LYN BOXALL LLC

11 June 2018

The Personal Data Protection Commission
10 Pasir Panjang Road
#03-01 Mapletree Business City
Singapore 117348 **corporate@pdpc.gov.sg**

Dear Sir/Madam,

PDPC's Public Consultation on Managing Unsolicited Commercial Messages and the Provision of Guidance to Support Innovation in the Digital Economy

The Data-Driven Marketing Association of Singapore (**DMAS**) thanks the Personal Data Protection Commission for the opportunity to provide comments in its public consultation on phase two of the PDPA review. DMAS' interest is in commenting on the merger of the Do Not Call (DNC) Provisions of the PDPA and the Spam Control Act (SCA) under a single Act and on the introduction of Enhanced Practical Guidance (EPG) under the PDPA.

DMAS is a non-profit trade organisation established in 1983 as the Direct Marketing Association of Singapore representing the interests of its members in Singapore, of whom 45 percent are SMEs. The balance are MNCs. Its mission is to enable its members to keep abreast of industry trends and best practices in Singapore and the region.

DMAS champions and promotes the interests of its members. It helps to enhance knowledge by facilitating the sharing of information and ideas on data-driven marketing. Key areas include social media, search, direct mail, email, and mobile marketing. DMAS' activities offer the opportunity for members to network and build relationships to profitably grow their businesses.

Major points in this submission:

- DMAS safeguards members' interests by constantly seeking to raise the stature and standards of data-driven marketing and building consumer confidence with adherence to high ethical standards of practice. It focusses consistently on maintaining consumer trust. Managing unsolicited commercial messages to best practices standards is key.

- Generally, DMAS supports the merger of the DNC Provisions and the SCA and related issues. However, DMAS feels very strongly that B2B marketing messages should not be subject to the requirements under the DNC Provisions. Where an individual publishes their phone number for their own business purposes, DMAS considers that this amounts to at least a *de facto* consent for business contact.

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It follows that the individual should not be able to complain if other businesses use that published phone number for marketing, unless the relevant individual has previously unsubscribed from such a communication. This is consistent with Singapore's positioning as a Smart Nation and with its acceptance of 'business contact information' in its personal data protection provisions.

- DMAS welcomes the PDPC's proposal for EPG on the basis that it has the potential to enhance and support data protection in Singapore. However, DMAS attaches to its submission our comments on various practical aspects of the proposal. These comments are not intended to be critical of the proposal, but to assist in developing it in a way that is most likely to result in effectiveness from the perspective of DMAS' members in the context of Singapore as a Smart Nation.

We attach a submission to the above consultation by DMAS. Contact details for DMAS are:

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Mr Azhar Azib, DPO
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Yours faithfully

Lyn Boxall
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DMAS
DATA-DRIVEN MARKETING ASSOCIATION OF SINGAPORE

In summary, while the Data-Driven Marketing Association of Singapore (**DMAS**) has some comments on the details of the Commission's proposals for managing unsolicited commercial messages and the provision of guidance to support innovation in the digital economy (as set out below), DMAS welcomes them.

Managing Unsolicited Commercial Messages

> **Question 1**: What are your views on the proposed scope and applicability of the DNC Provisions and the Spam Control Provisions?

All direct marketing rules in one logical place

DMAS observes that the existing position of the Do Not Call provisions (the '**DNC Provisions**'):

- being included in the Personal Data Protection Act ('**PDPA**') together with the regulation of the collection, use, disclosure and storage of personal data and
- being separate from the Spam Control Provisions,

is not ideal from a practical perspective, though it understands how this outcome came about.

Consequently, DMAS welcomes the proposal to have these rules that typically apply to direct marketing activities consolidated into a separate and single piece of legislation (the '**New Act**'). It also welcomes wholeheartedly streamlining them and eliminating any inconsistencies.

Reviewing a draft of the new legislation in due course

DMAS notes that drafting the new, single piece of legislation in a way that makes it straightforward for marketers to work through will be crucial, including in order to make compliance with it straightforward with a reasonably high degree of assurance.

Consequently, DMAS would appreciate the opportunity to review and comment on it in due course from a practical perspective.

> **Question 2**: What are your views on including commercial text messages sent using IM identifiers under the Spam Control Provisions?

