Public Consultation for Managing Unsolicited Commercial Messages and the Provision of Guidance to Support Innovation in the Digital Economy – Submission of Comments

Date Submitted	**12 June 2018**
Name	This submission sets out **Allen & Gledhill LLP**'s comments and/or comments from **one or more of our clients** (who each have requested that their identity not be disclosed), on the public consultation by the Personal Data Protection Commission ("**PDPC**") for managing unsolicited messages and the provision of guidance to support innovation in the digital economy as part of a review of the Personal Data Protection Act 2012 (No. 26 of 2012) of Singapore ("**PDPA**"). References to "*we*" are to Allen & Gledhill LLP and/or one or more of our clients. This submission only touches on some of the matters in the public consultation paper issued on 27 April 2018 ("**Consultation Paper**") - mainly "**Part IV: Second, Third and Fourth Schedules to the PDPA**" but also some limited comments on the review of the Do Not Call ("**DNC**") Provisions and the Spam Control Act and the proposed enhanced Practical Guidance framework under the PDPA. Any terms not defined herein are as defined in the PDPA. We thank the PDPC for the opportunity to provide comments herein on the PDPA.
Contact Details	**Tham Kok Leong** Tel: 6890 7526 / Email: tham.kokleong@allenandgledhill.com **Alexander Yap** Tel: 6890 7627 / Email: alexander.yap@allenandgledhill.com **Eugene Ho** Tel: 6890 7620 / Email: eugene.ho@allenandgledhill.com
Industry concerned	Legal

Public Consultation for Managing Unsolicited Commercial Messages and the Provision of Guidance to Support Innovation in the Digital Economy – Submission of Comments

No.	Questions	Comments
Part II: Review of DNC Provisions and the SCA		
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?**	We are in favour of aligning the unsubscribe and withdrawal of consent processes, including the period of time for effecting such withdrawal of control, for marketing messages sent to Singapore telephone numbers (as currently set out under the DNC Provisions) and those sent by electronic messages (as currently set out under the Spam Control Provisions). However, we are of the view that the proposed time period of 10 business days is potentially operationally challenging for organisations to adhere to, given that: (i) the changes may raise the profile of the Spam Control Provisions, resulting in a potentially voluminous number of withdrawal requests; and (ii) depending on the scale of businesses, certain organisations (especially small organisations who previously were not be used to dealing with requests, or larger organisations who are unused to having to deal with such volume based on past practice) may require a longer period of time to completely effect the withdrawal of consent. As such, we would propose that the time period be set at 30 days instead, which is in line with the period to effect a request for withdrawal of consent under the DNC Provisions.
5.	**Should B2B marketing messages be subject to the requirements under the DNC Provisions, in alignment with the coverage under the Spam Control Provisions?**	We are of the view that B2B marketing messages should continue to be excluded from coverage under the DNC Provisions and the position under the Spam Control Provisions should be amended to exclude B2B marketing messages in a similar manner as the DNC Provisions, on the basis that: (i) the DNC Provisions were primarily targeted to protect consumers and not businesses and the same policy considerations should affect the Spam Control Provisions;

No.	Questions	Comments
		(ii) this could reduce require administrative processes (and associated costs) for businesses/start-ups which do not target consumers; and (iii) although B2B marketing messages are currently covered under the Spam Control Provisions, an amendment to exclude B2B marketing messages in the style of the DNC Provisions is unlikely to cause any significant inconvenience given that it is easier for businesses to set up protection for spam (e.g. filters to block certain types of e-mails) and in practice this is quite common.
Part III: Enhanced Practical Guidance		
10.	**What are your views on the proposed Enhanced Practical Guidance framework?**	We are in favour of the proposed Enhanced Practical Guidance framework as set out in the Consultation Paper, though we would put forth the following suggestions for the PDPC's consideration: 1. **Proposed timeline for the Enhanced Practical Guidance determination process**: For added clarity, we would suggest that the PDPC considers publishing an estimated timeline for the Enhanced Practical Guidance determination process, including a maximum time period within which a determination will generally be issued by the PDPC, as well as factors which may delay the determination process and result in an extension of this timeline. An example would be if the information submitted by the requesting organisation is insufficient or incomplete, and the PDPC is required to write to the organisation for further information. 2. **Expansion of the scope of the Enhanced Practical Guidance** (a) We note that Section 6.1 of the Consultation Paper requires that "*the queries must be from the organisation(s) performing the business activity for which the guidance is sought*". We would suggest that the PDPC also permits queries to be from

