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Legislative Council

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**Subcommittee on Personal Data (Privacy) (Amendment) Ordinance 2012
(Commencement) Notice**

Background brief prepared by the Legislative Council Secretariat

Purpose

This paper provides background information on the Personal Data (Privacy) (Amendment) Ordinance 2012 (Commencement) Notice (L.N. 5) ("the Notice") and gives a brief account of previous discussions on the subject.

Background

2. The Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO") protects the privacy of individuals in relation to personal data. PDPO covers any data relating directly or indirectly to a living individual ("data subject"), from which it is practicable to ascertain the identity of the individual and which are in a form in which access or processing is practicable. PDPO applies to any person ("data user") who controls the collection, holding, processing or use of personal data. Data users must follow the fair information practices stipulated in the six data protection principles in Schedule 1 to PDPO in relation to the purpose and manner of data collection, accuracy and duration of data retention, use of personal data, security of personal data, availability of data information, and access to personal data.

3. In August 2009, the Administration, with the support of the Office of the Privacy Commissioner for Personal Data ("PCPD"), issued the Consultation Document on Review of PDPO to invite public views on proposals to amend PDPO. In October 2010, the Administration published the Consultation Report.

4. The Administration further consulted the public on the legislative proposals to amend PDPO and published the Further Public Discussions Report ("the Report") in April 2011. The Personal Data (Privacy) (Amendment) Bill 2011 ("the Bill"), which seeks to implement the proposals in the Report, was

introduced into the Legislative Council ("LegCo") in July 2011. A Bills Committee was formed to scrutinize the Bill. Members may refer to the report of the Bills Committee (LC Paper No. CB(2)2113/11-12) for details of the relevant deliberations.

5. The Personal Data (Privacy) (Amendment) Ordinance 2012 ("Amendment Ordinance") was passed by LegCo on 27 June 2012. The Amendment Ordinance introduced amendments to PDPO, inter alia, to provide for regulation over the use of personal data in direct marketing and provision of personal data for use in direct marketing; to empower PCPD to provide legal assistance to aggrieved data subjects in bringing proceedings to seek compensation from data users under PDPO; to create a new offence for disclosure of personal data obtained without consent; to impose a heavier penalty for repeated contravention of enforcement notices; and to create a new offence for repeated contravention of the requirements under PDPO for which enforcement notices have been served.

6. All the provisions in the Amendment Ordinance have come into operation since 1 October 2012, with the exception of sections 20, 21, 38(2), 39 and 43. In gist, section 21 of the Amendment Ordinance introduces a new Part VIA to PDPO, which provides for a statutory scheme to regulate the use of personal data by a data user in direct marketing and the provision of personal data by a data user to another person for use by that other person in direct marketing. Section 34 of PDPO, the existing provision governing the use of personal data in direct marketing, is repealed by section 20 of the Amendment Ordinance.

7. Sections 38(2), 39 and 43 of the Amendment Ordinance empower PCPD to provide legal assistance to aggrieved data subjects who intend to institute legal proceedings pursuant to section 66 of PDPO and provide for related amendments. Assistance may include the giving of advice and any other form of assistance which PCPD may consider appropriate.

8. The new regulatory requirements for the use and provision of personal data for use in direct marketing and the new legal assistance scheme are detailed in **Appendix I**.

The Personal Data (Privacy) (Amendment) Ordinance 2012 (Commencement) Notice (L.N. 5)

9. The Notice was made by the Secretary for Constitutional and Mainland Affairs under section 1(3) of the Amendment Ordinance to appoint 1 April 2013 as the day on which sections 20, 21, 38(2), 39 and 43 of the Amendment Ordinance come into operation.

Deliberations of the Bills Committee on the relevant sections of the Amendment Ordinance

10. In the course of scrutiny of the Bill, the Bills Committee expressed concerns on the following issues regarding the provisions relating to direct marketing and legal assistance –

- (a) "opt-in" and "opt-out" mechanisms and "taken not to object if no reply sent within 30 days arrangement";
- (b) verbal communication between data user and data subject;
- (c) meaning of sale of personal data;
- (d) grandfathering;
- (e) mechanism to provide information on transferee(s) to data subjects;
- (f) commencement of operation of the new requirements;
- (g) refusal to comply with data access requests; and
- (h) legal assistance to data subjects.

