

Guidance on the Collection and Use of Personal Data in Direct Marketing



Important Notice

This guidance note has been updated by reference only to those relevant amendments to the Personal Data (Privacy) Ordinance (“the Ordinance”) which have become effective on 1 October 2012. New provisions regarding the use or provision of personal data for use in direct marketing (“new regime”) (which have not yet been brought into effect) are not taken into account in this guidance note. Users of this guidance note should take special note of this when referring to the information or legal provisions contained in this guidance note.

The Privacy Commissioner for Personal Data (“the Commissioner”) will issue a new guidance note for the new regime shortly, which shall supersede and replace this guidance note once the new regime comes into operation.

Introduction

Direct marketing is a common business practice in Hong Kong and often involves the collection and use of personal data. In the process, compliance with the requirements of the Ordinance is essential. To this end, this guidance note is issued by the Commissioner to serve as general guidance to data users who collect and use personal data for direct marketing activities. Data users should also make reference to other laws and regulations that are relevant to cold-calling and direct marketing, such as section 174 of the Securities and Futures Ordinance and the Unsolicited Electronic Messages Ordinance. Data users of

respective industries should also follow guidelines and codes of practice issued by their own professional bodies, such as the Code of Practice on Person-to-Person Marketing Calls issued by the Hong Kong Association of Banks, insofar as they are not inconsistent with the requirements under the Ordinance in relation to the handling of personal data.

Meaning of “direct marketing” under the Ordinance

“Direct marketing” is defined under section 34(2) of the Ordinance to mean:

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

by means of –

- (i) *information or goods sent to any person by mail, facsimile transmission, electronic mail, or other similar means of communication, where the information or goods are addressed to a specific person or specific persons by name; or*
- (ii) *telephone calls made to specific persons.*

A data user shall observe the requirements under the Ordinance, in particular, section 34 and the data protection principles (“DPPs”) in Schedule 1. The requirements under the Ordinance for the

collection and use of personal data in direct marketing are highlighted below.

I. When collecting personal data directly from customers for direct marketing

Personal data not to be excessively collected

DPP1(1) of the Ordinance provides in essence that only necessary, adequate but not excessive personal data shall be collected by a data user for a lawful purpose directly related to its function or activity.

A data user does not normally collect a customer's personal data solely for direct marketing purpose. There is usually a specific main purpose or reason that a data user collects personal data for (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 customers for direct marketing purpose if the customers elect to supply the data on a voluntary basis.

Generally, the name and contact information of a customer should suffice for the purpose of direct marketing. A data user may seek to collect more information from the customers in order to carry out customer profiling and segmentation, thereby enhancing the cost-effectiveness of direct marketing calls. In such circumstance, the data user should inform its customers that the provision of such additional information is entirely voluntary.

Special care should be paid to the collection of sensitive personal data such as Hong Kong Identity Card Number. It is not normally required for direct marketing purposes.

Collection by means that are lawful and fair

DPP1(2) requires that personal data shall be collected by means which are lawful and fair in the circumstances of the case. In considering what is "fair" in the circumstances of the case, the relevant factors to be considered include:

- whether deceptive or misleading means is used
- whether it is voluntary for the customer to supply the personal data
- whether customer's consent to provide the data was given in circumstances that raise a reasonable doubt as to the genuineness of the consent

Use of deceptive or misleading means

A data user should not use deceptive or misleading means to collect personal data for direct marketing. For instance, when the actual purpose of making a cold call is to obtain the called 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. Another example is where Company A holds itself out to be Company B in promoting the product / service of Company A in circumstances that the called party was misled to believe that it was Company B which was making the direct marketing approach for promoting Company B's product / service and it was based on such reliance that the called party's relevant personal data was provided in the course of the transaction.

Voluntariness

Where additional personal data is requested for direct marketing, irrespective of whether or not the marketing activities are directly related to the original purpose of collection of data, the customer is free to decide whether to give that personal data. In the circumstances, the data user should make

known to the customer that it is optional for him to supply the data.

Consent obtained in doubtful circumstances

This may happen 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. For example, when the service application form incorporates both the terms and conditions for provision of the data user's services as well as statements relating to the use of the data collected for marketing products or services not directly related to the service originally sought, or the outright sale or transfer of the personal data to a third party for monetary gains. If the customer is only provided with one space to sign on the form, he has to choose between (i) giving up the application for the service and (ii) giving his "bundled consent" agreeing to the terms and conditions for the provision of the service originally sought as well as the use of his data as prescribed by the data user when in fact he finds such prescribed use objectionable.

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 customer's consent to the use of his personal data for marketing any products or services not relating directly to the services he seeks. Recommended ways to achieve this end include inviting the customer to "tick" a box or to give a separate signature specifying whether the customer agrees to the prescribed use of his personal data.

