

Morrison & Foerster Client Alert

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Hong Kong Data Privacy Law Update: Personal Data (Privacy) (Amendment) Ordinance 2012

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INTRODUCTION

The Personal Data (Privacy) (Amendment) Ordinance 2012 (“Amendment Ordinance”) was formally adopted in July 2012. One of the most significant changes the Amendment Ordinance made to the existing Personal Data (Privacy) Ordinance (“PDPO”) is the tightening of control over the use and provision of personal data in direct marketing activities. The new regime is particularly relevant to organizations that engage in direct marketing activities or acquire and transfer personal data to third parties for direct marketing purposes. The Amendment Ordinance also makes certain amendments to the data protection principles, introduces new offenses and penalties, and enhances the authority of the Privacy Commissioner for Personal Data (“Commissioner”). In addition, it introduces a new scheme whereby the Commissioner may provide legal assistance to individuals.

The majority of the Amendment Ordinance came into effect on October 1, 2012. However, provisions concerning the new direct marketing regime and the legal assistance scheme provided by the Commissioner will take effect on April 1, 2013. In January 2013, the Commissioner issued new guidance on direct marketing activities (“Guidance Note”) before commencement of the applicable provisions of the Amendment Ordinance in order to enable organizations to take compliance measures and reengineer their policies.

THE DIRECT MARKETING REGIME

Prior to the adoption of the Amendment Ordinance, there was limited regulation on the use and transfer of personal data for direct marketing activities. A nonbinding guidance note on the collection and use of personal information in direct marketing was issued in 2010 to supplement the PDPO following the investigation of Octopus Holdings Limited for its unauthorized transfer of customers’ personal information for direct marketing purposes.

The Amendment Ordinance creates a new direct marketing regime (Part VI A of the PDPO) to establish the rights and obligations of parties using personal information for direct marketing purposes or transferring personal information to a

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third party for marketing purposes. Under the new regime, an organization can only use or transfer personal information for direct marketing purposes if that organization has provided the required information and consent mechanism to the individual concerned, and obtained his or her consent. Under the Amendment Ordinance it is a criminal offense, punishable by fines and imprisonment, for an organization to fail to comply with any of these new requirements.

The new requirements are summarized below.

Notice and Consent

Before using or transferring individuals' personal information for direct marketing purposes, an organization must provide individuals with specified information in an easy-to-read and understandable format. In particular, the organization must inform individuals about its intention to use their personal information for its own direct marketing purposes and/or to provide their personal information to third parties for their own direct marketing purposes, and that the organization may not use and/or provide individuals' personal information for such purposes unless the organization receives consent to the intended use and/or provision. Individuals must also be advised about the kinds of personal information to be used and/or provided to others, the types of goods or services to be marketed to them, the types of third parties to whom the personal information will be provided (including noting where such provision is for profit) and the free mechanism through which the individual may communicate his or her written consent to the intended uses.

Once this notice has been provided, individuals then must consent to the use and/or provision of their personal information for direct marketing purposes. The Amendment Ordinance broadly defines "consent" in the direct marketing context as "an indication of no objection to the use or provision"; however, the Guidance Note states that in order for such consent to be valid, individuals must explicitly indicate that they do not object to the use and/or provision of their personal information to another for use in direct marketing activities. An individual's nonresponse would not constitute valid consent.

The Guidance Note provides examples of valid consent: an individual ticks a box that states "I do not object to the use of my personal data for direct marketing of XXX"; or he or she does not check the box indicating objection to receive direct marketing materials, but then signs and returns an agreement indicating that he or she has read and understood the organization's notice regarding the collection, use and provision of personal information. The Guidance Note cautions that tick-boxes should be conspicuous and easy to read. Simply informing customers in writing that their personal information will be used or provided to others for direct marketing, and that any objections must be made by returning the objection form, and then proceeding to use the information without obtaining their response would not be sufficient.