An extract of the relevant parts from the Bills Committee's report is in **Appendix II**.

Consultation with the Panel on Constitutional Affairs ("CA Panel") on the Notice

11. No LegCo Brief on the Notice has been issued by the Administration. However, PCPD and the Administration briefed the CA Panel at its meeting on 21 January 2013 on the preparatory work for bringing the remaining five sections into operation on 1 April 2013. In this connection, an information paper on the Notice was provided by the Administration (LC Paper No. CB(2)483/12-13(02)). At the meeting, some Panel members expressed concern about the adequacy of staffing resources of the Office of PCPD to cope with the additional workload arising from the implementation of the Amendment Ordinance, and urged the Administration to provide adequate resources for PCPD.

Recent development

12. The Notice was gazetted on 25 January 2013 and tabled before LegCo on 30 January 2013. At the meeting of the House Committee on 8 February 2013, Members decided to form a subcommittee to examine the Notice.

13. The scrutiny period of the Notice has been extended to 20 March 2013 by resolution of the Council on 20 February 2013.

Relevant papers

14. A list of the relevant papers is in **Appendix III**.

Council Business Division 2
Legislative Council Secretariat
21 February 2013

Legislative Council Panel on Constitutional Affairs

**Personal Data (Privacy) (Amendment) Ordinance 2012 (Commencement)
Notice**

(Extract)

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Use of personal data in direct marketing

5. Section 20 of the Amendment Ordinance repeals the existing section 34 of PDPO on the use of personal data in direct marketing. Section 21 of the Amendment Ordinance introduces a new Part VIA governing use of personal data in direct marketing and provision of personal data for use in direct marketing. The provisions are elaborated in paragraphs 6 to 14 below.

6. To provide data subjects with an informed choice as to whether to allow the use of their personal data in direct marketing, the Amendment Ordinance requires a data user who intends to use personal data in direct marketing to, before such use:

- (a) inform the data subject that the data user intends to so use the personal data and that the data user may not do so unless the data user has received the data subject's consent¹ to the intended use;
- (b) inform the data subject of the following in relation to the intended use:
 - (i) the kind(s) of personal data to be used; and
 - (ii) the class(es) of marketing subjects² in relation to which the data is to be used; and

¹ "Consent", in relation to use of personal data in direct marketing or provision of personal data for use in direct marketing, includes an indication of no objection to the use or provision.

² "Marketing subject", in relation to direct marketing means (a) any goods, facility or service offered, or the availability of which is advertised; or (b) any purpose for which donations or contributions are solicited.

- (c) provide the data subject with a channel through which the data subject may, without charge by the data user, communicate the data subject's consent to the intended use.

The information in (a) and (b) above must be presented in a manner that is easily understandable and, if in written form, easily readable.

7. A data user must not use the data subject's personal data in direct marketing unless:

- (a) the data user has received the data subject's consent to the intended use as described in paragraph 6(b) above;
- (b) if the consent is given orally, the data user has, within 14 days from receiving the consent, sent a written confirmation to the data subject, confirming –
 - (i) the date of receipt of the consent;
 - (ii) the permitted kind(s) of personal data; and
 - (iii) the permitted class(es) of marketing subjects³; and
- (c) the use is consistent with the data subject's consent.

8. The requirements in paragraph 7 above would not apply if, before the new provisions relating to direct marketing in the Amendment Ordinance come into operation:

- (a) the data user has explicitly informed the data subject in an easily understandable and, if in writing, easily readable manner of the intended use or use of the data subject's personal data in direct marketing in relation to a class of marketing subjects;
- (b) the data user had so used any of the data;
- (c) the data subject had not required the data user to cease to so use any of the data; and

³ The "permitted class of marketing subjects" means a class of marketing subject that is specified in the information in paragraph 6(b) above and in relation to which consent is given.

- (d) the data user had not, in relation to the use, contravened any provision of the PDPO as in force at the time of the use.

