

Therefore, the Coalition strongly recommends the scope of the private right of action be tightened.

Two suggestions for this are:

- setting a minimum amount of pecuniary loss that must be suffered before an entity is eligible to make a claim; or



- restricting the claimants to certain categories, such as internet service providers and e-mail service providers who are likely to bear relatively high costs as a result of being spammed. These claimants would have the ability and resources to successfully pursue claims and have a clear stake in ensuring the legitimacy of electronic messages which are handled by their systems and networks.

Under either of these suggestions, the remaining parties who qualify under the tightened scope would still act as effective deterrents against would-be spammers. The latter suggestion has been successfully implemented in the United States.

## **12 Address harvesting should be treated in the same manner as dictionary attacks**

The Coalition does not agree with paragraph 64 of the Consultation Paper which states that address harvesting has some legitimate uses and is not a wrongful act when messages sent to harvested addresses comply with the proposed opt-out regime. Further, the inconsistent treatment of address harvesting and dictionary attacks (which are disallowed in all cases) creates an incentive for unscrupulous e-marketers to claim that addresses were obtained by address harvesting where in fact they were obtained by dictionary attack.

We object to address harvesting being legalised when the opt-out regime is complied with. Given that the address harvesting and dictionary attack techniques serve the same purpose - to permit spammers to obtain electronic addresses through automated means which they would not otherwise have access to - we believe that the proposed UEM Bill should treat both of those techniques in the same manner. Address harvesters should not have recourse to including an opt-out mechanism to legitimise their activities.

We suggest that the supply, acquisition or use of address harvesting software or harvested address lists be prohibited in the same manner in which address lists compiled using dictionary attacks are prohibited under paragraph 76 of the Consultation Paper. We also suggest that an address-harvested list be defined consistently with the definition in the Australian Spam Act (ie the product of the use of address-harvesting software) or the United States CAN-SPAM Act (which refers to the use of automated means to collect addresses).

## **13 Harmonisation of anti-spam laws with other jurisdictions**

The Coalition believes that harmonisation of anti-spam laws with other jurisdictions, where possible, is important. In paragraph 27, the proposed UEM Bill has extra-territorial reach, regulating spam sent from outside of Hong Kong even though it is likely to be difficult to enforce anti-spam laws against persons located outside of Hong Kong's jurisdiction and with no assets in the jurisdiction. In all likelihood, it is only legitimate multinational businesses who will feel the extraterritorial impact of the UEM Bill - unscrupulous foreign spammers with no assets in Hong Kong are most likely to ignore the legislation. Compliance with anti-spam laws becomes a complex undertaking for multinational entities if they have to comply with the different requirements imposed by inconsistent anti-spam legislation of the jurisdictions in which they operate. Therefore, we recommend that the Government should harmonise, as much as is possible, the UEM Bill with other jurisdictions - most notably with Hong Kong's major trading partners which is why we have referred to United States anti-spam legislation throughout this response.

## 14 Conclusion

The Coalition appreciates this opportunity to provide feedback on the Consultation Paper. We again commend the current proposed UEM Bill as a productive and valuable step towards creating another practical and effective measure to address the issue of spam which is a problem that will only continue to grow. Nonetheless, the Coalition believes that the proposed UEM Bill can be strengthened by considering and dealing with the comments provided in this response.

Thanks are extended to the Commerce, Industry and Technology Bureau by the Coalition for examining the issues raised in this response. The Coalition welcomes, if desired, further discussion of this response.