Depending on whether the information will be used by the organization for its own direct marketing purposes or transferred to a third party for its direct marketing purposes, the form of the notice and consent differs. For example, when an organization wants to use personal information for its own marketing purposes, the notice and consent may be provided in writing or orally. If the individual gives oral consent, the organization must, within 14 days, send a written confirmation to the individual. In contrast, when an organization intends to transfer personal information to third parties for their own direct marketing purposes, written notice and consent must be provided (oral notice and consent are not sufficient).

Where an organization intends to obtain individuals' consent through an application form, the Commissioner cautions that the form should separate the customer's agreement to the terms and conditions for the provision of the service from the consent to use his/her personal information for direct marketing. Recommended ways to achieve this include providing a

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separate signature line or a tick box to indicate the customer's agreement or no objection to the prescribed use of his/her personal information.

Moreover, an individual's consent may be general or specific. Selective consent means that the individual may choose to restrict his/her consent to only certain kinds of personal information held by the organization, certain types of products or services marketed by the organization, and/or only certain types of third parties to whom the organization intends to provide for use in direct marketing. To help individuals exercise their right to choose, the Commissioner recommends that organizations inform individuals of this right when requesting personal information, and in the mechanism through which the individuals may elect to give their consent.

Individuals may revoke their consent at any time, and the organization must comply with the request to cease using or transferring the personal information for direct marketing purposes.

Penalties

Failure to comply with the disclosure and consent requirements can result in a fine of HK\$500,000 and three years' imprisonment. In cases involving transfer of personal data for gain, a fine of HK\$1,000,000 and five years' imprisonment are possible. (ss35C(5), 35E(4), 35J(5), 35K(4))

Failure to cease using or transferring personal information as requested can result in a fine of HK\$500,000 and three years' imprisonment. In cases involving transfer of personal information for gain, a fine of HK\$1,000,000 and five years' imprisonment are possible. (ss35G(4), 35L(6), 35L(7))

Grandfathering Exception

An organization that has been legitimately using personal information for direct marketing purposes prior to the commencement of the new regime may continue to use such information if the following conditions are met:

- (i) the organization had explicitly informed the individual of the intended use of the information in direct marketing in relation to a class of marketing subjects;
- (ii) the organization had used the information for that purpose;
- (iii) the individual had not requested the organization to cease using the information for that purpose; and
- (iv) the organization had not contravened any provision of the PDPO as in force at the time of the use of information.

AMENDMENTS TO THE DATA PROTECTION PRINCIPLES (DPP) – REGULATIONS ON DATA PROCESSING

The Amendment Ordinance introduced new security requirements with respect to the retention of personal data transferred by data users to third-party data processors. Organizations are now required to have in place procedures to ensure that any personal information transferred to any service provider is not retained for longer than necessary, and is protected against any unauthorized or accidental access, processing, erasure, loss, or use (**DPP2(3) and DPP4(2)**).

UNAUTHORIZED DISCLOSURE OF PERSONAL DATA

Under the Amendment Ordinance, a new offense has been created to deter malicious disclosure of personal information without individuals' consent. Any person who has obtained personal information from an individual is prohibited from

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subsequently disclosing the information without the individual's consent, where such disclosure: (i) is made with intent to obtain gain or cause loss to the individual concerned; or (ii) causes psychological harm to that individual. The maximum penalty of this offense is a fine of HK\$1,000,000 and five years' imprisonment (**s64**).

CONTRAVENTION OF ENFORCEMENT NOTICES

The penalties for repeated contravention of enforcement notices have been increased. Organizations, upon a second and subsequent conviction, are subject to heavier penalties of a fine of HK\$100,000, a daily fine of HK\$2,000 for any continuing offense, and two years' imprisonment (**s50A(1)**).

The Amendment Ordinance also creates a new provision punishing an organization that, having complied with an enforcement notice, subsequently intentionally repeats the act or makes the same omission in breach of the requirement under the PDPO. The penalties of such an offense is a fine of HK\$50,000, a daily fine of HK\$1,000 for any continuing offense, and two years' imprisonment (**s50A(3)**).