9. When using the personal data of a data subject in direct marketing for the first time, a data user is required to inform the data subject that the data subject may request the data user to cease to so use the data. Moreover, irrespective of whether the data subject has given consent earlier, he may, at any time, require a data user to cease to use his personal data in direct marketing. A data user who receives such a requirement must, without charge to the data subject, comply with the requirement.

10. A data user commits an offence and is liable, on conviction, to a fine of \$500,000 and imprisonment for three years if the data user uses personal data in direct marketing without taking all of the actions in paragraph 6 above, or uses personal data in direct marketing in contravention of paragraph 7 or 9 above. It is a defence for a data user charged to prove that all reasonable precautions have been taken and all due diligence has been exercised to avoid the commission of the offence.

Provision of personal data to another person for use in direct marketing

11. The Amendment Ordinance also requires a data user who intends to provide a data subject's personal data to another person for use by that other person in direct marketing to, before such provision:

- (a) inform the data subject in writing that the data user intends to so provide the personal data and that the data user may not do so unless the data user has received the data subject's written consent to the intended provision;
- (b) inform the data subject of the following written information in relation to the intended provision:
 - (i) that the data is to be provided for the data user's gain, if the data is to be so provided;
 - (ii) the kind(s) of personal data to be provided;
 - (iii) the class(es) of persons to which the data is to be provided; and

- (iv) the class(es) of marketing subjects in relation to which the data is to be used; and
- (c) provide the data subject with a channel through which the data subject may, without charge by the data user, communicate the data subject's consent to the intended provision in writing.

The information in (a) and (b) above must be presented in a manner that is easily understandable and easily readable.

12. A data user must not provide the data subject's personal data to another person for use in direct marketing unless:

- (a) the data user has received the data subject's written consent to the intended provision as described in paragraph 11(b) above;
- (b) if the data is provided for the data user's gain, the intention to so provide was specified in the information in paragraph 11(b) above; and
- (c) the provision is consistent with the data subject's consent.

13. A data subject who has been provided with information by a data user under paragraph 11(b) above may, at any time, require the data user:

- (a) to cease to provide the data subject's personal data to any other person for use by that other person in direct marketing; and
- (b) to notify any person to whom the data has been so provided to cease to use the data in direct marketing.

A data user who receives such a requirement from a data subject must, without charge to the data subject, comply with the requirement. If the data user receives a requirement in (b) above, then the data user must also so notify the person to whom the data has been provided in writing; a person who receives such a notification must, without charge to the data subject, cease to use the personal data in direct marketing in accordance with the notification.

14. A data user commits an offence and is liable, on conviction, to a fine of \$500,000 and imprisonment for three years (\$1,000,000 and imprisonment for five years in the case of provision of personal data for gain) if the data user provides personal data to another person for use by that other person in direct marketing without taking all of the actions in paragraph 11 above, or provides personal data in direct marketing in contravention of paragraph 12 above, or fails to comply with the requirement of the data subject in paragraph 13 above. A person who receives a notification referred to in paragraph 13(b) above but fails to cease to use the personal data in direct marketing in accordance with the notification will commit an offence and be liable, on conviction, to a fine of \$500,000 and imprisonment for three years. It is a defence for a data user or a person charged to prove that all reasonable precautions have been taken and all due diligence has been exercised to avoid the commission of the offence.

Provision of legal assistance

15. Sections 38(2), 39 and 43 of the Amendment Ordinance empower the Privacy Commissioner to provide legal assistance to aggrieved data subjects who intend to institute legal proceedings pursuant to section 66 of the PDPO and provide for related amendments. The assistance the Privacy Commissioner provides may include (a) giving advice; (b) arranging for the giving of advice or assistance by a solicitor or counsel; (c) arranging for representation by any person, including all such assistance as is usually given by a solicitor or counsel in the steps preliminary or incidental to any proceedings, or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings; and (d) any other form of assistance which the Privacy Commissioner may consider appropriate. Applications for legal assistance may be granted if the Privacy Commissioner thinks fit to do so, in particular, where the case raises a question of principle, or where it is unreasonable to expect the applicant to deal with the case unaided having regard to the complexity of the case or the applicant's position in relation to the respondent or another person involved or any other matter.