No.	Questions	Comments
		professional advisers (e.g. lawyers) acting on behalf of the organisation performing the business activity – organisations often seek to engage professional advisers to represent them in liaising with regulators. (b) Further to (a), the PDPC could also consider extending the scope of the Enhanced Practical Guidance framework to allow professional advisers to represent their clients in liaising with the PDPC on a "*no-names basis*". This may also encourage more use of the framework. 3. **Redaction of organisation identifying information from the published guidance**: We are in favour of the PDPC publishing a redacted version of the determination on the understanding that the redaction is expected to adopt a similar approach as that currently taken for the current practical guidance framework, i.e. that the name of the organisation, as well as any information which is specific, confidential or commercially sensitive to the organisation will be redacted. We highlight that depending on the circumstances, this would mean that the PDPC may not be able to publish every determination. For example, where a particular determination involves an issue which is sufficiently confidential and/or commercially sensitive that publishing even a redacted version of the determination may be tantamount to a disclosure of confidential information. 4. **Clarification that the Enhanced Practical Guidance framework will not affect the right of an organisation to appeal against any direction or decision of the PDPC**: In the interests of certainty, we would also propose that the PDPC clarifies that the right of an organisation under Part VIII of the PDPA to appeal against any direction or decision of the PDPC, including the right to make such appeals to the High Court and the Court of Appeal, remains unaffected by the Enhanced Practical Guidance framework. In other words, in the event that the PDPC investigates an organisation and finds such organisation to be in breach of the PDPA, the fact that the organisation had

No.	Questions	Comments
		previously applied for and obtained a determination under the Enhanced Practical Guidance process should not operate to adversely affect its rights.
Part IV: Second, Third and Fourth Schedules to the PDPA		
	Should the scope or conditions of any exception be adjusted or clarified	Yes. **(1) Business Asset Transaction exception (Section 17 read with paragraph 1(p) of each of the Second and Fourth Schedules)** *Summary* Section 17 read with paragraph 1(p) of each of the Second and Fourth Schedules provide for certain consent exceptions in relation to business asset transactions – these exceptions facilitate the disclosure of personal data of employees, customers, directors, officers or shareholders to a prospective party to the business asset transaction without consent of the relevant individuals ("**BAT Exception**"), subject to certain conditions in paragraph 3 of each of the Second and Fourth Schedules. However, the BAT Exception appears to only be effective for business asset transactions where the target company is a party to such transaction. Assuming that the policy intention is for the BAT Exception to apply to all types of business asset transactions, and since there is no clear reason to treat only certain types of business asset transactions preferentially, we propose that the BAT Exception be adjusted and/or clarified. In the following paragraphs we set out a further description and proposed amendments. *Explanation* We reproduce below the relevant provisions from the Second and Fourth Schedule. **Second Schedule** *Paragraph 1*

No.	Questions	Comments
		(p) Subject to the conditions in paragraph 3, the personal data – (i) is collected by an organisation, being a party or a prospective party to a business asset transaction with another organisation, from that other organisation; (ii) is about an employee, customer, director, officer or shareholder of the other organisation; and (iii) relates directly to the part of the other organisation or its business assets with which the business asset transaction is concerned; *Paragraph 3* (2) If the organisation is a prospective party to a business asset transaction — (a) the personal data collected must be necessary for the organisation to determine whether to proceed with the business asset transaction; and (b) the organisation and the other organisation must have entered into an agreement that requires the prospective party to use or disclose the personal data solely for purposes related to the business asset transaction. **Fourth Schedule** *Paragraph 1* (p) Subject to the conditions in paragraph 3, the personal data – (i) is disclosed to a party or a prospective party to a business asset transaction with the organisation; (ii) is about an employee, customer, director, officer or shareholder of the organisation; and (iii) relates directly to the part of the organisation or its business assets with which the business asset transaction is concerned; *Paragraph 3* (2) In the case of disclosure to a prospective party to a business asset transaction —

