

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

**PURPOSE**

Further to the meeting of the Subcommittee on 22 February 2013, this paper apprises Members of the preparatory work done, as tabulated below, by the Office of the Privacy Commissioner for Personal Data (“PCPD”) for bringing the remaining provisions in the Personal Data (Privacy) (Amendment) Ordinance 2012 (“Amendment Ordinance”) into operation on 1 April 2013.

**NEW REGULATORY REGIME FOR DIRECT MARKETING ACTIVITIES**

- (a) Preparation for Implementation of the New Regulatory Regime for Direct Marketing Activities

The New Guidance on Direct Marketing issued by the PCPD in January 2013 (**Annex A**) has taken into account the suggestions raised by members of the Bills Committee during the course of discussion on the Personal Data (Privacy) (Amendment) Bill 2011.

<i>Suggestions raised by Bills Committee</i>	<i>New Guidance on Direct Marketing</i>
Standard form for indicating consent/ no objection: (a) To provide a standard form to facilitate data users in presenting the required information and for data subjects to indicate consent/ no objection; (b) To provide a standard form for data subjects to raise objection/ indicate opt-out.	Please refer to the examples under paragraphs 3.4 and 3.6.  Data subjects may refer to Q.11 of the Information Leaflet on “Exercising Your Right of Consent to and Opt-out from Direct Marketing Activities under the Personal Data (Privacy) Ordinance” ( <b>Annex B</b> ).

<i>Suggestions raised by Bills Committee</i>	<i>New Guidance on Direct Marketing</i>
<p>In cases where consent/ no objection is obtained verbally:</p> <p>(a) to provide a standard script to facilitate data users in conveying the required information and obtaining verbal consent/ no objection;</p> <p>(b) to encourage data users (i) to record the telephone communication and (ii) to alert data subjects that the telephone communication between them will be recorded before the recording commences.</p>	<p>Examples of obtaining consent/no objection have been provided under paragraphs 3.4 and 3.6. These examples are not restricted to obtaining written consent only, so data users can refer to them and adapt for oral use as appropriate.</p> <p>Please refer to paragraph 3.10 and the “Good Practice for Recording Oral Consent” that follows.</p>
<p>Written confirmation of oral consent:</p> <p>(a) to encourage data users to present the contents of the written confirmation in an easily readable manner;</p> <p>(b) to provide for sending of written confirmation to the last known address of the data subject.</p>	<p>Please refer to paragraph 3.7.</p> <p>Please refer to paragraph 3.7.</p>

PCPD will monitor the implementation of the above new guidance by data users after the remaining provisions in the Amendment Ordinance come into force.

(b) Promotional and Public Educational Work

To facilitate data users’ compliance with the new requirements of the regulatory regime for direct marketing activities, PCPD has launched promotional and public educational work for two groups of target audience.

<i>Target Audience</i>	<i>Activities</i>
Data users involved in the collection and use of personal data for direct marketing activities	<p>1. Media briefing to all media held on 15 Jan 2013.</p> <p>2. New Guidance on Direct Marketing issued on 15 January 2013:</p> <ul style="list-style-type: none"> <li>- New requirements on the Collection and Use of Personal Data in Direct Marketing; and</li> <li>- Sale of personal data to third parties for Direct Marketing.</li> </ul> <p>3. Introductory seminar to members of the Data Protection Officers' Club held on 22 January 2013.</p> <p>4. Advertisements in professional publications/newsletters of the Hong Kong General Chamber of Commerce, the Hong Kong Retail Management Association, and the Hong Kong Institute of Chartered Secretaries will be placed in March 2013.</p> <p>5. 12 professional workshops and one special seminar on Direct Marketing have been/will be organized from January to March 2013. Participants included data protection officers, compliance officers, legal practitioners, marketing practitioners and personnel from the industries of banking, insurance, telecommunications and retail, as well as the public and other private sectors.</p> <p>6. A dedicated seminar for the Hong Kong Retail Management Association will be held in March 2013.</p>
Data subjects (General public)	<p>7. A short video was uploaded onto PCPD website in October 2012.</p> <p>8. To generate coverage in mass media:</p> <ul style="list-style-type: none"> <li>- Special article published on 16 October 2012 in Metro Daily;</li> <li>- Special ATV report broadcast on 31 December 2012; and</li> <li>- Pitch for coverage in print and electronic media from January to March 2013.</li> </ul> <p>9. Information leaflet on the exercise of the right of consent to and opt-out from direct marketing activities (<b>Annex B</b>) was issued on 15 January 2013.</p> <p>10. The contents of seminars for the public/organizations (held approximately three times per month) have been updated to cover the new regulatory requirements.</p>

## LEGAL ASSISTANCE SCHEME

### (a) Preparation for Implementation of the Legal Assistance Scheme

<i>Item</i>	<i>Section</i>	
1	s.66A(1)&(2)	<p>The provisions will empower PCPD to prescribe forms by which an aggrieved data subject may question the target respondent (the data user). The information so obtained from the target respondent may help the data subject decide whether to institute civil action to seek compensation.</p> <p>No prescribed form has yet been prepared because of the following reasons:-</p> <p>(a) Section 66A(1) states that the Commissioner “may” prescribe the forms. The operative word “may” means the Commissioner can in his discretion decide whether and when to exercise this power.</p> <p>(b) The legal assistance scheme is a new service of the PCPD and it is too early to predict the demand for it. If it turns out to be in great demand and cases are generally meritorious, the PCPD will seek more resources from the Administration as well as consider prescribing the forms so that prospective applicants for legal assistance may avail of such self-help procedures to make their own preliminary assessment of whether to institute civil action.</p> <p>(c) There are a number of issues which the PCPD will have to consider in prescribing the forms, such as the questions to be set out in the forms and how detailed they ought to be, the period within which the forms must be served, and the manner in which the forms may be served. PCPD will be in a better position to consider those issues after having acquired more practical experience in operating the legal assistance scheme.</p>
2	s.66A(3)	<p>In light of item 1 above, no work under this subsection will be carried out at this stage.</p>

<i>Item</i>	<i>Section</i>	
3	s.66A(4)	In light of item 1 above, no work under this sub-section will be carried out at this stage.
4	s.66B	<p>To prepare for the launch of the legal assistance scheme, the PCPD has carried out/will carry out the following activities:</p> <p>(a) Prepared and launched an information leaflet on “Legal assistance for civil claims under the Personal Data (Privacy) Ordinance” (<b>Annex C</b>) which covers the prerequisites to an application for legal assistance, factors to be considered in vetting an application, forms of legal assistance, and review of a decision to refuse or to discontinue legal assistance; and</p> <p>(b) An application form will be made available upon the launch of the legal assistance scheme.</p>

(b) Promotional and Public Educational Work

<i>Target Audience</i>	<i>Activities</i>
Data subjects (general public) and data users	1. Media briefing to all media held on 15 Jan 2013.
	2. Information leaflet on “Legal assistance for civil claims under the Personal Data (Privacy) Ordinance” was issued on 15 January 2013. This is available on PCPD website and copies are available for distribution at District Offices.
	3. A short video was uploaded onto PCPD website in October 2012.

**Office of the Privacy Commissioner for Personal Data**  
**25 February 2013**



# Guidance Note

## New Guidance on Direct Marketing

### PART 1: Introduction

#### Purpose of guidance

1.1 Direct marketing is a common business practice in Hong Kong. It often involves collection and use of personal data by an organization for direct marketing itself and in some cases, the provision of such data by the organization to another person for use in direct marketing. In the process, compliance with the requirements under the Personal Data (Privacy) Ordinance (the “**Ordinance**”) is essential. This document is issued by the Privacy Commissioner for Personal Data (the “**Commissioner**”) to provide practical guidance on data users’ compliance with the new regulatory requirements for direct marketing under the new Part VI A of the Ordinance<sup>1</sup>. It helps data users to fully understand their obligations as well as to promote good practice. Data users should also make reference to other laws, regulations, guidelines and codes of practice that are relevant for direct marketing purposes insofar as they are not inconsistent with the requirements under the Ordinance.

1.2 This Guidance shall take effect on the same date as the date of commencement of Part VI A of the Ordinance (the “**commencement date**”). It will supersede and replace the Commissioner’s “Guidance on the Collection and Use of Personal Data in Direct Marketing” issued in November 2012. For the avoidance of doubt, until Part VI A of the Ordinance

takes effect, the Commissioner’s “Guidance on the Collection and Use of Personal Data in Direct Marketing” remains fully valid.

#### What is “direct marketing”?

1.3 The Ordinance does not regulate all types of direct marketing activities. It defines “**direct marketing**” as:

- (a) *the offering, or advertising of the availability, of goods, facilities or services; or*
- (b) *the solicitation of donations or contributions for charitable, cultural, philanthropic, recreational, political or other purposes,*  
*through **direct marketing means**<sup>2</sup>.*

“**Direct marketing means**” is further defined to mean:

- (a) *sending information or goods, addressed to specific persons by name, by mail, fax, electronic mail or other means of communication; or*
- (b) *making telephone calls to specific persons.*

1.4 Hence, “direct marketing” under the Ordinance does not include unsolicited business electronic messages sent to telephones, fax machines or email addresses without addressing to specific persons by name and person-to-person calls being made to phone numbers randomly generated<sup>3</sup>.

<sup>1</sup> The new Part VI A under the Ordinance was introduced by the Personal Data (Privacy) (Amendment) Ordinance 2012. It will take effect on 1 April 2013.

<sup>2</sup> Section 35A(1)

<sup>3</sup> Please refer to the Unsolicited Electronic Messages Ordinance (Cap. 593, Laws of Hong Kong) enforced by the Office of the Communications Authority.

#### Examples:

- ✓ A marketing SMS sent to the mobile phone number of a named individual is considered a form of direct marketing.
- ✓ A telecommunications service provider approaching its existing customers by telephone to offer upgrade services is direct marketing.
- ✗ Direct mail sent to an address or the “occupant” of an address is not considered direct marketing as it is not addressed to specific persons by name.
- ✗ A salesperson knocking on the door of a potential customer to promote his products is not considered direct marketing.
- ✗ A customer service manager’s introduction of goods/services to a customer face-to-face is not considered direct marketing (but the subsequent use of the customer’s personal data for sending him promotional materials is considered direct marketing).
- ✗ A marketing call to the unidentified owner of a particular telephone number is not direct marketing.

#### Direct marketing to a corporation’s owner or staff

1.5 Generally speaking, an individual’s office telephone number or office address, when combined with his name, would amount to his personal data from which his identity can be ascertained directly or indirectly. It is common for the holder of a certain post or job title (e.g. purchasing manager) in a corporation to be approached by a direct marketer at his office telephone or address for selling products or services targeted at the corporation (e.g. photocopying machines or photocopying services) or targeted at him personally. In these circumstances, whether the Commissioner will enforce the provisions in Part VI A of the Ordinance depends on:–

- (a) the circumstances under which the personal data is collected, for example, whether the personal data concerned is collected in the individual’s official capacity;

- (b) the nature of the products or services, that is, whether they are for the use of the corporation or personal use; and
- (c) (where the products or services can cater for either use of the corporation or personal use) whether the marketing effort is targeted at the corporation or the individual.

1.6 In clear-cut cases where the personal data is collected from individuals in their official capacities and the product or service is clearly meant for the exclusive use of the corporation, the Commissioner would generally take the view that it would not be appropriate to enforce the provisions in Part VIA of the Ordinance. In other cases, the provisions in Part VIA should be complied with.

#### Examples:

- ✓ In an office furniture exhibition, an exhibitor collected business cards from the procurement staff of a corporation and sent brochures to them by using the names and addresses on the business cards to market office furniture. Part VIA would not apply.
- ✗ This exhibitor is not allowed to use the same personal data to market beauty products to the procurement staff without complying with the requirements under Part VIA.
- ✗ A bank collected a customer’s office telephone number and address as contact information in his application for a savings account. The bank cannot use the office telephone number and address to contact him to market tax loan without complying with the requirements under Part VIA.