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**An extract from the report of the Bills Committee on
Personal Data (Privacy) (Amendment) Bill 2011**

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Deliberations of the Bills Committee

Direct marketing (clause 21 - proposed new Part VIA)

8. Members noted that the Octopus incident had aroused public concerns about the inadequacies of the existing regulatory regime and the practices adopted by some data users engaging in direct marketing. The concerns included the lack of specific requirements in PDPO for clear notification from data users to data subjects about the intended use, provision or sale of personal data for direct marketing purposes; data users requiring data subjects to give "bundled consent" to the terms and conditions of goods/services contracts and the use of their data for direct marketing purposes; the poor legibility of the written notification provided by data users to data subjects in relation to the use, provision or sale of personal data; and contravention of DPPs under PDPO not being a criminal offence. In the light of these public concerns, members have expressed support for tighter regulation of the use of personal data by enterprises in order to afford more protection to the personal data privacy of data subjects. Members have, however, found it necessary to strike a balance between safeguarding personal data privacy and business efficacy.

9. According to the Administration, the proposed regulatory requirements for the use and provision of personal data for use in direct marketing are clearer and more stringent than the existing ones under PDPO. They would enhance the transparency of the whole regulatory regime and afford more personal data privacy protection to data subjects. The proposed regulatory requirements have also struck a balance between safeguarding personal data privacy and facilitating business operations while providing data subjects with an informed choice as to whether to allow the use of their personal data in direct marketing.

"Opt-in" and "opt-out" mechanisms and "taken not to object if no reply sent within 30 days arrangement"

10. The Bill provides that a data user who intends to use or provide the personal data of a data subject to others for use in direct marketing should inform the data subject in writing of certain prescribed information and provide the data subject with a response facility through which the data subject may indicate in writing whether he objects to the intended use or provision (i.e. the

"opt-out" mechanism). Members have expressed diverse views on this proposed "opt-out" mechanism. Some members consider that the proposed "opt-out" mechanism falls short of the strong public expectation revealed in the Octopus incident and is in effect a retrograde step in tightening the control over the unauthorized sale of personal data by data users. They also consider the "opt-out" mechanism unfair to data subjects because it would be incumbent upon data subjects to make a specific opt-out request or else they would be deemed not to have opted-out. Moreover, as a data subject may have provided his personal data to various data users and if he wishes to exercise his opt-out right, it would be very difficult for him to identify which data user has used his personal data for direct marketing purposes. Since a data user may also sell the collected personal data to others unless the data subject has exercised his opt-out right, some members take the view that it is too burdensome for the data subject to identify each and every person to whom the data has been sold and make an opt-out request to each of them. In this regard, they have called for the adoption of an "opt-in" mechanism under which it is incumbent upon data users to obtain explicit consent from data subjects before the use or sale of their personal data. This "opt-in" mechanism would respect a data subject's right of choice on the use of his personal data and could reduce complaints about the intrusion into personal data privacy and the cost of handling such complaints.

11. Some members, however, have expressed support for adopting the "opt-out" mechanism on the grounds that the "opt-out" mechanism has been adopted by most overseas jurisdictions and the Administration has already proposed to introduce additional specific requirements to strengthen regulation over the collection, use and sale of personal data in direct marketing. In their view, the proposed "opt-out" mechanism has already struck a balance between the protection of personal data privacy and businesses efficacy, while at the same time providing benefits and choices to consumers. They have also pointed out that following the implementation of PCPD's recommendations in his 2010 investigation report on the Octopus incident, there have been improvements in the protection of personal data. As there is public demand for direct marketing, these members consider that the adoption of an "opt-in" mechanism would have a negative impact on the operation of the direct marketing business. They have also queried whether it is necessary for Hong Kong to take a great leap forward to adopt an "opt-in" mechanism given that most overseas jurisdictions have adopted an "opt-out" mechanism.

12. Some members consider that the Administration could adopt an "opt-out" mechanism for the use of personal data in direct marketing and an "opt-in" mechanism for the provision of personal data to others for use in direct marketing. They share the view of PCPD that the provision of personal data for gain would not be reasonably contemplated by a data subject if he was not informed of this before or at the time of data collection.