Customers to be informed of the purpose of use of personal data and classes of transferees

DPP1(3)(a) and (b) require 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. The data user should take all reasonably practicable steps to ensure that this is effectively communicated to the data subject.

Effective communication: Personal Information Collection Statement

Although DPP1(3) does not require the information to be provided to the customers in writing, it is good practice that data users inform customers of the purpose of collection of their personal data, the classes of transferees of the data, etc. by way of a written notice which is generally described as "Personal Information Collection Statement" ("PICS"). Whether all reasonably practical steps have been taken by a data user to inform a customer of the PICS shall be considered in the light of all the relevant circumstances of the case.

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, use of underlining, 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 contained in 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 legal terms or convoluted phrases.)
- (d) whether further assistance from the data user such as help desk or enquiry service is given to enable the customer to understand the contents of the PICS?

Data users should strive to enhance the effectiveness of communicating the PICS to the customers by reference to the actual circumstances in which personal data is collected such as the characteristics of the targeted customers (in terms of age, educational level, etc).

The purpose of use and classes of data transferees

While the purpose of use of personal data may be defined in general or specific terms, the data transferees have to be specified by classes. Data users should not define the purpose of use and class of data transferees 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.

While a data user is only required to inform the customers the purpose of collection in general rather than specific terms, it should refrain from 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. It is recommended good practice for the types of direct marketing activities (e.g. marketing financial or insurance products) to be clearly stated. Where there are serious doubts as to whether the direct marketing activities fall within the directly related purpose of the original collection of data, these intended activities should be clearly and conspicuously stated in the PICS and the data user is strongly advised to obtain the

explicit and voluntary consent of the customer.

A data user should define the class of data transferees by its distinctive features, such as “financial services companies”, “telecommunications service provider”, etc. Definitions couched in vague terms such as *“such other agents as the Company may from time to time appoint,”*, *“selected companies which will provide information of services in which customers may be interested”* or *“all business partners”*, etc. should not be used.

II. When collecting personal data from other sources

Data users may collect an individual’s personal data from a source other than the individual himself e.g. from a partner in a cross-marketing scheme or from records in the public domain. They should note that the source of the information, e.g. a telephone directory of a trade union or professional body, may have specified the purpose for which the personal data may be used and may even contain a specific prohibition against the use of the personal data for direct marketing. They should therefore ascertain the permitted use of the data before using it for any direct marketing activities. For example, the Government provides online telephone directory information of Government officials to facilitate official communication between the Government and the public. It is also expressly stipulated that use of such information for directing marketing is prohibited.

Public registers may contain information relating to individuals. Data users should note that the use of the personal data kept in such public registers is governed by the terms prescribed by the operators of the registers or the relevant ordinance establishing such registers. If data users indiscriminately use personal data retrieved from public registers for direct marketing

which amounts to a new purpose without the explicit and voluntary consent of the data subject¹, they may contravene not only **DPP3**, but may also be in breach of the provisions of the relevant ordinances establishing the public registers. For example, using the voter's personal data kept in any register of electors for any purpose other than election is an offence².

Normally, the permitted use of personal data contained in any public register will not include direct marketing purposes. In such circumstances and where the purpose of use of the data is not specified by any ordinance, data users need to consider the following in determining whether the personal data may be used for direct marketing purposes:-

- (a) the background leading to the creation of the public register; and
- (b) the reasonable expectation of the data subject as regards the use of the data by direct marketers.

It is recommended good practice that a data user shall refrain from using the data for direct marketing where the conclusion

drawn from the above consideration is against the intended marketing use.

III. When using personal data for direct marketing

Section 34(1) of the Ordinance requires a data user on the first occasion that it uses an individual's personal data for direct marketing to inform the individual that he or she may, on a no charge basis, request the data user to cease to use his or her personal data. If the individual makes such a request, the data user should cease to so use the data concerned. This arrangement is generally described as "**opt-out**". Failure to comply with these requirements without reasonable excuse is an offence and renders the offender liable on conviction to a fine³.

DPP3 provides that unless with the explicit and voluntary consent of the data subject, personal data shall not be used for a new purpose. A new purpose means any purpose other than the purpose for which the data was to be used at the time of collection of the data or a directly related purpose.

A data user may use personal data obtained from the customers for marketing products or services directly related to the original purpose of collection of the data. For example, a bank may use personal data of its customers for marketing financial and insurance products. However, a telecommunications network operator should not use personal data of its customers for marketing financial and insurance products (as they are unrelated to telecommunications services) unless express and voluntary consent is obtained from the customers.