No.	Questions	Comments
		(a) the personal data must be necessary for the prospective party to determine whether to proceed with the business asset transaction; and (b) the organisation and prospective party must have entered into an agreement that requires the prospective party to use or disclose the personal data solely for purposes related to the business asset transaction. (4) In this paragraph and paragraph 1(p) – "*business asset transaction*" means the purchase, sale, lease, merger or amalgamation or any other acquisition, disposal or financing of an organisation or a portion of an organisation or of any of the business or assets of an organisation other than the personal data to be disclosed under paragraph 1(p); "*party*" means another organisation that enters into the business asset transaction with the organisation. (emphasis ours). On a strict reading of the language above, the BAT Exception will only be available in the context of a disclosure of personal data: (a) from the organisation whose employees, customers, directors, officers or shareholders such personal data relates to ("**Target**"), (b) to an organisation who enters into the business asset transaction with the organisation ("**Purchaser**"), and provided that the Target and the Purchaser enter into an agreement that requires the prospective party to use or disclose the personal data solely for purposes related to the business asset transaction. In other words, practically speaking, while the BAT Exception will be available in most situations where a transaction is effected by way of a sale of the business or assets (since the Target Company itself will be entering into the transaction document(s) with the Purchaser), it will rarely be applicable to allow disclosure to a prospective purchaser where

No.	Questions	Comments
		a transaction is effected by way of a sale of shares (since the transaction document(s) are typically entered into between the current holder of the shares in the Target Company and the Purchaser of those shares, and it is rare, especially where the Target Company is a public company, for the Target Company to be party to the transaction document(s)). This is overly limiting if the policy intention is for the BAT Exception to apply generally in all mergers and acquisitions. It is also unusual for the BAT Exception to treat a certain type of merger or acquisition preferentially, although for completeness we would note that in the case of less complex transactions involving the sale of shares there may be no need for any formal disclosure of personal data, if the prospective purchaser is only provided with anonymised information pre-completion (since the same entity will be dealing with the relevant personal data both pre and post completion). *Proposed amendments* We suggest that paragraphs 1(p) and 3 of both the Second and Fourth Schedules of the PDPA be adjusted and/or clarified as follow: **Second Schedule** *Paragraph 1* (p) Subject to the conditions in paragraph 3, the personal data – (i) is collected by an organisation, being a party or a prospective party to a business asset transaction ~~with another organisation, from that other organisation~~; (ii) is about an employee, customer, director, officer or shareholder of the ~~other~~ organisation who is the subject of such business asset transaction; and (iii) relates directly to the part of the ~~other~~ organisation who is the subject of such business asset transaction or its business assets with which the business asset transaction is concerned; *Paragraph 3*

No.	Questions	Comments
		(1) The conditions in this paragraph shall apply if the personal data is collected under paragraph 1(p). (2) If the organisation is a prospective party to a business asset transaction — (a) the personal data collected must be necessary for the organisation to determine whether to proceed with the business asset transaction; and (b) the organisation ~~and the other organisation~~ must have entered into an agreement that requires ~~the prospective party~~ such organisation to use or disclose the personal data solely for purposes related to the business asset transaction. (3) If ~~an~~the organisation which collects personal data under paragraph 1(p) enters into the business asset transaction ~~with another organisation~~ — (a) the organisation shall only use or disclose the personal data collected for the same purposes for which the ~~other~~ organisation who is the subject of such business asset transaction would have been permitted to use or disclose the data; (b) if any of the personal data collected does not relate directly to the part of the ~~other~~ organisation who is the subject of such business asset transaction or its business assets with which ~~the~~ such business asset transaction ~~entered into~~ is concerned, the organisation shall destroy, or return to the ~~other~~ organisation who was the subject of such prospective business asset transaction, any such personal data; and (c) the employees, customers, directors, officers and shareholders whose personal data is disclosed shall be notified that — (i) the business asset transaction has taken place; and (ii) the personal data about them has been disclosed to the organisation who collected personal data under paragraph 1(p). (4) If a business asset transaction does not proceed or is not completed, the organisation shall destroy, or return to the ~~other~~ organisation who was the subject of such prospective business asset transaction, all the personal data collected. (5) In this paragraph and paragraph 1(p), "*business asset transaction*" has the same