13. The Bills Committee has noted the position of PCPD that while an "opt-in" mechanism is not widely applied to the use of personal data for direct marketing purposes in overseas jurisdictions, it should be adopted in Hong Kong as an ultimate goal to better protect personal data privacy and respect customers' rights of choice. As it would take time for consumers and the trade to adjust to an "opt-in" mechanism, PCPD has suggested that an improved "opt-out" mechanism with some interim measures, such as a central "Do-not-call" register for person to person telemarketing calls, should be put in place before the full roll-out of an "opt-in" mechanism. Some members have suggested that if an "opt-in" mechanism would be adopted in future, it should be implemented incrementally rather than in one go.

14. The Administration has explained that, coupled with the introduction of the additional requirements in relation to the provision and use of personal data in direct marketing, the "opt-out" mechanism proposed in the Bill would afford better and more protection of personal data than the existing regulatory requirements under PDPO. It would also strike a right balance between the protection of personal data privacy and allowing room for businesses to operate while providing data subjects with an informed choice as to whether to allow the use of their personal data in direct marketing. The arrangement is also in line with the approach adopted under the Unsolicited Electronic Messages Ordinance (Cap. 593).

15. The Bill also proposes that data users will have to provide certain information on the intended use or provision and a response facility to data subjects for them to exercise their opt-out right. If no reply indicating objection is sent within 30 days after the required information and response facility are provided, the data subject is taken not to object. This arrangement is intended to cater for situations where the data user did not intend to use or provide the data subject's personal data to others for use in direct marketing at the time of data collection but intends to do so afterwards.

16. Members have expressed strong opposition to the arrangement as "no reply" cannot be taken as "no objection". They have pointed out that the notification from the data user about the intended use or provision of personal data may not have reached the data subject as the data user's record of the data subject's address may not be up-to-date, or the data subject's reply to indicate objection may not reach the data user. In either event, the data subject will be taken not to have opted-out. In the view of PCPD, the arrangement will place an unnecessary burden on the data subject if he exercises his opt-out right after the 30-day response period, as he may also have to deal with the person(s) to whom his personal data have been provided and not only the data user himself. The data subject may have to make his opt-out request to each and every person to whom his data have been provided.

17. Having regard to members' views and concerns in paragraphs 10 to 13 and 16 above, the Administration has agreed to withdraw the "taken not to object if no reply sent within 30 days arrangement". The Administration has put forward for the Bills Committee's consideration a revised regulatory regime under which a data user can only use or provide a data subject's personal data to others for use in direct marketing if he has provided the required information and response facility and received a reply from the data subject indicating that the data subject does not object to the data user doing so. If the data user has not received such a reply from the data subject and uses, or provides the data to others for use in directing marketing, the data user will be liable, on conviction, to a fine of \$500,000 and imprisonment for three years (or a fine of \$1,000,000 and imprisonment for five years if the provision is for gain). Members generally consider the revised proposal to be in the right direction. As to the details, their in-depth deliberations are elaborated in the ensuing paragraphs.

Verbal communication between data user and data subject

18. Some industry bodies consider it not uncommon for personal data to be collected and transactions concluded over the phone. Most of these transactions will be recorded as well, and the recording will be an effective safeguard for data subjects. They urge the Administration to consider accepting verbal communication between data users and data subjects, as it would be more convenient for data subjects to indicate no objection during the telephone conversation with the data users, rather than in writing. Some members share these views. Some members have also suggested that to provide additional safeguard for personal data privacy, consideration should be given to making audio recording a statutory requirement if the required information on the intended use or provision and the data subject's consent are given orally. Data users should also be required to alert data subjects that the telephone communication between them will be recorded. Standard scripts for that purpose should be prepared by PCPD to facilitate the adoption of the practice of recording the entire telephone communication.

19. While the Bills Committee does not object to accepting oral consent, some members have expressed grave concern that this oral consent should be restricted to the use of personal data by the data user for direct marketing purposes and should not be extended to the provision of personal data (whether for gain or not) by the data user to others for use in direct marketing. In their view, data subjects may not wish their personal data to be provided to third parties in particular for monetary gains. Also, PCPD considers that sale of personal data will fall outside the reasonable contemplation of data subjects if they were not informed of this before or at the time of data collection and therefore the explicit and express consent of data subjects should be obtained.

