



## RESTRICTIONS ON USE OF PERSONAL DATA FOR DIRECT MARKETING

The laws on protection of personal data in Hong Kong continue to evolve. Since the passing of the Personal Data (Privacy) (Amendment) Bill in the year of 2012, provisions for strengthening the data privacy regime in Hong Kong have been implemented in phases. The use of personal data is now more heavily regulated and data user should be made aware the changes.

As from 1st April 2013, the new provisions under Part VIA of the Personal Data (Privacy) Ordinance and the New Guidance on Direct Marketing issued by the Office of the Privacy Commissioner regulating the use of personal data for direct marketing will become effective. Direct marketing has always been an important method for organizations to reach out potential customers for marketing and promotion purposes. This newsletter seeks to update on how personal data collected can be used for direct marketing.

### WHAT WILL BE CAUGHT?

The present amendments only deal with “direct marketing” activities and do not regulate all types of such activities. Direct marketing is defined as the offering or advertising of goods and services in different forms, or the solicitation of donations or other contributions. In particular, only marketing and promotional activities that address specific persons by name through different means of communications (including mail, fax, email or even telephone calls) will be caught. Thus, an advertisement which is sent to the “occupant” of an address and a telephone call to an unnamed recipient will not fall under the definition of “direct marketing”.

As a result, corporations that use the personal data in such way have to pay extra attention on this development.

### COLLECTION OF PERSONAL DATA

Under the new regime, data subjects should be clearly informed of the intention of using personal data for direct marketing from the beginning. Information relating to the use, including the kind of personal data to

be used, the classes of marketing subject (i.e. what kind of marketing information will be provided) will have to be stated clearly. At the same time, liberal and vague terms in communicating such intention should be avoided.

Express consent from the data subject is required. There must be a clear and explicit indication that the data subject at did not object to the use / provision of the personal data in direct marketing. Under no circumstances can a non-response be relied upon as consent. Genuineness and voluntariness of consent is being emphasized, and accordingly data user should avoid creating circumstances that may raise a reasonable doubt to the same. Bundled consent should not be relied on as such collection of consent and use of personal thereupon may be deemed an unfair collection, violating the data protection principles. On the other hand, although oral consent is acceptable, a written confirmation of such consent must be sent to the data subject not later than 14 days after the oral consent is obtained. As a result, it is always advisable to solicit written consent right from the very beginning to avoid future doubts in using the personal data.



## USE OF PERSONAL DATA FOR DIRECT MARKETING FOR THE FIRST TIME

As with the existing regime, when the personal data is used for the first time in direct marketing, the data subject should be notified of the right to request the data user to cease using without charge. How this notification should be communicated to the personal data will depend on the means of direct marketing and the practice of the data user, but it is important to ensure that this is clearly communicated to the data subject.

## TRANSFER OF PERSONAL DATA TO ANOTHER PERSON

Another important area is the transfer of the personal data to another person for direct marketing. Regardless of whether such transfer is for gain or not, a data transferor is required to inform the data subject in writing of such intention, and obtain the data subject's written consent before such transfer. Unlike the consent for use of the personal data for direct marketing, oral consent will not suffice.

This requirement applies even if the transfer occurs between a parent company and its subsidiary or associated companies. Similarly, the provision of

personal data to business partners under a cross-marketing scheme requires written consent as well. In this regard, corporation may choose to send out the marketing information of its partners / associates in the cross-marketing scheme by itself to avoid the need of transferring the personal data. Attention has to be paid to ensure that the original consent for direct marketing covers such marketing subjects.

## CONCLUSION

Data users should take note of the new provisions and update its practice accordingly, as it is a criminal offence for failure in doing so with the maximum penalty of a fine of HKD1,000,000 and imprisonment for 5 years. By the virtue of the broad definition of "data user" (i.e. person who either alone, jointly or in common with other persons controls the collection, holding, processing or use of the personal data), it is possible for the management of corporation to be held responsible for not following the requirements. As the laws on protection of personal data in Hong Kong are ever evolving, it is always advisable to keep a close eye on the change of laws, and to ensure compliance with the new requirements on time.

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