If at the time the data user collects the data it has no particular direct marketing activities in mind but subsequently decides to do so, then prior to the carrying out of the

¹ DPP3(2) empowers a specified third party (i.e. a "relevant person") to give consent, on behalf of minors, persons incapable of managing their own affairs, or mentally incapacitated persons, to the change of use of their personal data when it is clearly in their interest to do so. The third parties specified for these classes of data subjects are respectively a person who has parental responsibility for the minor, a person appointed by the court to manage the data subject's affairs, and a person appointed to be the guardian of the data subject under the Mental Health Ordinance (for details on the definition of "relevant person", please refer to section 2(1) of the Ordinance).

² Section 22(3) Electoral Affairs Commission (Registration Of Electors) (Legislative Council Geographical Constituencies) (District Council Constituencies) Regulation Cap.541A; Section 42(3) Electoral Affairs Commission (Registration) (Electors For Legislative Council Functional Constituencies) (Voters For Election Committee Subsectors) (Members Of Election Committee) Regulation Cap.541B; Section 32(3) Electoral Affairs Commission (Registration Of Electors) (Village Representative Election) Regulation Cap.541K

³ At level 3, i.e. a maximum fine of \$10,000

direct marketing activities including the transfer of customers' personal data to third parties for the purpose of direct marketing, it must ensure that such use of the data is directly related to the original purpose of collection of the data, and consider informing the customers of its intention to do (and the reason for doing) so. If in doubt, the data user should seek the explicit and voluntary consent of the customers.

When the data user uses personal data the first time for direct marketing activities, it has to observe the requirement of **section 34(1)** of the Ordinance by giving the data subject the "opt-out" choice. Where the marketing approach is made by telephone, the marketer should inform the data subject of his right to opt out by making clear to the called party that *"if you do not wish to have further marketing calls from us, please tell us and we will not call again"*.

If the marketing approach is done by mail or fax to the customer, the marketing material should provide a "tick" box and a return address for the customer to exercise his opt-out right.

Where the customer is approached by email, he should be provided with an electronic link to the address of the data user for exercising the opt-out right.

Personal data transferred to third parties for direct marketing

Customers' personal data may be transferred⁴ by a data user:

- (a) to a contractor or agent promoting the data user's products and services directly related to its pre-existing relationship with the customers; or
- (b) under a cross-marketing scheme, to a business partner ("the Partner Company"): (i) promoting products

⁴ Under section 2(1) of the Ordinance, the term "use", in relation to personal data, includes disclose or transfer the data.

and services of the data user ("the Transferor Company") directly related to its pre-existing relationship with the customers and/or (ii) promoting products and services of the Partner Company which are similar or related to those originally or currently provided to the customers by the Transferor Company.

As an alternative to transfer customers' personal data to the Partner Company, the Transferor Company may consider the option of obtaining the marketing material from the Partner Company and carrying out the marketing by its own staff.

Direct marketing carried out by agent or contractor

The data user should be mindful of the provisions in **section 65(2)** of the Ordinance that it will remain liable for its agent's or contractor's breach of the requirements under the Ordinance. It should therefore be prudent in selecting a reputable agent or contractor.

In the event that the data user outsources to the agent or contractor the carrying out of direct marketing activities, such agent or contractor (whether within or outside Hong Kong) may become a "data processor"⁵ in which case the data user must comply with the requirements under DPP2(3) to adopt contractual or other means to ensure that the personal data transferred to the agent or contractor is not kept longer than is necessary after completion of the direct marketing activities. The data user shall also comply with the requirements under DPP4(2) that it must adopt contractual or other means to prevent unauthorized or accidental access, processing, erasure, loss or use of the personal data transferred to the agent or contractor.

⁵ "Data processor" is defined in DPP2(4) to mean a person who (a) processes personal data on behalf of another person; and (b) does not process the data for any of the person's own purposes.

In the contract with the agent or contractor, due consideration should be given to incorporating the following standard terms :

- (a) that the agent or contractor is prohibited from using or disclosing 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 transferred personal data, including copies or reproductions thereof; alternatively, the customers' personal data shall be safely erased and destroyed when the direct marketing activities are completed. It would be prudent to obtain, where appropriate, a professional third party's verification on the safe erasure and destruction of data;
- (c) where transfer of personal data outside Hong Kong is not permitted, it should be explicitly made known in the contract;
- (d) that proper logs of direct marketing calls and other contacts shall 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.

For other recommended obligations to be imposed on agents or contractors by contract, please refer to Information Leaflet : ***Outsourcing the Processing of Personal Data to Data Processors*** published by the Commissioner⁶.