He considers that an oral consent falls short of the standard of an explicit and express consent and the provision of personal data to others for use in direct marketing should be subject to written consent so as to meet that more stringent standard.

20. Having considered members' views and concern, the Administration has agreed to introduce Committee Stage amendments ("CSAs") to permit a data user who intends to use the data subject's personal data in direct marketing for his own purposes, to provide the data subject with the required information either orally or in writing, and the data subject to indicate his consent (including indication of no objection) to the data user either orally or in writing. As an additional safeguard, the Administration also proposes that if consent is given orally, the data user must, before using the personal data in direct marketing, confirm in writing to the data subject within 14 days from the date of receipt of the consent the permitted kind of personal data and the permitted class of marketing subjects.

21. In the light of members' grave concern on the acceptance of oral consent of data subjects in relation to the provision of personal data (whether for gain or not) to others for use in direct marketing, the Administration has agreed not to pursue this. In other words, the provision of personal data (whether for gain or not) to another data user will be subject to the requirement that the data user must provide to the data subject in writing the required information. Before proceeding to provide the data, the data user must receive a reply in writing from the data subject indicating that the data subject does not object to the data user doing so.

22. Noting that a data user would be allowed to use the personal data of data subjects in direct marketing for his own purposes once he has received the oral consent of the data subjects and sent the written confirmation, some members have expressed concern that the revised proposal could not cater for the situation where the data subjects may not receive the written confirmation and hence may not have the opportunity to raise objection to the contents of the written confirmation. They have sought the view of the Administration on the PCPD's suggestion that the personal data of a data subject can be used by a data user in direct marketing only when the data user has not received any objection from the data subject on the details of the consent as set out in the written confirmation within 14 days after the written confirmation is sent to the data subject. The Administration has advised that data user should be allowed to use the personal data in direct marketing once he has received the oral consent of the data subject and sent the written information. The data subject may subsequently at any time require the data user to cease to use the personal data.

23. As regards making audio recording a statutory requirement, the Administration has advised that it would be in the interest of the data user to keep a record of the consent of the data subject, whether in written form or audio recording. Data subjects can also make data access requests to obtain copies of the relevant recordings under PDPO. Nevertheless, to address members' concern, best practices for recording verbal communication will be covered in the guidance notes to be prepared by PCPD with a view to enhancing compliance and understanding of the new requirements proposed in the Bill.

24. Members have also deliberated on the scope of and contents to be covered in PCPD's guidance notes. In addition to the inclusion of best practices for the use and provision for use of personal data in PCPD's guidance notes, members have suggested that standard scripts and standard forms for the purposes of obtaining data subjects' oral or written consent to the intended use of their personal data should be provided in the guidance notes. At the request of the Bills Committee, the Administration has undertaken to revert to the Panel on Constitutional Affairs of the Legislative Council on the preparation of the guidance notes and the related publicity and public education work.

Meaning of sale of personal data

25. Members have also discussed the expression "sale of personal data" in the Bill. According to the submission from the Hong Kong Direct Marketing Association, in direct marketing business, personal data may be licensed for temporary sharing, but they have not been sold and no transfer of ownership is involved. While the definition of "sale of personal data" in the Bill is drafted in such a way to cover such sharing, the Association has taken issue with the use of the word "sale", which is commonly taken to mean giving up of ownership or control. To provide clarity, the Administration will introduce a CSA to replace the expression "sale" in the Bill with the expression "provision for gain".

Grandfathering

26. Some members take the view that a data user who has collected any personal data in compliance with the existing requirements under PDPO before the commencement of the new legislative provisions relating to direct marketing should be allowed to continue to use the data already collected for direct marketing purposes after the commencement. They have suggested that before the implementation of the proposed new requirements for the provision and use of personal data in direct marketing, a one-off exercise should be conducted to grandfather the personal data that have been collected and let data subjects opt out if they choose to.