#### Overarching principles

1.7 When handling personal data in the course of carrying out direct marketing activities, it is good practice for data users to observe the following principles:

- (a) Respect data subject’s right of self-determination of his/her own data

- (b) Be accountable, open and transparent in the handling of personal data including clearly identifying to the data subject the data user whom the direct marketer represents
- (c) Give individuals an informed choice of deciding whether or not to allow the use of their personal data in direct marketing
- (d) Present information regarding the collection, use or provision of personal data in a manner that is easily understandable and, if in written form, easily readable
- (e) Honour and update the data subject's request for ceasing the use of his/her personal data in a professional and timely manner
- (f) Be inclusive to cater for the special needs of minorities, for example, adopt a universal design for webpages following the W3C principles<sup>4</sup> and thus provide information in large prints for the aged and those with impaired vision

## Definitions

1.8 First and foremost, it is important to understand the meaning of certain key terms used under Part VI A of the Ordinance. The definitions are found in section 35A.

### Consent

1.9 The word "**consent**" is widely used in Part VI A to denote a data subject's agreement to the use or provision of his/her personal data for use in direct marketing. Specifically, it is provided that a data user must not use or provide personal data to another person for use in direct marketing unless it has obtained the data subject's consent<sup>5</sup>. Consent is defined broadly to cover "an indication of no objection to the use or provision"<sup>6</sup>. To qualify as an indication of no objection, the data subject concerned must have **explicitly** indicated that he/she did not object to the use and/or provision of his/her personal data to another for use in direct marketing. Hence, consent cannot be inferred from the data subject's non-response. In other words, silence does not constitute consent.

1.10 The circumstances under which a data user collects a data subject's personal data and obtains his consent will be relevant in determining whether or not the consent is validly given.

#### Examples of valid consent:

- ✓ An oral reply: "Okay, please send me the promotional offer/information to my address at XYZ"
- ✓ An oral reply: "I am interested to know more about the product but I am busy, please call my home number at 1234-5678 in the evening"
- ✓ Not checking the tick box indicating objection to receive direct marketing materials but signed and returned to the data user an agreement to the effect that the data user's notification regarding collection, use and provision of personal data has been read and understood\*
- ✓ Ticking the box "I do not object to the use of my personal data for direct marketing of XXX" in an application form

\* Whether it is a valid indication of consent or not is still subject to the manner in which the information in the agreement is presented, (e.g. whether the tick box is conspicuous and easily readable, the location of the signature, etc.).

#### Examples of invalid consent:

- ✗ A customer hanged up immediately upon knowing that the caller is calling for direct marketing purpose.
- ✗ The data subject replied "I am busy, please call back later".
- ✗ The data subject replied "I will think about it".
- ✗ No response is received from the data subject to a direct marketing solicitation by mail or electronic means.
- ✗ An investment company informed its customers in writing of the use or provision of their personal data for use in direct marketing and stated that any objection has to be made by sending back the objection slip attached. A non-response from the customers does not amount to valid consent.
- ✗ A telemarketer ending a call upon queries from the data subject about the source of personal data used by the telemarketer.

<sup>4</sup> Please refer to World Wide Web Consortium (<http://www.w3.org>) for details.

<sup>5</sup> Section 35E and section 35K

<sup>6</sup> Section 35A(1)



## Marketing subject

1.11 The term “**marketing subject**” is defined to mean (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<sup>7</sup>.

1.12 Data users are required to inform the data subjects of the classes of marketing subjects in relation to which the data users are going to carry out direct marketing. In specifying the **classes** of marketing subjects, the description should be specific, making reference to the distinctive features of the goods, facilities or services so that it is practicable for the customers to ascertain the goods, facilities or services to be marketed with a reasonable degree of certainty.

### Examples of acceptable and unacceptable descriptions of the classes of marketing subjects:

- ✓ Promotional offers in relation to telecommunications network services operated by ABC Company
- ✓ Beauty Products offered by ABC Company
- ✗ “All goods and services offered by ABC Group Company” (a holding company of subsidiary companies with a diversified business portfolio) would be too vague without naming the classes of goods, facilities or services
- ✗ “Goods and services provided by ABC Company, related parties, agents, contractors and suppliers” would be too broad
- ✗ “Retail services and products provided by ABC Company” would be too broad for customers to comprehend the classes of goods, facilities or services

## Permitted class of marketing subjects

1.13 “**Permitted class of marketing subjects**” means a class of marketing subjects in relation to which a data subject has provided his/her consent to the data user for the use or provision to another person for use of his/her personal data in direct marketing<sup>8</sup>.

### Example of class of marketing subjects:

If a data subject has given consent to allow a data user to use his/her personal data for direct marketing of (a) cosmetic products and (b) telecommunications network services, then (a) and (b) would be the permitted class of marketing subjects for this particular data subject.

## Permitted class of persons

1.14 “**Permitted class of persons**” means the class of persons in relation to whom a data subject has provided his/her consent to the data user to provide his/her personal data for use in direct marketing<sup>9</sup>.

### Example of permitted class of persons:

If a data subject has given consent to AAA Company to provide his/her personal data to: (a) financial services companies and (b) telecommunications network service providers for use in direct marketing, then the permitted class of persons of the data subject’s personal data for use in direct marketing would be any company whose nature of business is financial services or telecommunications network services.

<sup>7</sup> Section 35A(1)

<sup>8</sup> “Permitted class of marketing subjects” is defined under section 35A(1) as “in relation to a consent by a data subject to an intended use or provision of personal data, means a class of marketing subjects– (a) that is specified in the information provided to the data subject under section 35C(2)(b)(ii) or 35J(2)(b)(iv); and (b) in relation to which the consent is given”.

<sup>9</sup> “Permitted class of persons” is defined under section 35A(1) as “in relation to a consent by a data subject to an intended provision of personal data, means a class of persons– (a) that is specified in the information provided to the data subject under section 35J(2)(b)(iii); and (b) in relation to which the consent is given”.

## Permitted kind of personal data

1.15 “**Permitted kind of personal data**” means the specific type of personal data (e.g. address, telephone number) in relation to which a data subject has given his/her consent to the data user for use or provision to another person for use in direct marketing<sup>10</sup>.

### Example of permitted kind of personal data:

If a data subject has given consent to use or provide his/her (a) contact details (e.g. phone number or address) and (b) age group to ABC company for direct marketing purpose, then (a) and (b) would be the permitted kinds of personal data in relation to the consent by the data subject to an intended use or provision of his/her personal data for use in direct marketing.

## Response channel

1.16 “**Response channel**” is the means of communication provided by a data user for a data subject to indicate his/her consent to the intended use or provision for use of his/her personal data<sup>11</sup>. A response channel can be:

- A telephone hotline\*
- A facsimile number
- A designated email account
- An online facility to allow data subject to subscribe or unsubscribe
- A specific address to collect written response from the data subject
- A designated person to handle request from the data subject through the above or other means\*

\* Where telephone communication is involved, it is advisable for data users to record the communication. Data users should also remind data subjects that the telephone communication between them would be recorded before the recording.

1.17 Where the consent to be sought from a data subject is for the provision of his/her personal data to another person for use in direct marketing, a data user can only elect a response channel which enables the data subject’s consent to be made **in writing**. This arrangement is necessary for complying with Division 3 of Part VIA of the Ordinance which specifically requires that such consent has to be communicated in writing<sup>12</sup>.

<sup>10</sup> “Permitted kind of personal data” is defined under section 35A(1) as “in relation to a consent by a data subject to an intended use or provision of personal data, means a kind of personal data– (a) that is specified in the information provided to the data subject under section 35C(2)(b)(i) or 35J(2)(b)(ii);and (b) in relation to which the consent is given.”

<sup>11</sup> “Response channel” is defined under section 35A(1) as “a channel provided by a data user to a data subject under section 35C(2)(c) or 35J(2)(c).”

<sup>12</sup> Section 35J(2)(c)

## PART 2: Collection of Personal Data for Direct Marketing

### Personal data not to be excessively collected

- 2.1 Data Protection Principle (“DPP”) 1(1) in Schedule 1 to the Ordinance provides that only necessary, adequate but not excessive personal data is to be collected by a data user for a lawful purpose directly related to its function or activity.
- 2.2 A data user does not normally collect a customer’s personal data solely for direct marketing purpose. There is usually a specific or main purpose or reason for collecting the personal data (e.g. for provision of mobile phone network services by a telecommunications operator or provision of financial services by a bank). While the data user may collect personal data which is necessary for fulfillment of that specific purpose, it may only collect *additional* personal data from the customer for direct marketing purpose (e.g. customer profiling and segmentation) if the customer elects to supply the data on a voluntary basis.

#### Tips:

Basically, the name and contact information of a customer should suffice for the purpose of direct marketing. Data users should inform their customers that the supply of any other personal data to allow the data user to carry out specific purposes, e.g. customer profiling and segmentation, is entirely voluntary.

e.g. Hong Kong Identity Card Number is not normally required for direct marketing purposes.

#### Example:

It is not necessary for a bank to collect the “education level” and “marital status” of an applicant for opening a savings account. Though the information may assist the bank in better understanding the background of this customer and selecting appropriate services or products to be promoted to him, the data is only intended for business promotion purpose and need not be collected in the first place. The bank thus has to inform the customer that the provision of such data is entirely voluntary.

### Collection by means that are fair and lawful

- 2.3 DPP 1(2) requires that personal data shall be collected by means which are lawful and fair in the circumstances of the case.
- 2.4 A data user should not use deceptive or misleading means to collect personal data for direct marketing.

#### Example of deceptive or misleading means:

If the actual purpose of making a cold call is to obtain the party’s personal data for direct marketing purpose, this should be explicitly made known to the called party prior to the actual collection of the personal data.

Similarly, in promoting the product/service of Company A, Company A should not hold out to be Company B to the called party so as to mislead the latter to believe that it is Company B (with whom the called party has an established customer relationship) which is making the direct marketing approach and, based on such false reliance, he discloses his personal data in the course of the transaction.

Further, the offering of free gifts on the street by a person to attract passers-by to complete a survey questionnaire and to provide their personal data in the process when the true purpose is to collect and amass personal data for sale in bulk to direct marketing companies is considered an unfair means of collection of personal data.

2.5 Irrespective of whether or not the direct marketing activities of the data user are directly related to the original purpose of collection of the customer's personal data for a primary function of the data user which the customer seeks, the customer is free to decide whether to give *additional* personal data for the purpose of direct marketing. In the circumstances, the data user should make known to the customer that it is optional for him to supply the *additional* data.

2.6 A customer's consent to provide the personal data may be obtained in such circumstances that raise a reasonable doubt on the genuineness of the consent and whether it was voluntarily given.

Example of a "bundled consent" situation:

When a data user collects personal data from customers through a service application form which is designed in such a way that renders it impracticable for its customers to refuse the use of their personal data for direct marketing purposes unrelated to the services the customers seek (i.e. under a "bundled consent" situation), such collection of personal data may be deemed an unfair collection of personal data.

**Data subject to be informed of the purpose of use and classes of transferees**

2.7 DPP 1(3) requires a data user to take all reasonably practicable steps to inform the data subject on or before the collection of his personal data whether it is voluntary or obligatory for him to supply the data, the purpose of use of the data and the classes of persons to whom the data may be transferred (i.e. transferee). Where a data user intends to use the personal data in direct marketing, the requirements under Part VIA of the Ordinance apply as to the specific information to be given to the data subjects (see paragraphs 3.1 to 3.6 for further details).

2.8 Although there is no requirement under DPP 1(3) and Part VIA of the Ordinance that requires the information to be provided to the customers in writing where the data user intends to use the personal data in direct marketing, it is prudent for data users to provide the information by way of a written notice which is generally referred to as "Personal Information Collection Statement" ("**PICS**").