Instant Messaging (IM)

DMAS supports the proposal to regulate direct marketing carried out through instant messaging ('**IM**') channels.

DMAS takes it somewhat for granted that the DNC Provisions in the New Act will apply to unsolicited marketing text messages that are sent to Singapore telephone numbers and that

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this will continue to be the case regardless of whether they are sent in bulk or not. Consequently, DMAS supports this proposal in connection with instant messages.

Regulation by reference to messages sent in bulk

DMAS appreciates the practical point that, because of the way that instant messaging addressed to IM identifiers works, the New Act needs to continue on the same 'bulk' approach as the existing Spam Control Act ('**SCA**').

The impact on trust is the same whether or not the messages are sent in bulk and, as a result, DMAS expects its members to adhere to a higher standard that DMAS developed and published at the time of the inception of the SCA.

Availability of civil action v stronger regulatory supervision

DMAS also supports civil action being available to affected individuals and organisations whenever there is a contravention.

But DMAS urges strong regulatory supervision and control as it is seldom the case that the cost of taking civil action is justified by the extent of the damage suffered by such affected individuals and organisations.

Labelling requirements

DMAS supports the continuation of the existing labelling requirements for specified voice, text and fax messages under the DNC Provisions as well as continuation of the calling line identity ('**CLI**') requirements.

Unsubscribe facility

DMAS supports the need for, and use of, an unsubscribe facility across all digital and non-digital communication channels, which of course includes emails and instant messages.

> **Question 3**: What are your views on the proposed reduction of the period for effecting withdrawal of consent to 10 business days, in line with the period to effect an unsubscribe request under the Spam Control Provisions?

Withdrawal period for specified voice, text and fax messages

DMAS both understands and promotes the benefits of prompt removal of consumers from contact lists. However, we recommend no change be made to the current 30 day period for effecting the withdrawal of consent to receiving voice, text and fax communications. This is because doing so in less than 30 days may be prohibitively (or disproportionally) expensive in some cases due to the execution lead-times required for voice, text and fax campaigns.

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> **Question 4**: What are your views on prohibiting the use of dictionary attack and address harvesting software for sending of commercial messages to all telephone numbers, IM identifiers and email addresses?

DMAS supports this proposal, although queries why the PDPC would extend the prohibition to non-Singapore telephone numbers.

> **Question 5**: Should B2B marketing messages be subject to the requirements under the DNC Provisions, in alignment with the coverage under the Spam Control Provisions?

DMAS feels very strongly that B2B marketing messages should not be subject to the requirements under the DNC Provisions. Where an individual publishes their phone number for their own business purposes, DMAS considers that this amounts to at least a *de facto* consent for business contact. The individual should not be able to complain if other businesses use that published phone number for marketing, unless the relevant individual has previously unsubscribed from such a communication.

This is consistent with Singapore's positioning as a Smart Nation and with its acceptance of 'business contact information' in its personal data protection provisions.

> **Question 6**: What are your views on the proposal for the DNC Provisions to be enforced under an administrative regime?

DMAS supports the proposal for administrative enforcement of the DNC Provisions. Such enforcement should have the effect of more efficiently weeding out individuals and organisations that engage in bad marketing practices – that is, not checking the DNCR – thus boosting the reputation of responsible marketers generally.

> **Question 7**: What are your views on the proposed obligation to communicate accurate DNCR results, and liability on third-party checkers for any infringements of the DNC Provisions resulting from inaccurate information they provided?

<u>Checking the DNCR on behalf of an organisation</u>

DMAS supports the proposed obligation to communicate accurate DNCR results and the liability on third-party checkers for any infringements. However, DMAS does not understand why these issues should not continue to be covered in the contract between the two parties.

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Question 8: What are your views on the proposed prohibition of resale of results of telephone numbers checked with the DNCR?

The business of conducting checks of the DNCR both on behalf of organisations and for the purpose of selling the 'scrubbed' list to multiple organisations is established and, at least insofar as it concerns DMAS, is carried out in accordance with the PDPA.

DMAS does not see a need for the PDPC to impose a fundamentally adverse effect on business activities.

Question 9: What are your views on the proposed deeming provision?

DMAS understands that the PDPC proposes introducing a deeming provision under the DNC Provisions under the New Act such that the subscriber of the Singapore telephone number is presumed to have sent the specified message unless he or she proves otherwise.