27. The Administration has advised that a grandfathering arrangement for pre-existing personal data subject to certain conditions has already been provided in the Bill, i.e. proposed new section 35I(1) (to be renumbered as section 35D(1) in the CSAs to be introduced by the Administration). The proposed new section 35I(1) provides that, for personal data which a data user has, before the entry into force of the new requirements, used in direct marketing in compliance with the existing requirements under PDPO, and which the data user intends to use in relation to the same marketing subject, the new requirements will not apply. This grandfathering arrangement, however, will only be applicable to the personal data that have been used in direct marketing before the commencement of the provisions in the Bill relating to direct marketing. Having regard to the operational need of the direct marketing business that direct marketing activities may involve the use of different combinations of personal data, the Administration has agreed to introduce CSAs to provide for the application of the grandfathering arrangement to the use of any personal data of the data subject in relation to the same class of marketing subjects if any of the data subject's personal data have been so used before the commencement date.

Mechanism to provide information on transferee(s) to data subjects

28. Some members have expressed support for PCPD's suggestion of conferring on individuals a right to be informed of the source of their personal data by direct marketers. Alternatively, consideration could be given to devising a mechanism for data subjects to request data users to provide information on each and every person to whom their personal data have been provided so that data subjects can require these persons to cease to use their personal data in direct marketing.

29. The Administration has explained that a data user who intends to provide personal data of a data subject to a third party for use in direct marketing must, under the proposed new requirements, inform the data subject of certain required information relating to the provision, including the class of persons to whom the data are to be provided (i.e. the transferee(s)). A data subject may also subsequently require the data user to notify the transferee to cease to so use the personal data. The transferee who receives such a notification from the data user must cease to use the personal data of the data subject in direct marketing in accordance with the notification. Otherwise, the transferee will commit an offence and be liable on conviction to a fine of \$500,000 and imprisonment for three years (or a fine of \$1,000,000 and imprisonment for five years if the provisions is for gain). The Administration considers that the proposal will afford adequate protection to data subjects and there is no need to devise the suggested mechanism.

Commencement of operation of the new requirements (clauses 1 and 21)

30. The Bills Committee notes the Administration's proposal that provisions unrelated to direct marketing or the legal assistance scheme shall commence operation on 1 October 2012. A separate commencement date will be proposed for the commencement of provisions relating to direct marketing, taking into account the need to provide sufficient time for PCPD to prepare guidance notes in relation to the promotion of and compliance with the new requirements in the Bill and for data users to prepare for the necessary documentation and procedural changes after passage of the Bill. According to the Administration, PCPD may take around nine months after the passage of the Bill to prepare the guidance notes in consultation with the relevant parties and undertake other preparatory work.

31. As there will be an interim period between the passage of the Bill and the commencement of the new requirements relating to direct marketing, PCPD has proposed a cut-off date for the grandfathering arrangement under the proposed new section 35D(1), which should be a date as soon as possible after the passage of the Bill. In the view of PCPD, some data users may, during this interim period, carry out massive direct marketing activities for the purpose of avoiding compliance with the new requirements. In order to prevent such activities, some members have expressed support for PCPD's proposal that a cut-off date should be specified under the proposed new section 35D(1). If a data user has not used personal data of data subjects in direct marketing before that date, the data user cannot rely on the proposed new section 35D(1) for exemption under the grandfathering arrangement.

32. The Administration has explained that the grandfathering arrangement is to cater for personal data collected before the commencement of the new requirements relating to direct marketing, including the data collected during the period between the passage of the Bill and the commencement of the new requirements. In the Administration's view, setting an earlier cut-off date for the grandfathering arrangement will mean advancing the commencement date of the new requirements for those data users who intend to use the personal data collected during this interim period in direct marketing. However, during this interim period, PCPD's guidance notes and other publicity and public education work to assist data users in complying with the new requirement are not yet in place. This will create unnecessary confusion to both data users and data subjects.

33. The Administration has further explained that with the latest drafting of the proposed new section 35D(1), a data user cannot trigger the exemption by simply having used the personal data of a data subject in direct marketing

before the commencement date. The data user's eligibility for the exemption is also subject to the conditions that the data user has not, in relation to the use of the personal data in direct marketing before the commencement date, contravened any existing requirements under PDPO, and that the data subject has not indicated objection. The Administration has informed members that a further condition under the proposed new section 35D(1) is that the data subject must have been explicitly informed of the use of his personal data in direct marketing in relation to the class of marketing subjects before the commencement date. Also, the grandfathering arrangement will not affect the right of the data subject to object to the use of his personal data in direct marketing at any time.