*PICS and Privacy Policy Statement ("**PPS**")*

2.9 PICS and PPS are common tools for data users to communicate their purpose(s) of collection of personal data, the kinds of data collected, the possible classes of transferees of the data as well as the policies and practices in relation to personal data. They serve as evidence to demonstrate that practical steps have been taken by a data user to provide the information to the data subjects.

2.10 To ensure that a PICS is effective, it is necessary for data users to take into consideration the following factors:

- (a) Whether the layout and presentation of the PICS (including the font size, spacing, underlining, use of headings, highlights and contrasts) has been designed so that the PICS is easily readable to customers with normal eyesight.
- (b) Whether the PICS is presented in a conspicuous manner (e.g. the PICS is a stand-alone section and its contents are not buried among the terms and conditions for the provision of the data user's services).
- (c) Whether the language used in the PICS is easily understandable (e.g. the choice of simple rather than difficult words and the avoidance of use of legal terms or convoluted phrases).
- (d) Whether further assistance from the data user such as help desk or enquiry service is available to enable the customer to understand the contents of the PICS.

2.11 Data users should communicate their message effectively in clear and simple language and in a form easily understandable, readable and accessible by reference to the actual circumstances under which the personal data is collected such as the characteristics of the targeted customers (in terms of age, education level, etc.).

2.12 Data users should not define the purpose of use and class of transferees of the personal data in such liberal and vague terms that it would not be practicable for customers to ascertain with a reasonable degree of certainty how their personal data could be used and who could have the use of the data.

2.13 If a data user intends to use or provide personal data for use in direct marketing, it must inform the data subjects that it intends to so use or provide the data and that the data may not be so used or provided unless it receives the data subject's consent (in the case of provision of personal data, the consent must be in writing) to the intended use or provision<sup>13</sup>. More elaboration on the information to be provided to the data subject will be discussed below and under Part 3.

Tips for defining purpose of use and class of transferees:

- ✗ Avoid using loose terms, for example, *"such other purposes as the Company may from time to time prescribe"* to cover direct marketing as a purpose of collection.
- ✓ An effective way is to define the class of transferees by its distinctive features, such as *"financial services companies"*, *"investment service providers"*, *"telecommunications services providers"*, etc.
- ✗ Avoid using vague terms such as, *"all business partners"*, *"selected companies which will provide information of services in which customers may be interested"* or *"such other agents as the company may from time to time appoint"*.

## Obtain consent on application forms

2.14 Data users are reminded **NOT** to design a service application form in such a way that renders it impracticable for its customers to refuse the use of their personal data for direct marketing purposes. For example, it is common for a service application form to incorporate both the terms and conditions of provision of the data user's services as well as statements relating to the use of the data collected for marketing products or services, or the provision of the personal data to a third party. If the customer is only provided with one space to sign on the form, he has to choose between (a) giving up the application for the service or (b) giving his "bundled consent" agreeing to the terms and conditions for the provision of the service he originally seeks as well as the use of his personal data as prescribed by the data user when in fact he finds such prescribed use objectionable. This is undesirable.

2.15 In such circumstances, the data user is advised to design its service application form in a manner that provides for the customer's agreement to the terms and conditions for the provision of the service to be separated from the customers' consent to the use of his personal data for direct marketing. Recommended ways to achieve this end include providing a separate signature or tick box to indicate the customer's agreement or no objection to the prescribed use of his personal data.

<sup>13</sup> Sections 35C(2) and 35J(2).

## General or selective consent<sup>14</sup>

2.16 A data subject's consent for the use or provision of his/her personal data for use in direct marketing may be given either *generally or selectively*<sup>15</sup>. By selective consent, the data subject may choose to restrict his/her consent to (a) only certain kinds of personal data held by the data user; (b) only certain classes of the full range of marketing subjects offered by the data user; and/or (c) only certain classes of persons to which the data user intends to provide for use in direct marketing. To facilitate the data subjects' exercise of their choice, it is recommended that data users inform the data subjects of this right of choice (i) when soliciting the personal data in question; and (ii) in the response channel through which the data subject may elect to give his/her consent.

2.17 In some circumstances, a data user may seek a general consent from the data subjects to cover all specified kinds of personal data, classes of marketing subjects and classes of persons to which the data is to be provided. If no such consent is given by the data subject, a data user is not allowed to use any kind of personal data of the data subject to market any class of products or services or provide any personal data of the data subject to any class of persons for use in direct marketing.

### Tips:

1. Do not ask customers to provide bundled-consent. Service-providers should obtain customers' consent for the use and/or provision of their personal data to others for use in direct marketing separately from the agreement and acceptance to the use of their personal data in connection with the services offered to them
2. Allow customers to indicate separately whether they agree to (i) the use, and (ii) the provision of their personal data to others

3. Provide information to customers in one self-contained document and avoid making cross-reference to other documents or other sources of information as far as practicable
4. Provide a check-box for customers to indicate agreement or no objection to the use of personal data for promotion of products and services
5. Inform customers that they may give selective consent to (a) the kinds of personal data; (b) the classes of marketing subjects; and (c) the classes of data transferees
6. Highlight check-boxes to attract customers' attention and use simple, easily understandable and readable language

## Use of the personal data

2.18 Data users are required under DPP3 not to use personal data for a new purpose unless the prescribed consent is obtained from the data subject. A new purpose means a purpose other than the purpose for which the data was to be used at the time of the collection or a directly related purpose. Under section 2(3), prescribed consent means express consent given voluntarily which has not been withdrawn in writing.

2.19 In accordance with DPP3, if a data user intends to use or provide personal data for use in direct marketing, it has to seek the prescribed consent from the data subject if such data was originally collected not for direct marketing purpose. Despite section 2(3), a data user is taken to have obtained the prescribed consent of the data subject if it has not contravened any of the relevant provisions regarding (i) the taking of specified actions before using or providing personal data for use in direct marketing; (ii) not using or providing personal data for use in direct marketing without the data subject's consent; and (iii) ceasing the use or provision of personal data for use in direct marketing upon obtaining an opt-out request from the data subject<sup>16</sup>. These requirements [(i), (ii), and (iii)] are explained in Parts 3 and 4.

<sup>14</sup> The definition of consent includes an "indication of no objection".

<sup>15</sup> Sections 35E(1)(a) and 35K(1)(a)

<sup>16</sup> Sections 35H and 35M

## PART 3: Use of Personal Data in Direct Marketing

### New requirements to be followed before using personal data in direct marketing

3.1 A data user who intends to use a data subject's personal data in direct marketing must take specified actions which are elaborated below. The obligation on the data user applies irrespective of whether the personal data is collected from the data subject by the data user<sup>17</sup>. Hence, even if a data user has collected the personal data of a data subject from a third party, it is still required to take the specified actions and obtain the necessary consent<sup>18</sup> from the data subject before using the personal data for direct marketing.

### Inform the data subject of data user's intention to use the personal data in direct marketing and provide the data subject with the prescribed information

#### When to inform?

3.2 As a responsible approach, it is always advisable for the data user to inform the data subject as early as possible the data user's intention to use the data subject's personal data for direct marketing purpose. Where possible, this should be done on or before the personal data of the data subject is collected.

#### Example of notification:

When a customer opens a savings account with a bank, the customer should be informed of the bank's intention to use his personal data for marketing its different types of banking services and be given a choice of whether to allow such usage at the time his personal data is collected.

3.3 General and loose description of the purpose of use such as "*such other purposes as the company may from time to time prescribe*" will not be acceptable.

### What to be included?

3.4 The following information must be included in the notice to the data subject:

- (a) The data user intends to use the personal data of the data subject for direct marketing;
- (b) The data user may not so use the data unless the data user has received the data subject's consent to the intended use;
- (c) The kinds of personal data to be used;
- (d) The classes of marketing subjects in relation to which the data is to be used; and
- (e) The response channel through which the data subject may, without charge by the data user, communicate the data subject's consent to the intended use.

Example of notification to customers of the use of their personal data in direct marketing and obtaining their consent *selectively*:

1. We intend to use your personal data for direct marketing;
2. We may not so use your personal data unless we have received your consent;
3. We shall use the following personal data for marketing our services mentioned in paragraph 4:–
  - your name
  - your residential address
  - your mobile phone number
  - your residential phone number
  - your email addressPlease tick the box provided to indicate your consent\* for each item.
4. Your personal data will be used for marketing our services as follows:–
  - mobile phone
  - internet networkPlease tick the box provided to indicate your consent\* for each item.

\_\_\_\_\_  
Signature of the customer  
Name: xxx  
Date: yyyy/mm/dd

\* An alternative to this "opt-in" approach to indicate consent is to request the customer to tick the box to indicate his objection. The latter "opt-out" approach is equally acceptable.

<sup>17</sup> Section 35C(3)

<sup>18</sup> The definition of "consent" includes "an indication of no objection" (see section 35A(1)).

## How to inform?

3.5 There is no specific requirement under the Ordinance prescribing how the data subject is to be informed. However, it is a requirement that the above information should be presented in a manner that is **easily understandable** and if in written form, **easily readable**<sup>19</sup>. In this regard, a reasonable man's test should be adopted when deciding what is "easily readable and easily understandable". Vague and loose terms (e.g. "marketing goods and/or services by us, our agent, our subsidiaries, or our partners", "providing carefully selected offers, promotions and benefits by us, our subsidiaries, affiliates and/or our partners", "such type of services and products as the company may from time to time think fit") will fall short of meeting the requirement.

## Not to use personal data in direct marketing without the data subject's consent

3.6 Even though a data user has taken steps to inform or notify the data subject as described above, the data user should not use personal data in direct marketing unless the data subject's consent to the intended use was received. A data subject may communicate his/her consent either through the response channel provided by the data user or other means<sup>20</sup>. For the

meaning of consent, please refer to the discussion under the heading "Definition" in Part 1 above.

3.7 For a data user's use of personal data in direct marketing, consent from the data subjects may be obtained either in writing or orally. Where an oral consent is obtained from a data subject, a written confirmation must be sent to the data subject not later than 14 days after the oral consent is obtained<sup>21</sup>. The written confirmation has to be sent to the last known correspondence address of the data subject which includes a physical address, an email address and a telephone number for SMS. The following information<sup>22</sup> should be included in the written confirmation to the data subjects and presented in an easily readable manner:

- (a) The date of receipt of the consent;
- (b) The permitted kind of personal data; and
- (c) The permitted class of marketing subjects.

3.8 The use of the personal data in direct marketing must be consistent with the data subject's consent<sup>23</sup>, that is, (a) the personal data to be used falls within the permitted kind of personal data; and (b) the marketing subject in relation to which the data is used falls within the permitted class of marketing subjects<sup>24</sup>.

### Example of indicating no objection *generally*:

We intend to use your name, telephone number and address for direct marketing credit card and insurance products/services but we cannot so use your personal data without your consent.

Please sign at the end of this statement to indicate your agreement to such use. Should you find such use of your personal data not acceptable, please indicate your objection before signing by ticking the box below.

- The customer named objects to the proposed use of his/her personal data in direct marketing.

\_\_\_\_\_  
Signature of the customer  
Name: xxx  
Date: yyyy/mm/dd

<sup>19</sup> Section 35C(4)

<sup>20</sup> Section 35E(3)

<sup>21</sup> Section 35E(1)(b)

<sup>22</sup> Section 35E(1)(b)

<sup>23</sup> Section 35E(1)(c)

<sup>24</sup> Section 35E(2)



3.9 It is recommended that the data user also states in the written confirmation its contact information to facilitate the data subject to dispute the confirmation. It would be prudent for the data user to wait for a while (say for example, 14 days) for the data subject to dispute as necessary the written confirmation before (barring such disputes) using the personal data in direct marketing.

**Tips:**

Data users have NOT obtained a valid consent in the following situation:

- ✗ If a data subject refuses to provide his contact information and as a result the written confirmation cannot be sent
- ✗ When the written confirmation to the data subject's last known address (be it sent via mail or email) was returned undelivered

3.10 It is good practice for the data user to confirm, at the time of obtaining the data subject's oral consent, the data subject's contact means (e.g. telephone number to send SMS; correspondence or email address to send text message) to which the written confirmation is to be sent. Also, 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) and a record of the written confirmation sent. This would, in the case of a dispute, help to support that a written confirmation has effectively been sent to the data subject.