Direct marketing carried out by Partner Company ("Cross-marketing Activities")

A cross-marketing scheme may involve the transfer or disclosure of customers' personal data by the Transferor Company to the Partner Company. The following should be observed:

- (a) The Transferor Company should ensure that customers' personal data transferred to the Partner Company is only used for the purpose of carrying out the agreed cross-marketing activities. Typically, the data to be transferred should be confined to contact data, e.g. name, address and telephone number, enabling the Partner Company to approach the customer. 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. Once the customer agrees to purchase its products or services, the Partner Company may seek data other than contact data directly from the customer. Alternatively, the customer's express and voluntary consent may be obtained for the Transferor Company's disclosure to the Partner Company of other data necessary for the transactions.
- (b) As a matter of good practice and to enhance the transparency of any planned cross-marketing scheme, a company is advised to take steps to make prior announcement of a cross-marketing scheme to its

⁶ available at http://www.pcpd.org.hk/english/publications/files/dataprocessors_e.pdf

customers, e.g. by mailing to its customers information leaflets describing the nature and subject of the scheme, the identity and contact details of the Partner Company, whether any personal data of the customers will be transferred, the type of data to be transferred, and any measures to prevent data disclosed from being misused by the Partner Company.

Before conducting cross-marketing activities, 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 entered into between the Transferor Company and the Partner Company governing the handling of customers' personal data transferred for the purpose of cross-marketing. The Transferor Company should give due consideration to incorporating the standard terms recommended above for contracts with the agent or contractor.

When personal data of customers is entrusted to a third party for handling, it is recommended good practice that the data user shall undertake compliance audits or reviews regularly to ensure that the transferees of the data have taken appropriate data protection measures in compliance with the Ordinance.

IV. Updating of opt-out list

A data user should maintain a list of all customers who have indicated that they do not wish to receive further marketing approaches (the “**opt-out list**”).

The following are recommended practices to ensure no further use of the customer's personal data for direct marketing after he has opted out from such activities :

(a) The opt-out list should be updated regularly. Where the list is distributed on the company computer network, this

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

(b) Where cross-marketing is conducted under the name of both the Transferor and Partner Company for the marketing of the products or services of either the Transferor or the Partner Company, and the customer has indicated to the Partner Company his wish to opt-out, 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 approach to the customer.

(c) Where the data user conducts its business through branch offices, each branch office should 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 should 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.

- (d) A data user should have standing procedures for its staff to follow on accessing and updating the opt-out list and complying with the opt-out requirements of section 34 of the Ordinance.

V. Transfer of personal data to third parties for monetary gains

Under cross-marketing schemes, the Transferor Company may simply transfer its customers' personal data to the Partner Company for marketing the latter's products and services. In some cases, the Transferor Company simply selects the required customer data and plays little or no part in the marketing process but receives monetary gains from the Partner Company in reward for the data transfer. The transaction in essence is provision of personal data for gain (i.e. sale of personal data).

Although the provision of personal data for gain by a data user is not prohibited by the Ordinance, it would not normally be regarded as the original purpose of data collection or as a directly related purpose. For example, when a customer applies for a credit card from a Bank and supplies his personal data, he would only expect the Bank or the Bank's group companies to approach him for marketing related products and services of direct interest to him. These activities serve to enhance customer loyalty and are common in a competitive business environment like Hong Kong. It would fall outside his reasonable expectation that the data would be transferred or shared with third party for monetary gains. In the circumstances, explicit and voluntary consent from the customer has to be sought for the provision of personal data for gain, or else the Bank runs the risk of contravening DPP3. The consent may be indicated by a signature to that effect or by ticking a box.

VI. Grandfathering provisions under the new regime

The new requirements on the use of personal data in direct marketing under the new regime do not apply to the personal data which the data user has, before the entry into force of the new regime, used in direct marketing in compliance with the requirements in force at that time, in particular:-

- (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 a class of marketing subjects⁷;
- (b) the data user had so used any of the data;
- (c) the data subject had not required the data user to cease to so use any of the data; and
- (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.

This grandfathering arrangement applies to the use of any personal data of the data subject in relation to only the same class of marketing subjects for which the data subject's personal data has been so used before the commencement of the new regime.

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

⁷ The term "marketing subject" is defined under the new regime 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.

services). It does not apply to the data user's provision of personal data to another person for gain.

The burden of proof lies with the data user to establish that the grandfathering arrangement applies. Therefore, it is important for a data user who wishes to take advantage of the grandfathering arrangement to keep proper documentary evidence in the meantime prior to the commencement of the new regime.

VII. End Note

It is hoped that this guidance note will serve as useful reference for data users to review its current practice of collection and use of personal data in direct marketing activities and to ensure compliance with the requirements under the Ordinance.

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