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TECHNOLOGY, MEDIA & TELECOMMUNICATIONS ALERT

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Information Regulator publishes POPIA and PAIA operational readiness plans

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Direct marketing practices in the midst of South Africa's new era of data protection

Direct marketing has been legislatively regulated in South Africa since 2002. Before the commencement of the operative provisions of the Protection of Personal Information Act 4 of 2013 (POPIA) on 1 July 2020, direct marketing was already regulated under the Electronic Communications and Transactions Act 25 of 2002, the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008 (CPA).

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CLIFFE DEKKER HOFMEYR

Information Regulator publishes POPIA and PAIA operational readiness plans

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Actions to be undertaken in relation to POPIA

Some of the salient actions that the Information Regulator plans to take during the forthcoming months in terms of the POPIA ORP include:

- The development of a guide which will provide public bodies (and potentially certain private bodies) with guidance on when POPIA will not apply to their processing activities which involve the interests of national security.
- The provision of guidance on how data subjects are to be notified of data breaches in respect of their personal information, as well as on the manner in which responsible parties would be required to publicise such data breaches.
- The development of application forms for responsible parties to complete to request authorisation from the Information Regulator to process (i) special personal information; and/or (ii) the personal information of children. A responsible party would require such authorisation where its

processing of the personal information in question does not fall within one of the general authorisations (e.g. obtaining consent) for the processing of such personal information, either under section 27 (in respect of special personal information) or under section 35(1) (in respect of the personal information of children). To bring such an application, the processing by the responsible party would need to be in the 'public interest', and the responsible party would need to have put 'appropriate safeguards' in place to protect the personal information in question. In this regard, the Information Regulator will provide responsible parties with the following guidance in order to assist them in successfully bringing such applications: (i) a definition/list of acceptable public interest processing activities; and (ii) a definition/explanation of the technical and organisational requirements that will be deemed appropriate in relation to the responsible party's security safeguards.

- The development of regulations relating to the specific authorisation to process special personal information concerning a data subject's health or sex life (Health Data) under section 32 of POPIA. These regulations will be of particular importance in light of the vast processing of Health Data in the context of the COVID-19 pandemic. POPIA allows certain responsible parties (such as healthcare institutions, medical schemes, schools and

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employers) to process Health Data subject to requirements provided for under section 32 of POPIA. The proposed regulations relating to this section will presumably provide more detail on the specific instances in which the relevant responsible parties will be authorised to process Health Data in accordance with POPIA.

- The issuing of codes of conduct that will apply to specific sectors under Chapter 7 of POPIA. These codes of conduct may apply in relation to any specified information, body, activity, industry, profession or vocation, and will essentially speak to the practical application of POPIA within the specified sectors in question.
- The development of guidelines on trans-border information flows, automated decision making and profiling.

In addition to the above, the POPIA ORP lists several actions of an administrative nature that the Information Regulator plans to take in respect of its appointment of staff members, its internal structures and functions, and several of its powers and duties.

Actions to be undertaken in relation to PAIA

For PAIA, the Information Regulator plans to take some of the following steps as part of the ORP:

- The approval of the Information Regulator's PAIA manual under section 14(1) of PAIA – which requires

the Information Regulator (as a public body) to compile a manual containing, inter alia: (a) a description of its structure and functions; (b) its postal and street address; (c) sufficient detail to facilitate a request by a data subject for access to a record held by the Information Regulator; and (d) a description of the remedies available to a data subject in the event that the Information Regulator acts in a manner contrary to (or fails to act in accordance with) the provisions of PAIA.

- The development and conducting of educational programmes.
- The training of information officers and deputy information officers of public bodies.
- The development of regulations for lodging a complaint with the Information Regulator.

Conclusion

The successful implementation of the planned actions in the POPIA ORP by the Information Regulator will provide responsible parties, operators, data subjects and data protection practitioners alike with important clarification on the interpretation of several provisions in POPIA – clarification which has been long awaited since the initial promulgation of POPIA in 2013.

Preeta Bhagattjee, Aphindile Govuza and Liam Sebanz

Direct marketing practices in the midst of South Africa's new era of data protection

Under POPIA, responsible parties are prohibited from processing personal information for the purposes of direct marketing, unless certain requirements are complied with.

Direct marketing has been legislatively regulated in South Africa since 2002. Before the commencement of the operative provisions of the Protection of Personal Information Act 4 of 2013 (POPIA) on 1 July 2020, direct marketing was already regulated under the Electronic Communications and Transactions Act 25 of 2002, the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008 (CPA). While most businesses engaging in direct marketing practices are likely to have already come to grips with these pre-POPIA laws, such businesses will now need to make some adjustments before the POPIA enforcement deadline on 30 June 2021.

