

# A Practical Guide to the Proposed Regime for the Use and Sale of Personal Data

## What is happening?

The Personal Data (Privacy) Amendment Bill 2011 (**Bill**) was introduced before Hong Kong's Legislative Council (**LegCo**) in July 2011 to amend the Personal Data (Privacy) Ordinance (**PDPO**) in response to the public outcry following Octopus Cards Limited's mega-scale sale of customer personal data for direct marketing purposes. The Bill seeks to introduce a more stringent regulatory regime for the use and sale of personal data for direct marketing purposes. A number of new offences with severe penalties are set out in the Bill.

## Who will be affected?

### 1. Users of personal data

Users include those using personal data directly or those engaging third-party agencies to use the data, to market their own products or services to customers. For example, banks, credit service companies, insurance companies, telecommunication service providers and telemarketing agencies.

### 2. Sellers of personal data

Sellers may or may not be interested in using personal data to market their own products or services but may be making a gain by transferring personal data to third parties for direct marketing purposes.

## A two-pronged approach

Under the new regime, a data user or seller will be required to: (i) give its data subjects information about its intended use or sale of their personal data; and (ii) give them an option to object to the intended use or sale (**opt-out option**).

## How should information be given to data subjects?

A summary of the requirements proposed by the Bill is as follows<sup>1</sup>:

- (i) The information shall be expressed in writing and presented in an easily readable and understandable manner. The use of small fonts, difficult legal terms or complex sentence structures may be objectionable.

## Key Issues

### What is happening?

### Who will be affected?

### A two-pronged approach

### How should information be given to data subjects?

### How should the opt-out option be given to data subjects?

### Consequences of non-compliance

### What you need to know

If you would like to know more about the subjects covered in this publication or our services, please contact:

[Martin Rogers](#) +852 2826 2437

[James Wadham](#) +852 2825 8837

[Rita Chan](#) +852 2826 2416

Clifford Chance, 28th Floor, Jardine House,  
One Connaught Place, Hong Kong SAR  
[www.cliffordchance.com](http://www.cliffordchance.com)

<sup>1</sup> The Privacy Commissioner for Personal Data is expected to issue more detailed guidance.

- (ii) Specific information should be given about (a) the types of personal data to be used for direct marketing or provided to third parties; (b) the identity of the third parties receiving the personal data; and (c) the types of products or services to be promoted to the data subjects.

## **How should information be given to data subjects?**

The opt-out option should be given to data subjects by way of a free-of-charge response facility. The text about the intended use or sale should be easily readable and understandable.

## **Dealing with the response of data subjects**

Three scenarios are contemplated by the new regime:

- (i) Where a data subject opts out of any direct marketing campaigns, the data user or data seller shall not use or sell his personal data for direct marketing.
- (ii) Where a data subject leaves his opt-out option unexercised, the data user or data seller may proceed to use or sell his personal data for direct marketing.
- (iii) Where a data subject fails to give any response within 30 days, the data user or data seller may take that he does not object to the use or sale of his personal data for direct marketing.

If the data subject changes his mind subsequently, he may request the data user or data seller not to use or sell his personal data for direct marketing again. If so, the data user or data seller shall (i) cease to use or sell the data subject's personal data; and (ii) request any third parties having received the personal data not to use them for direct marketing.

## **Consequences of non-compliance?**

The maximum penalty for non-compliance is HK\$1 million plus 5 years' imprisonment for both sale and disclosure of personal data without the consent of the data subject. These penalties are significantly more severe than the current maximum penalty of HK\$50,000 and 2 years' imprisonment.

## **What you need to know**

Whilst it is not clear whether the Bill will be passed in its entirety in LegCo, in view of the possible changes to the regime, the following precautionary steps are recommended:

- (i) Review standard terms and conditions for the supply of products or services with a view to compliance with the new requirements, for example, consider whether the terms and conditions should be revised by inserting a "tick-box" to give the opt-out option to prospective data subjects.
- (ii) Take necessary action to bring on-going direct marketing activities in line of the new regime, for example, establish an effective channel for data subjects to raise objections to their personal data being used for direct marketing.
- (iii) Develop or update internal policies and procedures on the use or sale of personal data for direct marketing. Engage top management to coordinate this exercise and provide training to frontline marketing staff members.
- (iv) Ensure that contracts with outsourced or subcontracted data processors contain relevant clauses required under the Bill.
- (v) Ensure that the current information technology infrastructure is capable of updating data subjects' permission status on the use or sale of personal data on a continuous and real-time basis. In addition, the data subjects' permission status should be made available to all frontline marketing staff members.
- (vi) Under the new regime, legal assistance may be provided to data subjects for breach of the PDPO in claims against the data users and may lead to increased claims against them.

## Conclusion

Clifford Chance will be keeping you updated on the final Bill that is passed by the Legislative Council. We would be pleased to answer any questions you may have on this and share our thoughts on its implications with any interested clients.

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This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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