DMAS supports the underlying objective of such a deeming provision – that is, to improve enforcement effectiveness and ensure greater responsibility on subscribers to take active steps to prevent misuse of their telephone service. However, this needs to be done in conjunction with a public education campaign as DMAS understands that telephone numbers are often purchased from foreign workers who likely do not understand that selling their SIM card is illegal.

Question 10: What are your views on the proposed Enhanced Practical Guidance framework?

In summary, DMAS supports the PDPC's proposals for Enhanced Practical Guidance (EPG) with the objective of providing regulatory certainty to facilitate the development of new and innovative data services. It recognises the immense opportunities for innovations around the use of data as Singapore gears up to be a Digital Economy.

However, 'the devil is in the detail'. DMAS has obtained advice from outside counsel commenting on details that the PDPC might consider in connection with the needs of marketers using the EPG initiative with an intention to be constructive and to assist the development of an EPG framework.

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1 June 2018

Ms Lisa Watson
Chairman
Data-Driven Marketing Association of Singapore
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Dear Ms Watson,

Personal Data Protection Commission –
Phase two consultation on changes to the
Personal Data Protection Act: Enhanced Practical Guidance

We refer to your request to provide background advice to the Data-Driven Marketing Association of Singapore (DMAS) in connection with the proposal by the Personal Data Protection Commission (PDPC) to introduce an 'Enhanced Practical Guidance' (EPG) regime under the Personal Data Protection Act (PDPA).

We understand that DMAS supports the initiative in principle and seeks input on practicalities that might be taken into account as the EPG framework is delivered. The goal is to help structure the EPG in a way that best supports its effectiveness and usefulness in the context of marketing organisations.

Our general comments follow accordingly. Please do not hesitate to let us know if we can be of further assistance in relation to this matter at this point.

Legally binding determinations – the need for a clearly agreed set of facts

We are familiar with regimes similar to the proposed EPG outside Singapore, although not always in connection with personal data.

In those cases, a common and substantial practical difficulty is the extent to which every detail that may be relevant to a decision needs to be documented with precision so that there is:

- a concrete and agreed set of facts on which the determination is based so that the organisation seeking the determination is able to be confident about relying on it and
- a clear justification for the regulator to step back from the determination if new or different facts emerge subsequently to the determination having been given

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Such a process of recording details can seldom be undertaken by an organisation without substantial legal investigation and input. The expense of such an undertaking cannot be underestimated and we suggest that such expense should be taken into account when the PDPC makes its decision about how much it will charge for providing legally binding determinations.

Proposed scope and criteria

In relation to the proposed criteria and scope, it seems to us that the business reality is that there would necessarily be a need for the PDPC to review the organisation's – or the relevant business division of the organisation's – entire business model, processes or policies in order to provide a legally binding determination.

If full details of its business model, processes and policies are not provided by the organisation for review by the PDPC, when details later emerge the PDPC may well need to step back from the legally binding determination because it has made its decision on an incomplete set of facts.

The need for the PDPC to step back from its earlier determination in such circumstances would likely not be well-understood by organisations. Consequently, it would result in complaints by organisations that had taken the trouble to go through the EPG process and bad publicity of the 'but if they had asked us about that we would have told them'-type. Such complaints and bad publicity would likely and inevitably undermine confidence in the EPG.

Proposed criteria and scope – timing of iterations and issuance of determination

You have instructed us that DMAS understands that the process must inevitably be an iterative one.

However, in our experience, in order to be effective the process should not be long and drawn-out in the sense of there often being a waiting period between iterations. When our client organisations have their sights set on a new and innovative idea of any kind – and there is no reason to think that a new and innovative data service would be any different – the client organisation is always anxious to move forward quickly.

In the case of the EPG, we would expect that organisations would be, for example, concerned to ensure that a perhaps less conservative competitor that does not seek a determination under the EPG on the same or similar issues is not able to launch the new idea first simply because the organisation took the responsible route of seeking a determination to ensure regulatory compliance.

Hypothetical situations

The general principle is that a Court (and a regulator, by extension) cannot provide determinations to queries relating to hypothetical situations.

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However, in the case of an EPG framework there is a 'chicken and egg' problem in the sense that an organisation cannot generally afford to fully, or probably even partially, develop a new and innovative data service without first obtaining a good level of assurance about being able to proceed to launch it.