**Good Practice for Recording Oral Consent:**

1. Before recording, inform the data subject that the call may be recorded and make a reasonable effort to ensure that the individual is advised of the purposes for which the information will be used;
2. Recording may only take place with the data subject's consent;
3. The recording should be made available to the data subject upon request;
4. Ensure compliance with other provisions of the Ordinance relating to, for example, retention, security, access and erasure of data.

**Notify data subject of his/her right to request the data user to cease to use the data in direct marketing when using his/her personal data for the first time**

3.11 The data user must, when using the data subject's personal data for the first time in direct marketing, notify the data subject of his/her right to request the data user to cease to so use the data, without charge to the data subject. This obligation applies irrespective of whether the personal data is obtained directly from a data subject or from other sources.<sup>25</sup>

3.12 If the direct marketing approach is made by email, it is recommended that the data user highlights this opt-out right of the data subject in the email and provides the data subject with an electronic link to the address of the data user for the data subject to exercise such right. To allay the data subject's worry of responding to a fraudulent website, the marketer is advised not to collect personal data other than his/her email address (for proper identification purpose) in the opt-out process. If the marketing approach is made by mail or fax, a "tick" box and return address may be provided in the marketing communication to facilitate the customer to exercise his opt-out right. If the marketing approach is made by telephone, the marketer should inform the data subject of his right by making clear to the called party that *"if you do not wish to receive further marketing calls from us, let us know and we will not call again"* (or words to the same effect). In case that the marketing message is sent via SMS, a telephone hotline may be provided to receive opt-out requests or the customer may be alerted to return a SMS to the telephone number through which the SMS was sent.

<sup>25</sup> Section 35F

## Ceasing to use personal data in direct marketing when so requested by a data subject

- 3.13 A data subject may **at any time** require a data user to cease to use his/her personal data in direct marketing<sup>26</sup>, irrespective of whether the data is obtained directly from the data subject or not and whether an earlier consent has been given by the data subject to the data user or a third person for such use<sup>27</sup>. A data user must, **without charge** to the data subject, cease to use the personal data concerned upon receipt of such notification<sup>28</sup>.
- 3.14 There is no restriction under the Ordinance as to the manner in which the data subject shall exercise his/her opt-out right. A data subject is entitled to communicate his/her opt-out requirement to the data user either orally or in writing.
- 3.15 If a customer chooses to opt-out orally in, for example, a telemarketing call, the marketer must follow up to comply with the requirement. If the marketer is an agent making the marketing approach on behalf of the data user, the marketer must communicate the opt-out request to the data user and the data user is expected to make contractual arrangements with the marketing agent to ensure that it receives the opt-out notification. For further explanation on the exercise of customer's opt-out right, please refer to the "Exercising Your Right of Consent to and Opt-out from Direct Marketing Activities under the Personal Data (Privacy) Ordinance" issued by the Commissioner.

## How to comply with the data subject's opt-out request effectively?

- 3.16 In order to comply with the data subject's opt-out requirement effectively, data users have to maintain a list of all customers who have indicated that they do not wish to receive further marketing approaches (the "**Opt-Out List**"). Data users have to adopt a systematic approach to comply with the data subjects' requests for ceasing such use of their personal data. The Opt-Out List should be updated regularly.
- 3.17 Where the list is maintained via an online computer network, individual marketing staff connected to the network have to input new opt-out requests as and when they are received. If the list is distributed other than by a computer network, it is recommended that marketing staff members are notified of the updates at a frequency of no less than once per week.
- 3.18 Where the data user conducts its business through branch offices, each branch office has to maintain its own Opt-Out List of customers who have informed the branch office that they do not wish to receive further direct marketing approach. The head office has to coordinate the updating of a consolidated Opt-Out List by collecting the opt-out information supplied by all branch offices concerned and informing them on a continuous basis the updated position.
- 3.19 A data user should have standing procedures for its staff to follow in regard to accessing and updating the Opt-Out List and complying with the data subjects' opt-out requirements.

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<sup>26</sup> Section 35G(1)

<sup>27</sup> Section 35G(2)

<sup>28</sup> Section 35G(3)

## Retention of opt-out list and record of consent

3.20 A data user must take all practicable steps to erase the personal data it held which is no longer required for the original purpose (including any directly related purpose) for which the data was collected<sup>29</sup>. Hence, a data user is required to make an assessment of the necessity of deleting all or some of the personal data of those customers who have indicated their opt-out requirements, and erase unnecessary personal data accordingly. For details of the guidance on data erasure, please refer to the “Guidance on Personal Data Erasure and Anonymisation” issued by the Commissioner.

### Good Practice:

- ✓ Delete all personal data that is not required to implement the data user’s direct marketing strategy.
- ✓ Not to retain any personal data longer than is necessary for use in direct marketing. For example, after a marketing campaign is completed, a data user has to require its marketing agent to erase or return the personal data used in the campaign.
- ✓ Review the personal data held regularly to see if it is still necessary to retain the same and perform data erasure as required at regular intervals.

## Offence and Defence

3.21 The data user’s failure to comply with the requirements above may constitute an offence under the Ordinance and it will be liable on conviction to a fine and to imprisonment. For details, please refer to the table in the Schedule.

3.22 In any proceedings for an offence referred to in the said table, it is a defence for the data user charged to prove that the data user has taken all reasonable precautions and exercised all due diligence to avoid the commission of an offence.

## Exceptions

### Social and health care services

3.23 This part does not apply in relation to the offering, or advertising of the availability of: –

- (a) social services run, subvented or subsidized by the Social Welfare Department;
- (b) health care services provided by the Hospital Authority or Department of Health; or
- (c) any other social or health care services which, if not provided, would be likely to cause serious harm to the physical or mental health of –
  - (i) the individual to whom the services are intended to be provided; or
  - (ii) any other individual.

### Pre-existing data

3.24 The requirements for a data user to notify the data subject of his intention to use the latter’s personal data in direct marketing and to obtain the data subject’s consent or indication of no objection to the intended use under the new regulatory regime take effect on a prospective basis. They do not apply to the personal data (in relation to its use in marketing a class of marketing subjects) which the data user has control over its use before the entry into force of the new provisions<sup>30</sup> if:–

- (a) the data subject had been explicitly informed by the data user, in a manner which is easily understandable and (if informed in writing) easily readable, of the intended use or use of the data subject’s personal data in direct marketing in relation to the 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 use any of the data; and
- (d) the data user had not in relation to such use contravened any provision of the Ordinance as in force at the time of the use.

<sup>29</sup> Section 26 and DPP 2(2)

<sup>30</sup> Section 35D(1)

3.25 For the avoidance of doubt, this grandfathering arrangement does not apply to the use of the personal data of the data subject in relation to a different class of marketing subjects.

3.26 Also, this grandfathering arrangement applies only to the use of personal data by the data user for its own direct marketing (including the use of the data by its agent for marketing the data user's products or services).

**Example:**

If a bank had obtained a customer's mobile phone number, residential address and residential telephone number as well as his email address before the commencement date, and explicitly and clearly notified its customer that such personal data would be used for marketing banking and insurance services, and the bank has so used the mobile phone number before the commencement date, and such use has not met with the customer's indication of opt-out, then not only would the mobile phone number be exempted but the use of the other personal data already held by the bank prior to the commencement date, viz. residential address, email address and residential telephone number would also be exempted from the notification and consent requirement.

3.27 The grandfathering arrangement also applies to updates of personal data held by a data user before the commencement date. It does not apply to new data acquired after the commencement date through (i) updating the data subject's personal profile, and (ii) new business deals with the data subject.

**Example:**

If a data user held a data subject's residential address before the commencement date and the data subject moved after the commencement date, the data user may use the new residential address for continued marketing of the services it used to market to the data subject without the need to notify the data subject afresh and obtain his consent.

### Data collected from a third person

3.28 Data users should be reminded that the duty to inform the data subject of its intention to use the data subject's personal data in direct marketing is absolute and irrespective of whether the personal data is collected from data subjects directly or not. It is not uncommon that a data user may obtain personal data from a partner, an associate or a subsidiary company in a cross-marketing scheme. If the data user is planning to use the data received from a third party for direct marketing, the data user is still required to inform the data subject of the intention to use the data for direct marketing unless the third party has already taken such action and confirmed to the data user that the data subject had consented to the use or provision for use of his/her personal data in direct marketing and that the products or services that the data user intends to market fall within the class of marketing subject that the data subject had consented to<sup>31</sup>. In a nutshell, the data user must be notified **in writing** by the third party from whom the data was transferred (transferor) the following:–

- (a) the transferor has given **written** notice to the data subject and obtained his/her **written** consent to the provision of personal data;
- (b) the use of the personal data is consistent with the consent obtained from the data subject.

As for the transferor, the requirements in Part 4 of this guidance apply.

### Burden of proof

3.29 Data users are reminded that the burden of proof lies with the data user to establish that the specified actions to inform the data subject of its intention to use his/her personal data for direct marketing need not be taken due to the application of the grandfathering arrangement or a third party has already taken the specified actions<sup>32</sup>. It is therefore important for the data user to keep proper documentary evidence in this regard.

<sup>31</sup> Section 35D(2)

<sup>32</sup> Section 35C(7)

## Principal and agent

3.30 A data user may sometimes outsource the direct marketing to an agent. In such circumstance, either the principal or the agent will have to take the specified actions and obtain the data subject's consent as mentioned above. The principal and agent should spell out in clear terms in their contracts with whom the responsibility lies in giving information and obtaining consent.

3.31 Data users should be mindful that they will remain liable for its agent's or contractor's breach of the requirements under the Ordinance<sup>33</sup>. In addition, a data user is required to adopt contractual or other means to prevent any personal data transferred to the agent (i) from being kept longer than is necessary for processing of the data and (ii) from unauthorized or accidental access, processing, erasure, loss or use<sup>34</sup>. It is therefore prudent to select a reputable agent or contractor that can effectively monitor the performance of its frontline staff to ensure that the direct marketing activities comply with the requirements under the Ordinance. Due consideration should be given to incorporating the following standard terms:

(a) that the agent or contractor is prohibited from using the personal data for purposes other than the agreed direct marketing activities;

- (b) that a reasonable period be specified within which the agent or contractor has to return the personal data to the data user, including copies or reproductions thereof after the direct marketing activities have been completed. Alternatively, the customers' personal data shall be safely erased and destroyed. It would be prudent to obtain where appropriate, a professional third party's verification on the safe erasure and destruction of data;
- (c) where further transfer of personal data (e.g. sub-contracting) is not permitted, this should be explicitly made known in the contract;
- (d) that proper logs of direct marketing calls should be kept so that compliance checks can be conducted by the data user;
- (e) that appropriate security measures be put in place to protect the personal data from unauthorized or accidental access, processing, erasure, loss or use;
- (f) where the mailing or call list is prepared or compiled by the agent or contractor, the agent or contractor is required to check with the data user the latest opt-out list before making any direct marketing approaches; and
- (g) that the agent or contractor shall comply with the Ordinance and all applicable guidelines and codes of practice issued by the Commissioner and other relevant regulatory or professional bodies.

3.32 For more details regarding the outsourcing of processing of personal data, please refer to the Information Leaflet on "Outsourcing the Processing of Personal Data to Data Processors" issued by the Commissioner.

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<sup>33</sup> Section 65(2). It is to be noted that section 65 shall not be applicable for the purpose of any criminal proceedings.