Direct marketing provisions under POPIA

General requirements

Under POPIA, responsible parties (i.e. direct marketers) are prohibited from processing personal information for the purposes of direct marketing, unless the following requirements are complied with:

- consent is obtained or the processing falls within the scope of one of the other lawful bases for the processing of personal information as set out under section 11 of POPIA;
- the direct marketing communication contains details of the identity of the direct marketer or the person on whose behalf the communication has been sent (section 69(4) of POPIA); and

- the direct marketing communication contains an address or other contact details to which the relevant data subject (consumer) may send an objection to the processing of his personal information (section 69(4) of POPIA).

Direct marketing carried out by means of unsolicited electronic communications

However, where the direct marketing is specifically carried out by means of unsolicited electronic communications (including by way of automated calling machines, SMSs, fax machines or e-mails), such direct marketing will, in terms of section 69(1) of POPIA, be unlawful unless:

- the consumer is a customer of the direct marketer; or
- the consumer is not a customer of the direct marketer but has consented to the processing of his personal information.

Even if the direct marketing by means of unsolicited electronic communications complies with the provisions of section 69(1) above, the following further conditions will also apply:

- Where the consumer is not the customer of the direct marketer, POPIA follows an "opt-in" approach, in terms of which the direct marketer must obtain the consent of the consumer before sending a direct marketing communication to such person. In this situation, the direct marketer may only approach the consumer (who must not have previously withheld consent) on one occasion in order to obtain the necessary consent (so as to prevent the consumer being harassed for consent) (section 69(2) of POPIA).

Direct marketing practices in the midst of South Africa's new era of data protection...continued

Now that section 69 of POPIA is in effect and the commencement of the POPIA Regulations is imminent, it is advisable that direct marketers begin to plan how they are going to achieve compliance with such provisions, and do so as soon as possible.

- Where the consumer is a customer of the direct marketer, POPIA follows an "opt-out" approach, in terms of which the direct marketer must give the relevant customer the opportunity to object to the processing of his personal information (section 69(3) of POPIA). In this situation, the direct marketer may only send a direct marketing communication to the customer if:
 - the direct marketer obtained the customer's contact details in the context of the sale of a product or service;
 - such contact details were obtained for the purpose of direct marketing in relation to the direct marketer's own products or services that are of a similar nature; and
 - the customer is provided with a reasonable opportunity to object to the processing of his personal information. In this regard, the opportunity to object should be provided to the customer at the time when the personal information is collected and, if the customer has not objected to this at the time of collection, the direct marketer must provide such opportunity on every occasion when a direct marketing communication is sent to the customer.

In this regard, it is important to note that 'unsolicited electronic communications' under POPIA do not include telephone calls. Direct marketing via telephone is, however, already regulated under the CPA – which follows an "opt-out" approach. Although direct marketing via telephone will not need to comply with all of the direct marketing provisions in POPIA, the direct marketer will still need to generally process the personal information of the relevant consumers in accordance with the provisions of POPIA.

Requirements under the POPIA Regulations

Regulation 6 of the Regulations Relating to the Protection of Personal Information, 2018 (POPIA Regulations) provides that a direct marketer who wishes to process personal information of a data subject (consumer) for the purpose of direct marketing by way of electronic communications must do so in terms of the prescribed form (Form 4). The form requires, amongst other things, that:

- the direct marketer sign the request for the consumer's consent; and
- the consent provided by the consumer be linked to: (i) specified goods and/or services; and (ii) specified means of electronic communication (i.e. fax, email, SMS or other).

The direct marketer must, however, note that the POPIA Regulations are not currently in force and will commence on a date to be determined by the Information Regulator by proclamation in the Government Gazette.

Direct marketing practices in the midst of South Africa's new era of data protection...*continued*

Postponing the compliance process until 30 June 2021 may result in direct marketers becoming vulnerable to penalties for non-compliance with POPIA.

Commencing the compliance process

Now that section 69 of POPIA is in effect and the commencement of the POPIA Regulations is imminent, it is advisable that direct marketers begin to plan how they are going to achieve compliance with such provisions, and do so as soon as possible. Postponing the compliance process until 30 June 2021 may result in direct marketers becoming vulnerable to penalties for non-compliance with POPIA.

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The banner features a dark blue background with a grid pattern. On the right side, there is a stylized illustration of a coronavirus particle in shades of blue. The text 'CDH'S COVID-19 RESOURCE HUB' is prominently displayed in white, bold, sans-serif font, centered horizontally. Below the main title, there is a call to action 'Click here for more information' followed by a hand cursor icon pointing to the right.

CDH'S COVID-19 RESOURCE HUB

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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