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Refusal to comply with data access requests (clause 13 - proposed amendment to section 20)

42. The Bills Committee notes with concern the secrecy provisions in the proposed amendment to section 20(1)(c) and the proposed new section 20(3)(ea). They provide that a data user shall or may refuse to comply with a data access request if compliance with the request is prohibited under PDPO or any other Ordinance or if he is entitled under PDPO or any other Ordinance not to disclose the data. Some members have expressed concern that the Bill does not contain any provision that gives it an overriding effect over any other ordinances. They urge the Administration to specify all the ordinances under which compliance with a data access request is prohibited or refusal to comply with a data access request is allowed.

43. The Administration has advised that when formulating secrecy provisions, all relevant factors including not only the need to preserve secrecy, but also the need to respect the data subject's right to access his own personal data would have been taken into account. For this reason, some ordinances such as the Inland Revenue Ordinance impose a duty of secrecy on the official concerned but allow the data subject to access his own personal data, whereas some other ordinances such as the Sex Discrimination Ordinance do not allow such access. The proposed amendments to section 20(1) and (3) are intended to resolve the conflict between the requirement to comply with a data access request under section 19 of PDPO and the requirement to comply with secrecy provisions in other ordinances. Without these amendments, a data user bound by a statutory duty to maintain secrecy will face a dilemma of either breaching the data access provision of PDPO or the relevant secrecy provisions in another ordinance. At the same time, PCPD's decision may be challenged if he accepts a data user's compliance with a statutory secrecy requirement or a statutory right to non-disclosure as a ground for refusing a data access request.

44. According to the Administration, public views have been invited on these amendment proposals during the two rounds of public consultation in 2009 and 2010. The majority of the submissions received have agreed with the proposed arrangement and consider that this proposal could save the data user from the dilemma of either contravening the provisions of PDPO on data access or the relevant secrecy provision in other ordinances. The Administration considers it impracticable to specify all ordinances under which compliance with a data access request is prohibited or refusal to comply with a data access request is allowed. It would be more appropriate to set out the general rule that the right for a data subject to access his own personal data should be subject to the non-disclosure or secrecy requirements in other ordinances.

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Legal assistance to data subjects (clauses 37 and 38 - proposed amendment to section 66 and proposed new sections 66A and 66B)

62. The Bills Committee notes that at present, a data subject who suffers damage by reason of any contravention of a requirement under PDPO by a data user in relation to his personal data is entitled under section 66 of PDPO to compensation from the data user for that damage. PDPO, however, does not empower PCPD to provide assistance to aggrieved data subjects in respect of legal proceedings under the section. Members generally take the view that if PCPD is empowered to offer legal assistance to an aggrieved data subject who suffers damage to seek redress under PDPO, the aggrieved party may not be inhibited to file a lawsuit due to cost considerations. This could also achieve greater deterrent effect on acts or practices which intrude into personal data privacy, and enhance the overall effectiveness of sanctions provided for under PDPO.

63. The Bills Committee has expressed support for empowering PCPD to provide legal assistance to an aggrieved data subject to institute legal proceedings to seek compensation under section 66 of PDPO, based on the model of the Equal Opportunities Commission. Some members have suggested that PCPD should seek to mediate such claims for compensation before resorting to legal action.

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**Subcommittee on Personal Data (Privacy) (Amendment) Ordinance 2012
(Commencement) Notice**

Relevant Papers

Committee	Date of meeting	Paper
Bills Committee on Personal Data (Privacy) (Amendment) Bill 2011	---	<u>Report</u>
Panel on Constitutional Affairs	21 January 2013 (agenda item IV)	<u>Agenda</u> <u>Administration's paper on "Personal Data (Privacy) (Amendment) Ordinance 2012 (Commencement) Notice"</u>

Council Business Division 2
Legislative Council Secretariat
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