<sup>34</sup> DPP 2(3) and DPP 4(2)

## PART 4: For Data Users Providing Personal Data to another person for Use in Direct Marketing

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### New requirements to be followed before providing personal data to another person for use in direct marketing

4.1 A data user who intends to provide a data subject's personal data (transferor) to another person (transferee) for use in direct marketing must inform the data subject of the data user's intention to so provide the data and take specified actions which are elaborated below<sup>35</sup>. This obligation on the data user applies irrespective of whether the personal data is directly collected from the data subject by the data user<sup>36</sup>.

### Inform the data subject in writing of the data user's intention to provide the data subject's personal data to another person for use by that person in direct marketing and provide the data subject with the prescribed information

4.2 A data transferor is required to provide the data subject with the prescribed information **in writing** and obtain his/her **written consent**<sup>37</sup>. Verbal consent is not sufficient. If the personal data is transferred **for gain**, data subjects must also be explicitly informed in writing that the data is to be so provided<sup>38</sup>.

### For gain

4.3 "For gain" means the provision of personal data in return for money or other property<sup>39</sup>, irrespective of whether the return is contingent on any condition or the data transferor retains any control over the use of the data<sup>40</sup>. Promotions to provide gains or benefits to data subjects would not fall under the definition, as

long as no gain to the data transferor in money or other property is involved.

### Examples of gains:

1. Agreeing with the transferee that the transferor will be rewarded with a commission for any direct marketing approach made by the transferee through the use of the data subject's personal data, irrespective of whether the direct marketing approach leads to a successful business transaction.
2. Sharing and temporary transfer of personal data with a transferee in exchange for fees or commission.
3. Transfer of personal data to another business entity to explore a business opportunity or to pursue a business cooperation.

### What to be included in the notice?

- 4.4 The following information must be included in the **written notice** to the data subject<sup>41</sup>:
- (a) The data user intends to provide the personal data of the data subject to another person for use by that person in direct marketing;
  - (b) The data user may not so provide the data unless it has received the data subject's **written consent** to the intended provision;
  - (c) The provision of the data is **for gain** (if it is to be so provided);
  - (d) The kinds of personal data to be provided;
  - (e) The classes of persons to which the data is to be provided;
  - (f) The classes of marketing subjects in relation to which the data is to be used; and

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<sup>35</sup> Section 35J(1)

<sup>36</sup> Section 35J(3)

<sup>37</sup> Section 35J(2). The definition of consent includes an "indication of no objection".

<sup>38</sup> Section 35J(2)(b)(i)

<sup>39</sup> Under section 3 of the Interpretation and General Clauses Ordinance, Cap 1, Laws of Hong Kong, "property" includes  
(a) money, goods, choses in action and land; and  
(b) obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in paragraph (a).

<sup>40</sup> Section 35A(2)

<sup>41</sup> Section 35J(2)

- (g) The response 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.

4.5 The above information must be presented in a manner that is easily understandable and readable<sup>42</sup>. Please refer to Part 3 regarding how this should be done.

### **Not to provide personal data for use in direct marketing without the data subject's written consent**

4.6 A data user should not provide personal data to another person for use by that person in direct marketing unless the data subject's **written consent** has been received<sup>43</sup>. A data subject may communicate to a data user the consent to so provide the personal data to others either through a response channel provided by the data user or other **written means**<sup>44</sup>.

4.7 Before providing personal data to another person for use in direct marketing, a data user must ensure that<sup>45</sup>:

- (a) It has received the data subject's written consent to the intended provision of personal data;
- (b) If the data is provided for gain, the intention to so provide was specified in the information provided to the data subject; and
- (c) The provision is consistent with the data subject's consent, that is to say, the personal data to be provided falls within the permitted kind of personal data, the person to whom the data is provided falls within the permitted class of persons, and the marketing subject falls within the permitted class of marketing subjects.

### **Ceasing to provide personal data for use in direct marketing when so requested by a data subject**

4.8 A data subject may **at any time** require a data user (i) to cease to provide his/her personal data to any other person for use by that other person in direct marketing and (ii) to notify any person to whom the data has been so provided to cease to use the data in direct marketing<sup>46</sup>, irrespective of whether an earlier consent has been given by the data subject to the provision of the personal data<sup>47</sup>. A data user must, **without charge** to the data subject, comply with such requirement by taking the following actions<sup>48</sup>:–

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

4.9 A person who receives a **written notification** from a data user to cease to use a data subject's personal data for direct marketing **MUST** cease to use the data in accordance with the notification<sup>49</sup>.

### **Transfer to partners/associates**

4.10 It is a misconception that a data user may freely transfer personal data to its parent company and its subsidiary or associated companies. A data user should not provide personal data to another person for use by that person in direct marketing unless the data subject's **written consent** is obtained, irrespective of whether any gain is involved on the part of the data user.

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<sup>42</sup> Section 35J(4)

<sup>43</sup> Section 35K(1)(a)

<sup>44</sup> Section 35K(3)

<sup>45</sup> Section 35K(1) and (2)

<sup>46</sup> Section 35L(1)

<sup>47</sup> Section 35L(2)

<sup>48</sup> Section 35L(3)

<sup>49</sup> Section 35L(5)

### Examples:

1. A customer applied for a credit card from a bank and consented to the use by the bank of his/her personal data for marketing its banking-related products and services. A new consent has to be obtained if the bank later intends to transfer the customer's personal data to the bank's associate company (operating an insurance business) for the latter's direct marketing of its insurance products.
2. A customer provided his personal data to a data user for joining its customer loyalty scheme in order to enjoy discounts and other benefits for purchases made at the data user's grocery stores. For the transfer of the personal data to other companies which belong to the same holding company for direct marketing purposes, the customer's written consent is required.

4.11 Similarly, for the provision of customers' personal data to business partners under a cross-marketing scheme, the relevant customers' (data subjects') **written consent** is also required.

### Transfer of data in cross-marketing activities

4.12 Where cross-marketing is conducted under the names of both the data user (as the transferor) and its partner company (as the transferee) for marketing of products or services of either or both of the two parties, and the customer has requested the partner company to cease to use his data, then the partner company should, unless otherwise specified by the customer, also inform the transferor company about the request made by the customer. Both the partner company and the transferor company must make no further marketing approaches to the customer using his personal data concerned in the cross-marketing scheme. Where cross-marketing is conducted under the sole name of the partner company for marketing of the partner company's products or services and the customer has indicated his opt-out request to the partner company, the partner company must make no further marketing approaches to the customer.

4.13 The guidance in Part 3 on how to comply with the data subject's opt-out request, retention of the Opt-Out List and the record of consent of use of personal data in direct marketing is equally applicable to the data transferor and transferee here. Timely exchange of the Opt-Out lists between the two parties is required.

4.14 When conducting cross-marketing activities, the transferor and partner companies (transferee) are reminded to take the following steps:–

(a) Before transferring the personal data, the transferor company is advised to assess the adequacy of the personal data protection offered by the partner company. There should be clear written agreement between the transferor company and the partner company governing the handling of customers' personal data transferred for the purpose of cross-marketing. In particular, the transferor should ensure that the customers' personal data will only be used for marketing the permitted class of marketing subjects consented to by the data subjects.

(b) When conducting cross-marketing activities,

(i) unless the customer's consent has been obtained, the data to be transferred should be confined to contact data (e.g. name, address and telephone number), which facilitates the partner company to approach the customer;

(ii) the transfer or disclosure of the customer's sensitive data such as credit card number and/or Hong Kong Identity Card number to the partner company should be avoided; and

(iii) once the customer agrees to purchase its products or services, the partner company may seek further data directly from the customer in order to conclude the transaction. Alternatively, the customer's consent may be obtained beforehand for the transferor company's disclosure to the partner company of such data.



### Tips:

1. The data user may choose to avoid the transfer of customers' personal data to its partner companies by sending to its customers by mail or email information leaflets providing descriptions of the products/services in the cross-marketing scheme and the details of the partners (including their contact means). The data user should ensure that the products/services fall within the permitted class of marketing subjects.
2. If a transfer of personal data cannot be avoided, the data user must give prior written notice to the customers of its intention to provide their personal data to its partners under the scheme and that the provision of data can only be done with their written consent. The customers must also be informed of the kinds of their personal data intended to be provided to the partners. A response means such as a "tick" box should be provided for the customers to indicate their consent or otherwise. A written consent or indication of no objection has to be obtained by the data user before the transfer of the personal data to its partners.

### Good Practice:

It is recommended that the transferor company undertakes compliance audits or reviews regularly to ensure that the customers' personal data transferred is only used for the purpose of carrying out the agreed cross-marketing activities and the transferee company has taken appropriate data protection measures in compliance with the Ordinance.

## Transaction to effect merger or business amalgamation

- 4.15 The question may arise as to whether the requirements under this Part applies to the situation where personal data is provided to another person due to a merger or business amalgamation involving a sale

of business or shares. The short answer is that the requirements under this Part do not apply if the personal data provided is not for use in direct marketing<sup>50</sup>. Otherwise, consent has to be obtained from the data subject. Data users should be mindful that if the provision is for use in direct marketing under the guise of a merger or acquisition, they are still liable under the Ordinance.

## Offence and Defence

- 4.16 Failure to comply with the requirements above may constitute an offence under the Ordinance. For details, please refer to the table in the Schedule.
- 4.17 In any proceedings for an offence referred to in the said table, it is a defence for the data user charged to prove that the data user has taken all reasonable precautions and exercised all due diligence to avoid the commission of an offence.

## Exceptions

- 4.18 As in Part 3, the exception in relation to social and healthcare services (more particularly described under paragraph 3.23 in Part 3) applies to this Part provided that the provision of personal data by a data user to another person for use in direct marketing is **NOT for gain**.
- 4.19 For the avoidance of any doubt, the grandfathering arrangement of pre-existing personal data held by data users before the commencement date does not apply to the provision of personal data to another person for use in direct marketing.
- 4.20 It should also be noted that this Part does not apply if a data user provides the personal data of data subjects to its agent for use in direct marketing on the data user's behalf<sup>51</sup>. However, the data user is still required to comply with the requirements in Part 3. A data user and its agent should make it explicit in their contract the fulfillment of the statutory obligations.

<sup>50</sup> See also section 63B(3) whereby the exemption from DPP3 for transfer of personal data for due diligence exercise will not apply if the primary purpose of the proposed business transaction is the transfer, disclosure or provision for gain of the personal data.

<sup>51</sup> Section 35I(2)

## PART 5: Other Practical Guidance relating to Direct Marketing

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### Complying with data access requests

- 5.1 A Data Access Request (“**DAR**”) refers to a written request in the Chinese or English language made by an individual to request the data user to inform him or her whether the data user holds personal data of which the individual is the data subject; and if the data user holds such data, to supply him with a copy of such data<sup>52</sup>.
- 5.2 The Ordinance contains detailed provisions and procedural requirements regarding how a data subject may make, and how a data user complies with, a DAR<sup>53</sup>.
- 5.3 In relation to direct marketing, the data user should be mindful that the data subject’s written consent to the use or provision of his/her personal data is subject to DAR and the audio recording of any verbal consent (if any) may also be accessible by the data subject upon request if the recording contains his or her personal data.
- 5.4 Except where there are valid grounds for refusal<sup>54</sup>, a data user is required to supply a copy of the requested data to the requestor within 40 calendar (not working) days after receiving a DAR<sup>55</sup>.
- 5.5 A data user may impose a fee for complying with a DAR which should not be excessive<sup>56</sup>. The data user has to clearly inform the requestor what fee, if any, will be charged as soon as possible and to all intents and purposes not later than 40 days after receiving the DAR. A data user is entitled to refuse to comply with a DAR unless and until the fee imposed has been paid<sup>57</sup>.
- 5.6 For details on how to comply with DARs, please read the Commissioner’s guidance: “Proper Handling of Data Access Request and Charging of Data Access Request Fee by Data Users”.

### Source of personal data

- 5.7 Although data users are not obligated under the Ordinance to inform data subjects of the source of the personal data held by them, it is a good practice for data users to so inform the data subjects upon request. Such practice helps data subjects to exercise their opt-out rights against direct marketing approaches more effectively by tackling the problem at its root instead of rejecting individual direct marketing approaches as they arise. It will not only enhance the direct marketer’s professional image but also gain trust from the data subjects.