LEGAL ASSISTANCE PROVIDED BY THE COMMISSIONER

The Commissioner is empowered to provide various forms of legal assistance to an aggrieved individual who seeks to claim compensation from an organization with respect to the organization's contravention of the PDPO. The Commissioner has the discretion to provide legal assistance, such as giving legal advice and arranging legal representation, based on the specific facts of each case, with an emphasis placed on situations in which: (i) the case raises a question of principles, or (ii) the case is complex, and it is unreasonable to expect the data subject to deal with the case unaided.

ENHANCED AUTHORITY OF THE COMMISSIONER

The Amendment Ordinance has enhanced the enforcement authority of the Commissioner. The Commissioner may now issue an enforcement notice where it is of the opinion that an organization is contravening or has contravened a requirement under the PDPO, regardless of whether the contravention is likely to continue or repeat. This means that organizations can no longer avoid an enforcement notice by rectifying a contravention.

Under the PDPO and unchanged by the Amendment Ordinance, a yet-to-be implemented data-return scheme would require certain classes of organizations (including companies with large databases and those in the public sector) to submit to the Commissioner annual data returns containing certain information on personal information used; these returns will be published in an electronic register for public inspection. However, this returns scheme has not been implemented. The Amendment Ordinance does not change the underlying concept of the returns scheme, but expands the Commissioner's powers if the scheme ever takes effect. Under the Amendment Ordinance, the Commissioner would be able to verify the accuracy of the information provided by the organizations in the data returns, and require the organizations to correct any inaccurate information. Any failure to comply with the Commissioner's verification and correction request would be a criminal offense punishable by a fine of HK\$10,000.

NEW EXEMPTIONS FOR DUE DILIGENCE IN M&A

The Amendment Ordinance introduces an exemption to exclude personal information that is transferred or disclosed by an organization in a due diligence exercise conducted in connection with transfers of business, corporate acquisitions, and amalgamations. In such situations, the personal information can be lawfully used, disclosed, or transferred, provided that: (i) the information transferred or disclosed is not more than necessary for the purpose of the due diligence exercise;

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(ii) the same or similar goods, facilities or services will be provided to the individual by a party to the transaction or a new body formed as a result of the transaction; (iii) it is not practicable to obtain the prescribed consent for the transfer or disclosure; and (iv) the information concerned is only used for due diligence purpose. Upon completion of the due diligence exercise, all the information must be returned to the organization or destroyed as soon as practicable (**s63B**).

OTHER NEW EXEMPTIONS

The Amendment Ordinance also introduces the following exemptions:

- A broad exemption from all DPPs is created for personal information held by a court, a magistrate, or a judicial officer in the course of performing judicial functions (**s51A**);
- The use of a minor's personal information by the Hong Kong Police Force or the Customs and Excise Department is exempted, provided that the disclosure or transfer of such information is for the purpose of the proper care and guardianship of the minor and the use of such data is in the minor's interest (**s59A**);
- An organization is exempted from complying with a data access request in relation to any personal information that might incriminate it in any criminal proceedings (other than for an offense under the PDPO) (**s60A**);
- Personal information can be lawfully used, disclosed, or transferred if it is required by any rule of law or court order in Hong Kong, in connection with any legal proceedings in Hong Kong, or for establishing, exercising, or defending legal rights in Hong Kong (**s60B**);
- Personal information can be lawfully used, disclosed, or transferred for identifying an individual who is reasonably suspected to be or is involved in a life-threatening situation, for informing the individual's immediate family members, and for carrying out emergency rescue operations or providing emergency relief services (**s63C**); and
- Personal information can be lawfully used, disclosed, or transferred for the purposes of appraising the records to be preserved by the Government Records Service, and organizing and preserving such records (**s63D**).

RECOMMENDATIONS

Organizations that wish to use personal information in direct marketing should make it a priority to ensure that their current policies and marketing operations fulfill the conditions above, so that they can take advantage of the grandfathering exception for their current marketing subjects, and will only need to satisfy the requirements of the new regime for new marketing subjects after the regime comes into effect. Particular care should be taken to ensure that privacy policies and notifications are updated to refer to specific classes of marketing subjects, as this was not a requirement under the PDPO before the Amendment Ordinance. It should be noted that the grandfathering arrangement is only applicable to the use of personal information, but not the transfer of information for use in direct marketing.

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