No.	Questions	Comments
		meaning as in paragraph 3(4) of the Fourth Schedule. **<u>Fourth Schedule</u>** *Paragraph 1* (p) Subject to the conditions in paragraph 3, the personal data – (i) is disclosed to a party or a prospective party to a business asset transaction ~~with the organisation~~; (ii) is about an employee, customer, director, officer or shareholder of the organisation who is the subject of such business asset transaction; and (iii) relates directly to the part of the organisation who is the subject of such business asset transaction or its business assets with which ~~the~~ such business asset transaction is concerned; *Paragraph 3* (1) The conditions in this paragraph shall apply to personal data disclosed under paragraph 1(p). (2) In the case of disclosure to a prospective party to a business asset transaction — (a) the personal data must be necessary for the prospective party to determine whether to proceed with the business asset transaction; and (b) the ~~organisation and~~ prospective party must have entered into an agreement that requires the prospective party to use or disclose the personal data solely for purposes related to the business asset transaction. (3) If the organisation to whom personal data was disclosed under paragraph 1(p) enters into the business asset transaction, the employees, customers, directors, officers and shareholders of the organisation who is the subject of such business asset transaction whose personal data is disclosed shall be notified that — (a) the business asset transaction has taken place; and (b) the personal data about them has been disclosed to the ~~party~~organisation

No.	Questions	Comments
		to whom personal data was disclosed under paragraph 1(p). (4) In this paragraph and paragraph 1(p) – "*business asset transaction*" means the purchase, sale, lease, merger or amalgamation or any other acquisition, disposal or financing of an organisation or a portion of an organisation or of any of the business or assets of an organisation other than the personal data to be disclosed under paragraph 1(p); ~~"party" means another organisation that enters into the business asset transaction with the organisation.~~ *Further proposed amendments to the BAT Exception* In the context of the BAT Exception, we also highlight the following: • please also consider whether as a matter of public policy the offeror (in a business asset transaction involving a public listed company) should be permitted to contact individuals who are either legal or beneficial owners of shares in that public listed company, to notify them of the offering, without having to obtain consent. This would merely preserve the position which existed prior to the coming into force of the PDPA. In considering this, it is important to note that any such consent exception would not necessarily mean that an offeror would actually be able to obtain the relevant personal data of those individuals, to carry out such notification, since such offerors would still need to obtain access to such personal data. In this regard, please also consider whether amendments to (what is today) the Eighth Schedule might be helpful; and • our suggested changes above are also designed to permit use of the BAT Exception regardless of group structure. For example, some enterprises have subsidiaries designed to provide "*shared services*" to the holding company and other subsidiaries, where the "*shared services*" subsidiary employs a majority of the individuals employed by the enterprise as a whole. It is possible that even in a transaction effected by way of a sale of the business or assets, such "*shared services*" subsidiary would not be a

No.	Questions	Comments
		signing party to the relevant transaction document(s) (for example, the ultimate holding company might instead be required to procure compliance by the subsidiary), but if the BAT Exception is amended as set out above, such a subsidiary could potentially be treated as one of the "*organisation(s) who is the subject of [the] business asset transaction*". **(2) "*Legitimate interests*" exception (Section 5 of the Response to Feedback on the Public Consultation on Approaches to Managing Personal Data in the Digital Economy (issued 1 February 2018))** Based on Section 5 of the Response to Feedback on the Public Consultation on Approaches to Managing Personal Data in the Digital Economy (issued 1 February 2018), we understand that the PDPC intends to provide for "*legitimate interests*" as a basis to collect, use or disclose personal data regardless of consent. We are generally in favour of this "*legitimate interests*" exception. However, we would propose that the PDPC considers whether the openness requirement, in particular the requirement that organisations make available a document justifying its reliance on "*legitimate interest*" for the collection, use or disclosure of personal data, would be sufficient to satisfy the requirement that organisations implement accountability measures when relying on the "*legitimate interest*" exception. If our suggestion is accepted, we note that the requirement for organisations to carry out a risk and impact assessment could instead be framed as a best practice suggestion in helping organisations prepare its justifications to comply with the openness requirement, rather than a mandatory requirement in order to rely on the "*legitimate interest*" exception.