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<sup>52</sup> Section 18

<sup>53</sup> Part V of the Ordinance

<sup>54</sup> Section 20

<sup>55</sup> Section 19(1)

<sup>56</sup> Section 28(3)

<sup>57</sup> Section 28(5)

## Public registers

- 5.8 Data users may collect an individual's personal data from a source other than the individual himself, for example, public registers. Most public registers have specified the purposes for which the personal data is held or may be used. In some cases there are express and specific prohibitions against the use of the personal data for direct marketing. Data users should note that the use of the personal data kept in such public registers is governed by the terms and conditions prescribed by the operators of the registers or the relevant ordinances establishing such registers.
- 5.9 It is not uncommon that the operators of public registers require an applicant seeking information in the registers to spell out the reason for the application and the use of the information before releasing the same. Any data user who makes a misleading representation to the operators in his application runs the risk of contravening the requirements under DPP 1(2) of the Ordinance regarding collection of personal data by fair means.
- 5.10 Also, data users using indiscreetly personal data retrieved from public registers for direct marketing run the risk of contravening the new requirements under the Ordinance as explained in Part 3 above. It is important for them to follow the notification and consent requirements before using such personal data in direct marketing even if such use is not explicitly prohibited by the operators of the public registers.

- 5.11 Furthermore, data users should note that many public registers are set up under specific governing ordinances and there may be specific offences under these ordinances to penalize misuse of the information contained in the registers.

### Example:

The use of voters' personal data kept in a register of electors for any purpose other than a purpose related to the election is an offence under the Electoral Affairs Commission Regulation which attracts a fine at Level 2 and imprisonment for six months.

### End note

- 5.12 This guidance is compiled to serve as useful reference for data users to review their current practice in the collection, holding and use of personal data for direct marketing and to ensure their operations are in compliance with the requirements under the Ordinance. It may be revised and/or updated in light of the Commissioner's regulatory experience.

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## Schedule

Table: Offence for non-compliance with Part VIA of the Ordinance

Offence	Relevant section	Maximum Fine (HK\$)	Maximum Imprisonment
<p>Subject to section 35D, a data user who uses a data subject's personal data in direct marketing but fails to take <b>any</b> of the following actions:–</p> <p>(1) inform the data subject:–</p> <p>(a) the data user intends to so use the personal data;</p> <p>(b) the data user may not so use the data unless with the data subject's consent;</p> <p>(c) the kinds of personal data to be used;</p> <p>(d) the classes of marketing subjects which the data is to be used;</p> <p>(2) provide the data subject with a response channel through which the data subject may, without charge, communicate his consent to the intended use.</p>	35C(5)	\$500,000	3 years
<p>A data user who uses a data subject's personal data in direct marketing without observing <b>any</b> of the following:–</p> <p>(1) having received the data subject's consent to the intended use;</p> <p>(2) having sent a written confirmation to the data subject within 14 days from receiving the consent if given orally, confirming:–</p> <p>(a) the date of receipt of the consent;</p> <p>(b) the permitted kind of personal data; and</p> <p>(c) the permitted class of marketing subjects.</p> <p>(3) the use of the personal data is consistent with the data subject's consent.</p>	35E(4)	\$500,000	3 years
<p>A data user who, when using a data subject's personal data in direct marketing for the first time, fails to inform the data subject that the data user must, without charge, cease to use the data in direct marketing if the data subject so requires.</p>	35F(3)	\$500,000	3 years
<p>A data user who fails to comply with the request to cease to use personal data in direct marketing made by a data subject without charge.</p>	35G(4)	\$500,000	3 years

Offence	Relevant section	Maximum Fine (HK\$)	Maximum Imprisonment
<p>A data user who fails to take <b>any</b> of the following actions before providing personal data to another person for use in direct marketing:–</p> <p>(1) inform the data subject in writing:–</p> <p>(a) the data user intends to so provide the personal data;</p> <p>(b) the data user may not so provide the data unless with the data subject’s written consent;</p> <p>(2) provide the data subject with written information in relation to:–</p> <p>(a) where the data is to be provided for gain, that the data is to be so provided;</p> <p>(b) the kinds of personal data to be provided;</p> <p>(c) the classes of persons to which the data is to be provided;</p> <p>(d) the classes of marketing subjects which the data is to be used;</p> <p>(3) provide the data subject with a response channel through which the data subject may, without charge, communicate his consent to the intended use.</p>	35J(5)	<p>\$1,000,000 (for gain)</p> <p>\$500,000 (not for gain)</p>	<p>5 years (for gain)</p> <p>3 years (not for gain)</p>
<p>A data user who provides the data subject’s personal data to another person for use in direct marketing without observing <b>any</b> of the following:–</p> <p>(1) having received the data subject’s written consent to the intended provision of personal data;</p> <p>(2) if the data is provided for gain, having specified in the information provided to the data subject the intention to so provide;</p> <p>(3) the provision of the data is consistent with the data subject’s consent.</p>	35K(4)	<p>\$1,000,000 (for gain)</p> <p>\$500,000 (not for gain)</p>	<p>5 years (for gain)</p> <p>3 years (not for gain)</p>
<p>A data user who fails to comply with a data subject’s request to:–</p> <p>(1) cease to provide the data subject’s personal data for use in direct marketing; or</p> <p>(2) notify any data transferee in writing to cease to use the data in direct marketing.</p>	35L(6)	<p>\$1,000,000 (for gain)</p> <p>\$500,000 (in any other case)</p>	<p>5 years (for gain)</p> <p>3 years (in any other case)</p>
<p>A data transferee who fails to comply with a data user’s written notification to cease to use a data subject’s personal data in direct marketing</p>	35L(7)	\$500,000	3 years



## Exercising Your Right of Consent to and Opt-out from Direct Marketing Activities under the Personal Data (Privacy) Ordinance<sup>1</sup>

It is common for members of the public to receive unsolicited telephone calls, mail, email, etc. from direct marketers promoting various products and services.

Under the Personal Data (Privacy) Ordinance (“the Ordinance”) organizations are required to notify you and obtain your consent before using your personal data in their own direct marketing activities or transferring the data to another person for use in the latter’s direct marketing activities.

Despite your consent to use your personal data in direct marketing, direct marketers must notify you of your opt-out right when using your personal data in this manner *for the first time*. On the other hand, you may require them to cease to so use the data *at any time*. The request must be complied with at no cost to you. Further, despite your consent for an organization to transfer your personal data to third parties for use in the latter’s direct marketing activities, you may *at any time* require the organization to cease to transfer the data and to notify any person to whom your personal data has been so transferred to cease to use the data in direct marketing. Again the request must be complied with at no cost to you.

For contraventions of the requirements under the Ordinance involving the transfer of personal data to third parties for gain, the maximum penalty is a fine of \$1,000,000 and imprisonment for 5 years. For other direct marketing contraventions, the maximum penalty is a fine of \$500,000 and imprisonment for 3 years.

The purpose of this leaflet is to explain the direct marketers’ obligations when using your personal data and how you may exercise your right to indicate your consent to the intended use or transfer of your personal data in direct marketing. It also guides you to make an opt-out request under the Ordinance in order to effectively stop an organization from continuing to use or transfer your personal data for direct marketing purposes.

### ▶▶ 1 What is “direct marketing”?

Under the Ordinance, “direct marketing” means:–

- (a) the offering, or advertising of the availability, of goods, facilities or services; or
- (b) the solicitation of donations or contributions for charitable, cultural, philanthropic, recreational, political or other purposes.

<sup>1</sup> This leaflet takes effect on 1 April 2013: the date of commencement of the new provisions of the Ordinance, subject to the Government’s public announcement through gazetting. It updates and replaces the leaflet on this subject issued in October 2011.

by the following direct marketing means:

- (i) sending information or goods, addressed to specific persons by name by mail, fax, electronic mail or other means of communication; or
- (ii) making telephone calls to specific persons.

Hence direct marketing under the Ordinance does not include unsolicited business electronic messages<sup>2</sup> and person-to-person calls being made to phone numbers randomly generated.

Examples:

- ✓ A marketing SMS sending to the mobile phone number of a named individual is considered a form of direct marketing.
- ✓ A telecommunications service provider approaching its existing customers by telephone to offer upgrade services is direct marketing.
- ✓ A beauty salon offering a free beauty treatment to a specific person is direct marketing.
- ✗ Mere notification of the expiry of existing services without offering new services is not considered direct marketing.
- ✗ Direct mail sent to an address or the “occupant” of an address is not considered direct marketing as it is not addressed to specific persons by name.
- ✗ A customer service manager’s introduction of goods/services to a customer face-to-face is not considered direct marketing (but the subsequent use of the customer’s personal data for sending him promotional materials is considered direct marketing).
- ✗ A marketing call to the unidentified owner of a particular telephone number is not direct marketing.

## ▶ 2 What are the specific actions that an organization has to take if it intends to use my personal data in direct marketing?

If an organization intends to use your personal data in direct marketing, it must inform you of its intention to so use the data. The organization must provide the following information to you **orally or in writing**:

- (a) the organization intends to so use your personal data;
- (b) the organization may not so use the data unless with your consent;
- (c) the kinds of personal data to be used;
- (d) the classes of goods, facility or service offered/advertised or the purpose for which donations or contributions are solicited (i.e. marketing subjects); and
- (e) a response channel through which you may, without charge, communicate your consent to the intended use.

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

<sup>2</sup> Please refer to the Unsolicited Electronic Messages Ordinance (Cap. 593) enforced by the Office of the Communications Authority.

### ▶ 3 What forms can a response channel take?

A response channel can be:

- a telephone hotline
- a facsimile number
- a designated email account
- an online facility to allow data subject to subscribe or unsubscribe
- a correspondence address
- a designated person to handle your request through the above or other means

### ▶ 4 What are the specific actions that an organization has to take if it intends to provide my personal data to another person for the latter's use in direct marketing?

If an organization intends to transfer your personal data to another person for use by that other person in direct marketing, it must inform you **in writing** of its intention to so use the data. In the written notice, the organization must provide the following information to you:

- (a) the organization intends to so transfer the personal data;
- (b) the organization may not so transfer the data unless with your **written consent**;
- (c) whether the data is to be transferred **for gain**;
- (d) the kinds of personal data to be provided;
- (e) the classes of persons to which the data is to be provided;
- (f) the classes of marketing subjects in relation to which the data is to be used; and
- (g) a response channel through which you may, without charge, communicate your consent in writing to the intended data transfer.

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

### ▶ 5 Can I give a qualified consent for the use of my personal data or provision of my personal data for use in direct marketing?

You may consent to the use or transfer of your personal data either generally or selectively.

By selective consent is meant you may choose to provide your consent to some or all of the items in the following categories:–

- (a) the kinds of your personal data held by the organization;
- (b) the classes of the full range of marketing subjects offered by the organization; or
- (c) the classes of transferees of the data to which the organization intends to transfer for use in direct marketing.

Conversely, by a general consent, you either give a blanket approval to the organization to use or transfer your personal data in respect of all kinds of personal data, all classes of marketing subjects and all classes of data transferees as specified in the notification; or you simply refuse the organization to use or transfer all of your personal data.

You should study the organization's notice carefully to ascertain the choices before giving your consent.

The organization has no obligation to inform you that you may elect to give your consent either generally or selectively. Some organizations may design their response channel to solicit your consent generally while others may opt to solicit your consent selectively.



## ▶▶ 6 Does consent need to be express?

The word “consent” is defined under the Ordinance to include an indication of no objection to the use or transfer of personal data for use in direct marketing. To qualify for an indication of no objection, you must have **explicitly** indicated that you do not object to the use and/or transfer of your personal data to third parties for the latter’s use in direct marketing. In other words, “consent” should not be inferred from your non-response.

In determining whether or not a “consent” has been validly given, it will be relevant to consider the circumstances under which the data was collected and the consent obtained.