In commercial terms, our experience is that client organisations generally need an answer to questions such as 'If we were to go ahead and develop X, Y and Z would we comply with the PDPA?', not to 'We have developed X, Y and Z and now need to find out if we will comply with the PDPA when we launch it'.

Complex or novel compliance issues

In our view, the PDPC will need to make clear the difference between:

- a complex or novel compliance issue, on the one hand, and
- a situation that cannot be addressed by legal advice, on the other hand

They do seem to us to be two different ways of expressing, if not the same thing technically, then two concepts that for practical purposes would typically be understood by organisations as being the same thing. Any such confusion or misconceptions could be addressed by the PDPC providing some examples that illustrate the difference clearly so that organisations can understand it.

We note in passing that, from our experience, we would expect to see:

- responsible marketing organisations perhaps deciding to seek a determination on the basis that it is facing a complex or novel compliance issue and
- less conservative marketing organisations that are more open to accepting a level of compliance risk in return for, say, a 'first to market' opportunity simply seeking legal advice and moving forward immediately on the basis of such advice (or, of course, moving forward without receiving any relevant advice at all)

Data protection impact assessments and risk mitigation

It is unclear from the consultation document:

- whether the PDPC will be reviewing an organisation's data protection impact assessment (DPIA) and the steps it proposes to take to mitigate risk and/or
- whether the organisation should do its DPIA and decide how to mitigate risks before or after the PDPC has made its determination

Logically, we conclude that the organisation must do its DPIA and decide how to mitigate risks before it seeks a determination from the PDPC and that the PDPC will take these risk mitigation measures into consideration when deciding whether or not to provide the

requested determination. Thus the PDPC will be in a position of either, in effect, approving the risk mitigation measures or declining to approve them (because the PDPC will, at least, either accept or not accept them).

We consider it would be consistent with this position if, at the request of an organisation, the PDPC agreed to review and approve, or not, the DIPAs and risk mitigation decisions taken by organisations without the organisation necessarily seeking a determination under the EPG initiative.

In any event, if the PDPC decides not to issue a determination or the organisation decides to move ahead prior to the PDPC making a decision whether or not to issue a determination after the PDPC has reviewed and accepted – if not approved – its DPIA and risk mitigation matters, query whether the fact that the process was started provides the organisation with the regulatory relief outlined in the consultation document.

Confidentiality

It is trite to say that confidentiality will be of the utmost importance for organisations considering seeking a determination under the EPG framework. Therefore, we consider it should be made clear that the PDPC will not publish even a redacted version of its determination until after the relevant organisation has launched its new and innovative data service and details have therefore become known publicly.

Alternatively, we make the same point by observing that it is unlikely that a redacted version of the PDPC's determination will be of any general use unless it discloses sufficient details of the relevant new and innovative data service to enable readers of such redacted version to understand the context of the service. And if it does so it will virtually inevitably disclose confidential and commercially sensitive information: even without identifying the organisation involved in the determination, competitors will likely frequently be able to correctly guess the identity due to their general market knowledge and, even if not, will be alerted to a competitor's plans.

Information that is false, misleading or no longer accurate

It is our experience that it is common throughout the design and launch of new marketing ideas, whether or not they include the development of new and innovative data services, for a good degree of change to, and evolution of, ideas.

Sometimes this occurs as a result of market testing, for example, sometimes as a result of unexpected opportunities or roadblocks that arise, sometimes in response to competitive developments and/or opportunities, sometimes as a result of ideas simply being improved during implementation and sometimes as a result of other relevant factors that cannot be foreseen at the outset. Sometimes such change occurs after launch of new marketing ideas because of market/consumer feedback, competitor reactions and other market factors.

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As mentioned earlier, the timing for an organisation seeking a determination will generally need to be before it has invested substantial time, money and other resources into developing its new and innovative data service. Due to the factors described above, it will seldom be feasible for the service to be 'set in stone' at that point.

Consequently, we consider that the EPG framework will need to provide for an organisation that has sought and received a determination to be able to notify the PDPC of such changes and seek confirmation of the determination.

Where such changes occur, information should be considered to be false, misleading or no longer accurate only if the organisation chooses not to update the PDPC about evolution of its service during its design and launch phases or after its launch.

Yours faithfully

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