In order to avoid any misunderstanding, you are recommended to express your indication clearly by using definite terms, for example:–

- An oral consent: “Okay, please send me the promotional offer/information to my address at XYZ.”
- An oral objection: “No, I do not agree to your use of my personal data in direct marketing.”
- A written consent: Tick the box “I agree to the use of my personal data for direct marketing of (classes of goods, facility or service)” in a service application form.

Sometimes, an organization may provide a tick box for you to indicate objection as follows on a service application form:–

- “I object to the use of my personal data for direct marketing of (classes of goods, facility or service).”

If you do not tick the box but sign on the application form to signify your acceptance of the terms and conditions, you will normally be regarded as having indicated you have no objection (i.e. consent) to the use or transfer to third parties of your personal data for use in direct marketing. Hence, you have to study the application form carefully before you sign it.

## ▶▶ 7 What response should I expect from an organization after I have orally consented to its use of my personal data in direct marketing?

If you have given consent orally for the use of your personal data in direct marketing, the organization must within 14 days send to your last known correspondence address (which may include your physical address, email address and a telephone number for SMS) a written confirmation of the following:–

- (a) The date of receipt of the consent;
- (b) The permitted kind of personal data; and
- (c) The permitted class of marketing subjects.

You should read the written confirmation carefully. If you find anything objectionable, you should raise it immediately with the organization. Otherwise, it may start using your personal data in direct marketing without further notice.

## ▶▶ 8 What is the consequence if the organization uses my personal data or transfers my personal data for use in direct marketing without obtaining my consent?

The organization will commit an offence and will be liable on conviction to a maximum fine of \$500,000 and to imprisonment for 3 years. If the personal data is transferred to a third party for gain, the maximum penalty is a fine of \$1,000,000 and imprisonment of 5 years.

## ▶▶ 9 What is an opt-out request?

An opt-out request is a request that you may make to an organization requiring it to:-

- (a) stop using your personal data in direct marketing;
- (b) stop transferring your personal data to any other person for use in direct marketing; and
- (c) notify the transferee(s) to whom the organization has transferred your personal data to stop using such data in direct marketing.

It supersedes any previous consent given by you.

## ▶▶ 10 When can I make the opt-out request?

In general, you may at any time make an opt-out request to an organization.

In particular, you may request an organization to stop using your personal data for telemarketing at the time the caller makes the call to you or at any time thereafter.

## ▶▶ 11 How can I make an opt-out request under the Ordinance?

**Telemarketing.** Upon receiving a telemarketing call, after ascertaining the identity of the caller and the content of the marketing call, make a verbal opt-out request in reply over the phone by saying: ***"I do not wish to receive further marketing calls from your company"*** (or words to that effect).

**Direct marketing literature.** For direct marketing literature received via other means, write to the sender stating the time of receipt of the literature and the personal data used by the sender in the direct marketing activity, and explaining that you do not wish to receive any further direct marketing literature from the sender.

Where the marketing approach is made by a marketing agent on behalf of an organization which holds your personal data, your opt-out request may be directed to either the organization or its marketing agent. The two means are equally effective.

If you wish the organization to cease to transfer your personal data to third parties for use in the latter's direct marketing activities, you may make an opt-out request to the organization by saying: ***"Please stop transferring my personal data to third parties for their direct marketing activities and notify them to stop using my data in direct marketing"*** (or words to that effect).

The Ordinance does not stipulate the means by which an opt-out request has to be made. This may be done orally or in writing. We recommend making a written opt-out request to avoid any miscommunication or misunderstanding. Therefore, when opting out of telemarketing calls, for example, you should preferably follow up your verbal opt-out request with a written request, which would serve as cogent proof of your opt-out request made under the Ordinance. You are strongly advised to retain a copy of your written opt-out request.

## ▶▶ 12 What should the organization do after receiving my opt-out request?

Depending on your specific notification, the organization should:–

- (a) stop using your personal data in direct marketing; and/or
- (b) stop transferring your personal data to another person for use in direct marketing; and
- (c) notify in writing the transferees of your personal data to stop using the data in direct marketing.

When the transferee receives the **written notification** from that organization to cease to use your personal data for direct marketing, he **MUST** cease to so use the data in accordance with the notification.

Non-compliance with any of the above requirements may constitute a criminal offence. If convicted, an offender will be liable to a maximum fine of \$500,000 and imprisonment for 3 years. In case of non-compliance with (b) and (c) where the organization provides the personal data for gain, the maximum penalty is a fine of \$1,000,000 and imprisonment for 5 years.

## ▶▶ 13 Can I still make an opt-out request if I have previously consented to the use or the transfer to third parties for the use of my personal data in direct marketing?

Yes, you may make the request irrespective of whether you have given an earlier consent to the organization for such use or transfer of the data.

## ▶▶ 14 Will the organization charge me a fee if I exercise the opt-out request?

No, the organization may not charge you a fee for complying with your opt-out request.

## ▶▶ 15 I do not have any previous dealing with the organization making the direct marketing approach. Can I ask the organization to provide me with the source of my personal data when they use my personal data for direct marketing?

You may ask the organization about the source of your personal data but the organization is under no legal obligation to give you the required information. However, you may exercise your right to opt-out if you do not wish the organization to continue to use your personal data in direct marketing.

## ► 16 What should I do if I receive direct marketing calls after making an opt-out request?

If after making an opt-out request you continue to receive direct marketing calls, you can lodge a complaint with the Office of the Privacy Commissioner for Personal Data (PCPD). To make an effective complaint, you need to collect the relevant evidence by recording details of the marketing call(s) including:

- (a) *the date and time of receipt of the call;*
- (b) *the name of the caller and incoming telephone number;*
- (c) *the name of the organization which the caller represents;*
- (d) *the services, facilities or goods offered/advertised by the caller or the donations or contributions solicited by the caller; and*
- (e) *your personal data (i.e. name/surname and telephone number) used by the caller.*

It is crucial that you listen carefully to the caller who makes the direct marketing call. If you hang up without waiting for the offer or advertising of goods/services or the solicitation of donations/contributions by the caller, the call in question will not be considered a “direct marketing” call.

It is the responsibility of the organization to maintain a list of all customers who have made opt-out requests. To ensure no further use or transfer of the customers’ personal data for direct marketing after they have opted out of such activities, the organization is required to update its opt-out list regularly. In this regard, the PCPD’s recommendations are:–

- Where the list is distributed via the company computer network, this should be done by individual marketing staff members, who must add new opt-outs to the list as and when they are received.
- If the list is distributed other than by computer network, marketing staff members should be notified of the updates at a frequency of no less than once per week.

Please, therefore, make allowance for the time lag between sending the opt-out request and the actual cessation of direct marketing contacts.

## ► 17 Are there any exceptions for compliance with the provisions of the Ordinance relating to direct marketing?

### *Social and health care services*

Unless the personal data is transferred to another person for gain, the direct marketing provisions under the Ordinance do not apply in relation to the offering, or advertising of the availability of:

- (a) social services run, subvented or subsidized by the Social Welfare Department;
- (b) health care services provided by the Hospital Authority or Department of Health; or
- (c) any other social or health care services which, if not provided, would be likely to cause serious harm to the physical or mental health of –
  - (i) the individual to whom the services are intended to be provided; or
  - (ii) any other individual.

### *Pre-existing data*

The requirements for an organization to notify you of its intention to use your personal data in direct marketing and to obtain your consent or indication of no objection to the intended use under the new regulatory regime take effect on a prospective basis. They do not apply to the personal data (in relation to its use in marketing a class of marketing subjects) which the organization has control over its use before the entry into force on 1 April 2013<sup>3</sup> of the new provisions of the Personal Data (Privacy) (Amendment) Ordinance 2012 if all of the following conditions are fulfilled:–

- (a) you had been explicitly informed by the organization, in a manner which is easily understandable and (if informed in writing) easily readable, of the intended use or use of your personal data in direct marketing in relation to the class of marketing subjects;
- (b) the organization had so used any of the data;
- (c) you had not required the organization to cease to use any of the data; and
- (d) the organization had not in relation to such use contravened any provision of the Ordinance as in force at the time of the use.

This grandfathering arrangement does not apply to the use of your personal data in relation to a different class of marketing subjects.

Also, this grandfathering arrangement applies only to the use of personal data by the organization for its own direct marketing (including the use of the data by its agent for marketing the organization's products or services). It does not apply to the transfer of personal data to another person for the latter's use in direct marketing.

#### Example:

If a bank had obtained your mobile phone number, residential address and residential telephone number as well as your email address before 1 April 2013\*, and explicitly and clearly notified you that such personal data would be used for marketing banking and insurance services, and the bank has so used your mobile phone number before 1 April 2013\*, and such use has not met with your indication of opt-out, then not only would your mobile phone number be exempted but the use of the other personal data already held by the bank prior to 1 April 2013\*, viz. residential address, email address and residential telephone number would also be exempted from the notification and consent requirement.

The grandfathering arrangement also applies to updates of personal data held by an organization before 1 April 2013\*. It does not apply to new data acquired through (a) updating your personal profile, and (b) new business deals with you.

#### Example:

If an organization held your residential address before 1 April 2013\* and you moved after 1 April 2013\*, the organization may use your new residential address for continued marketing of the services it used to market to you without the need to notify you afresh and obtain your consent.

\* This is the commencement date of the new provisions of the Ordinance relating to direct marketing, subject to the Government's public announcement through gazetting.

## ► 18 Can I obtain a copy of my consent to the use or provision of my personal data?

Yes. Your written consent to the use or transfer of your personal data is subject to the data access request (DAR) provisions under the Ordinance and the audio recording of any of your verbal consent may also be made accessible to you upon request if the recording contains your personal data.

A DAR refers to a written request in the Chinese or English language made by an individual to request the data user to inform him whether the data user holds personal data of which the individual is the data subject; and if the data user holds such data, to supply him with a copy of such data. Except where there are valid grounds for refusal, an organization is required to supply to you a copy of your consent to the use or transfer of your personal data within 40 calendar days after receiving your DAR.

However, note that an organization may impose a fee for complying with a DAR which should not exceed the costs directly related to and necessary for complying with the request. The organization should clearly inform you what fee, if any, will be charged as soon as possible and to all intents and purposes not later than 40 days after receiving the DAR. An organization is entitled to refuse to comply with a DAR unless and until the fee has been paid.

If you wish to make a DAR to the organization for a copy of such consent, you may use the "Personal Data (Privacy) Ordinance Data Access Request Form" (OPS003) specified by the Privacy Commissioner under the Ordinance and send the completed form to the organization direct.

### **Office of the Privacy Commissioner for Personal Data, Hong Kong**

Enquiry Hotline: (852) 2827 2827

Fax: (852) 2877 7026

Address: 12/F, 248 Queen's Road East, Wanchai, Hong Kong

Website: [www.pcpd.org.hk](http://www.pcpd.org.hk) Email: [enquiry@pcpd.org.hk](mailto:enquiry@pcpd.org.hk)

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### **Disclaimer**

The information provided in this leaflet is for general reference only. It does not provide an exhaustive guide to the application of the Personal Data (Privacy) Ordinance (the Ordinance). For a complete and definitive statement of law, direct reference should be made to the Ordinance itself. The Commissioner makes no express or implied warranties of accuracy or fitness for a particular purpose or use with respect to the above information. The above suggestions will not affect the functions and powers conferred upon the Commissioner under the Ordinance.

@ Office of the Privacy Commissioner for Personal Data, Hong Kong  
First published in January 2013



Please note that the relevant provisions under the Personal Data (Privacy) (Amendment) Ordinance for the legal assistance scheme have not yet commenced and will be commenced on a date to be announced by the Administration. This Information Leaflet shall take effect on the same date as the relevant provisions.

## Legal assistance for civil claims under the Personal Data (Privacy) Ordinance

### Legal Assistance

Section 66 of the Personal Data (Privacy) Ordinance (“Ordinance”) provides that an individual who suffers damage by reason of a contravention of a requirement under the Ordinance by a data user may be entitled to compensation from that data user for that damage. The Privacy Commissioner for Personal Data (“Commissioner”) may, pursuant to section 66B of the Ordinance, grant legal assistance to the aggrieved individual who intends to institute proceedings to seek compensation. This information leaflet covers:

- (i) the application for legal assistance;
- (ii) the factors that may be considered by the Commissioner in vetting an application;
- (iii) the forms of legal assistance the Commissioner provides;
- (iv) the refusal or discontinuance of legal assistance; and
- (v) the review by the Commissioner of his decision to refuse or discontinue the provision of legal assistance.

### Application for Legal Assistance

Before applying for legal assistance, an individual should normally have lodged a complaint with the Office of the Privacy Commissioner for Personal Data (“PCPD”) under section 37 of the Ordinance and obtained a decision thereon by the Commissioner or his delegates. The nature of the act complained of must fall within the ambit of the Ordinance. The Commissioner will decide whether the complaint is substantiated<sup>1</sup>.

After the PCPD has concluded the complaint, if the complainant intends to claim compensation against the data user concerned, it is open to him

to apply for legal assistance from the PCPD. The complainant bears the responsibility to provide information to support his application. False or incomplete information will result in rejection of the application for assistance.

The limitation period for making a claim is normally 6 years from the date the cause of action accrued<sup>2</sup>, that is, 6 years from the time when the relevant wrongful act was committed.

### Factors to be considered in vetting an application

Section 66B(2) of the Ordinance provides that the Commissioner may grant legal assistance if he thinks fit to do so. In exercising the discretion to approve an application for legal assistance, the Commissioner will consider the following factors:

- (a) whether the case raises a question of principle, that is:
  - whether the case involves an issue of legal uncertainty which ought to be resolved through legal action;
  - whether the case raises grave privacy concern and data protection implications; or
  - whether the case would establish useful legal precedents for development of this area of the law;
- (b) whether it is unreasonable to expect the applicant to deal with the case unaided having regard to the complexity of the case, or the relative positions between the applicant and other parties to the case (e.g. the applicant is an

<sup>1</sup>Section 45(2) of the Ordinance prohibits statements made by any person during an investigation under the Ordinance to be admissible as evidence in court except on the trial of any person for perjury in respect of his sworn testimony, or for an offence under the Ordinance. Hence, any statement obtained in the course of an investigation under the Ordinance cannot be used for the purpose of instituting civil proceedings for an aggrieved data subject.

<sup>2</sup>As the Ordinance does not specify the time limitation for action to be brought under section 66, the Limitation Ordinance (Cap 347) will apply.

individual whilst the prospective defendant is a large corporation);

- (c) whether other sources of assistance (including legal aid) are available and provided to the applicant;
- (d) the merits of the case (i.e. whether the applicant has a reasonable claim and prospect of success);
- (e) whether the case can effectively enhance and sustain public awareness on personal data privacy issues, or if assistance is granted, whether the effectiveness of the PCPD in promoting personal data protection will be enhanced;
- (f) whether an efficacious remedy could be obtained through legal proceedings;
- (g) whether assistance has already been granted in other similar cases;
- (h) whether there is ongoing investigation conducted by another law enforcement agency (e.g. criminal investigation by the Police for suspected offences under the Ordinance);
- (i) the attitude and conduct of the applicant during the complaint handling process (e.g. whether the applicant was cooperative during the conciliation and investigation processes or whether the applicant has unreasonably refused to accept reasonable offer(s) of settlement);
- (j) resources allocated by the Administration for the legal assistance scheme.

Factors (a) and (b) are specified under section 66B(2) of the Ordinance that the Commissioner must consider. The Commissioner may take into account other factors such as (c) to (j) in exercising its discretion. The Commissioner may take into account yet other factors as it considers relevant.

It would be premature to lodge an application for legal assistance in cases which involve alleged offences under criminal investigations by the Police. If the aggrieved individual insists on

applying, his application will be refused or suspended pending the outcome of the criminal investigation.

## Grant of Legal Assistance

The PCPD may grant or refuse an application for legal assistance. The PCPD will notify the applicant of its decision in writing (and with reasons if assistance is refused). If the PCPD decides to grant assistance, the applicant will be asked to sign an agreement which sets out the terms and conditions under which the PCPD's assistance may be provided.

The PCPD may provide legal assistance in the form of legal advice, mediation and legal representation to the assisted person in court including any 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.

## Discontinuance of Legal Assistance

At any stage of the provision of legal assistance, the PCPD may at its absolute discretion, review its decision to grant assistance in the following circumstances:

- (a) the availability of fresh evidence and/or information which undermines the complaint (e.g. the defendant's new evidence which shows that he has not contravened the requirements under the Ordinance);
- (b) any material change of circumstances which undermines or nullifies any of the determining factors for granting the application (e.g. the defendant cannot be located or traced or the defendant company goes into liquidation);
- (c) the claim for compensation does not have a reasonable prospect of success (e.g. the claim is unsubstantiated by cogent evidence);
- (d) the applicant knowingly gives false or misleading information to the PCPD or its appointed legal or other representative (e.g. the applicant fabricates



or deliberately omits facts of the case due to a personal grudge against the defendant);

- (e) the applicant has failed, without any just cause, to observe the terms or conditions of his written agreement with the PCPD for granting legal assistance (e.g. the applicant has repeatedly failed to make himself available for giving instructions to the assigned solicitor);
- (f) the applicant fails, without any just cause, to comply with requests from the PCPD or its appointed legal or other representative for information or comments (e.g. the applicant, without reasonable cause, fails to provide material information about the case with the result that his claim cannot be properly proceeded with);
- (g) the applicant fails, without any just cause, to act in accordance with the advice given by the PCPD or its appointed legal or other representative (e.g. the applicant refuses to accept reasonable offer(s) of settlement, or to attend medical examination as arranged by the assigned solicitor);
- (h) exhibition of unreasonable conduct by the applicant including unreasonable conduct towards the staff of the PCPD or its appointed legal or other representative (e.g. use of violence, abusive language or hostile attitude by the applicant); or
- (i) other circumstances as the PCPD deems fit.

After reviewing its decision to grant assistance, the PCPD may decide to discontinue the provision of assistance and notify the assisted person in writing with reasons given.

## Review of Decision on Legal Assistance

There is no right of appeal under the Ordinance against the PCPD's decision to refuse to grant or discontinue legal assistance. The Commissioner may however carry out a review of the decision at his discretion.

## ***Refusal of Legal Assistance***

The Commissioner may decide to review the refusal to grant legal assistance upon receiving a written request from the applicant.

A request for review may be made by the applicant only when there has been a material change of circumstances. The request should set out clearly the material change of circumstances and be accompanied by evidence in support. The applicant will be informed of the Commissioner's decision in writing.

## ***Discontinuance of Legal Assistance***

A request for review of the decision to discontinue legal assistance may be made by the assisted person in writing to the PCPD. The request should set out clearly his grounds and be accompanied by evidence in support. The assisted person will be notified of the Commissioner's decision in writing.

The Commissioner's decision is final.

## Legal Fees and Costs

The PCPD will normally bear the costs of providing legal assistance. But in the event that the assisted person is ordered by the Court to pay the costs of the defendant or other parties in the legal proceedings, the PCPD may not cover the assisted person's liability to pay such costs if he has acted in an unreasonable manner leading to an adverse costs order being made against him.

If the assisted person is successful in his claim for compensation and in recovering the costs and expenses related to his claim, the PCPD has a first charge on such costs or expenses payable by other persons to the assisted person (i.e. the payment will be used to settle the PCPD's legal costs or expenses first). The first charge does not encroach upon the damages the assisted person obtains in the civil claim.

The PCPD's first charge is however subject to the first charge of the Director of Legal Aid where legal aid has been provided.

## Frequently asked questions

### **Under what circumstances can I claim compensation for infringement of my personal data privacy right?**

If you suffer any damage by reason of a contravention of a requirement under the Ordinance by a data user, you may make a civil claim for compensation from that data user for that damage. The kind of damage concerned may be or include injury to feelings.

### **From whom can I ask for assistance in lodging a civil claim?**

An application for legal assistance may be made to the Office of the Commissioner for Personal Data.

### **What types of legal assistance can be provided by the PCPD?**

The legal assistance that the PCPD may provide takes the form of legal advice, mediation, and legal representation in court, including any 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. The assistance may be rendered through the PCPD's legal staff or external lawyers engaged by the PCPD on your behalf.

### **How and when to apply?**

You normally have to lodge a complaint against the relevant data user with the PCPD first before applying for legal assistance. The PCPD will ascertain whether the nature of the act complained of falls within the ambit of the Ordinance, and if so, whether the complaint is substantiated based on the information gathered in the course of handling the complaint. You should therefore provide all relevant information to the PCPD during the complaint handling process. For information on the PCPD's complaint handling process, please refer to the Complaint Handling Policy<sup>3</sup> published by the PCPD.

You may lodge an application for legal assistance after the PCPD concludes the complaint. All applications for legal assistance must be made on the PCPD's Application Form<sup>4</sup>. Upon receipt of your application, the PCPD will assess the information provided and decide whether legal

assistance should be granted.

### **What is the time limit for making a civil claim?**

The time limit for making a civil claim on privacy infringement under the Ordinance is normally 6 years from the alleged wrongdoing. You have to act swiftly in order not to lose your legal right of action.

### **How long does it take to process an application?**

Normally, you will be informed of the result of the application within 3 months after you have submitted all the relevant information for the application. If a decision on your application cannot be made within three months, you will be kept informed of the position.

If the PCPD decides to offer assistance, you will be asked to sign an agreement which sets out the terms and conditions under which assistance will be given. You should read all the terms and conditions carefully before accepting the assistance.

If the PCPD refuses your application, you will be notified in writing.

### **What will the PCPD consider in deciding to grant or refuse assistance?**

The Commissioner may grant assistance if he thinks fit to do so, in particular, if the case raises a question of principle; or it is unreasonable, having regard to the complexity of the case and your position in relation to the relevant data user, to expect you to deal with the case unaided.

### **What can I do if my legal assistance application is refused?**

There is no right of appeal under the Ordinance against the PCPD's decision to refuse an application for legal assistance. However, if there is any material change of circumstances, the Commissioner may at his discretion review the refusal upon request.

<sup>3</sup>[http://www.pcpd.org.hk/english/enquiries/complaint\\_handling.html](http://www.pcpd.org.hk/english/enquiries/complaint_handling.html)

<sup>4</sup>The form is available for collection at the PCPD's office and is available for download at PCPD's website. ( [www.pcpd.org.hk](http://www.pcpd.org.hk) )

A request for review has to be made in writing setting out clearly what the material change of circumstances is (for example, subsequent discovery of new evidence that may affect the outcome of the case) and providing the supporting evidence. The Commissioner will, after review, inform the requestor of his decision in writing. His decision is final.

### **Do I need to pay for the legal assistance?**

The PCPD will normally bear the legal costs of providing legal assistance to you. But in the event that you are ordered by the Court to pay the costs of the defendant or other parties in the legal proceedings, the PCPD may not cover your liability to pay such costs if you have acted in an unreasonable manner leading to an adverse costs order being made against you.

If you are successful in recovering the costs and expenses related to your claim, the PCPD has a first charge on any costs or expenses which are payable by other persons to you (i.e. the payment will be used to settle the PCPD's legal costs or expenses first). The first charge does not encroach upon the damages you obtain in the civil claim.

### **Are there other alternatives to the PCPD's legal assistance?**

If your application for legal assistance is not successful, you can still consider taking legal action in person or by engaging lawyers in private practice, or applying for legal aid from the Legal Aid Department.

### **What if I have made a false statement to the PCPD?**

If you make any false statement in order to obtain legal assistance, the PCPD will terminate the assistance and take whatever actions it considers appropriate against you.

### **For enquiries, please contact : -**

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