

How Japan's New Privacy Bill Will Change Direct Marketing in Japan

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Background

On May 30, 2003, the Japanese Diet ratified the "Bill on the Protection of Personal Information." This legislation has significant impact for both Japanese and international direct marketers. *Most of it is good.*

One major reason most of it is good is that Japan in its attitudes to business activity is very unlike the United States and UK. In the US and UK direct marketers have for years actively exchanged customer data as a means to improve customer prospecting with the understanding that so long as no law prohibits such activity it is perfectly legal. However, in Japan, the legal-business culture is such that something that is not validated by law is *generally considered suspect at best, if not flat out illegal.*

Those who have tried or are currently trying to build their businesses in Japan know the greatest challenge is effective customer acquisition. The new Bill for the first time establishes a legal framework for the handling of personal information in Japan. It thus lays the groundwork for the more active exchange of customer lists for prospecting purposes.

While the Japanese government intends for this new Bill to help industry, term, it must be sensitive about the public's concerns over the use of their personal information. Because of these dual goals, in typical Japanese fashion the Bill has built in substantial government discretion so that if significant public outcry arises, the government will have ample latitude to respond.

Legislative Context-Why this law?

The Japanese government should be commended for taking the initiative on this legislation, even though a good part of the impetus came from the need to comply with the European Union's restrictions on the export of personal information from Europe arising from the Data Protection Directive of 1995. ¹

The government's stated objective is to stimulate the economy by providing the necessary framework for the exchange for personal information. As Chief Cabinet Secretary Yasuo Fukuda stated at the time of ratification, "Without this law, people cannot partake in an information technology society with peace of mind."

¹ [This Directive prohibits the sending of personal information from Europe to countries that do not provide "adequate protection" for that information. Thus, Japan has responded with legislation which probably will receive scrutiny by the European Commission as to its provision of protection.](#)

The government accomplishes its objective of supporting the exchange of information by establishing a rather broad framework with this one piece of legislation covering all sectors of the economy. It provides that the Ministry responsible for each industry sector will draft working “Guidelines” and then work with the relevant industry association to formulate standards for practical application. These Guidelines will be vague enough to leave the Ministries latitude to respond on a case by case basis.

Key Point: Notice and opt-out.

The key consideration for direct marketers is that should they wish to share their personal data in the form of a list swap or rental they must provide notice as to the purpose of use of the data and to offer individuals an easy way to opt-out of third party data sharing.

Basic Principle of the Bill-Sharing is the default.

As one of the original authors, Yoshihide Esaki explained, “The Bill tries to respond not to the concern that it’s wrong for someone to have another’s personal information, but to the general public’s concern this information is not being used properly.” The general standard is that individuals should understand how the data is being used and have the opportunity to opt-out if they do not approve. For the direct marketing industry, this concern is primarily focused on the sharing of a customer list.

The Bill states that a user of personal information, (the “User”) is free to share the data with a third party (another direct marketer or data services provider) so long as the individual (the “Principal”) understands how the data is being used.

Unlike some European countries that have advocated the need for express consent, or some kind of “opt-in” system, Japan has adopted the implied consent approach, that is, notification of purpose of use with the right to opt-out should the Principal not approve. The key principle of the Bill is that the Principal should know how his data is being used. The Bill requires that the User must at a minimum include the following in its notice:

- 1) That the data will be shared with a third party(ies);
- 2) The kind of data to be shared;
- 3) How the data will be shared;
- 4) A clear and simple means to opt-out should the Principal not want his data shared with a third party.

What constitutes an appropriate form of notice is an issue currently being considered in the drafting of the guidelines and remains perhaps the most important area of government discretion. Discussions with the Prime Minister’s Cabinet Office responsible for privacy issues and METI indicate a relatively convenient standard of notice. Both have stated that notice posted on a website may be sufficient so long as the notice is posted in advance of the sharing of the data and stays for a period after the data has been shared. These discussions also suggested that a notice of intent to share data provided in a catalog -- not significantly different than what is commonly

found in most US catalogs -- should be sufficient too. However, the criteria for notice will not be set until these Guidelines are finalized and the Japan Direct Marketing Association, (“JADMA”) formalizes its standards. Even then the standards will most likely be vague and open to interpretation.

Legacy databases.

One area of concern is the treatment of data collected prior to the implementation of the Bill, since many companies have client lists that have been built up over the course of a number of years.

The Bill is clear it will be acceptable to use data collected in the past. The criteria for judgment will be whether the Principals can be expected to know that their data is being shared.

If the Principals could argue that they were not aware their data is being shared then the User has the responsibility to publish clear notice to the effect that the data will be shared, as well as a clear explanation of the means to opt-out.

Another form of notice.

For most direct marketers, the notice and opt-out provisions will be the easiest and most convenient means to assure that data can be legally shared with third parties. But, the Bill offers one other option. This second alternative is applicable when the data is shared among members of a group.

The examples most frequently cited are the credit rating cooperatives used in the banking industry, and data sharing between travel agencies and airline companies. However, even in such instances, the User still must post notice that:

- 1) The data is used jointly within a specified group;
- 2) The kind of data to be shared;
- 3) The purpose of use; and
- 4) The range of the Users that will be sharing the data.

While the original drafters of the Bill felt this second provision would be an attractive alternative, in practice it appears few are intending to utilize this approach. The reason is that the government suggests that when describing the range of the Users it is necessary for this to be a clearly defined group with a publicly accessible membership list. The reluctance to publish one's partners has led most users to choose the relatively easy standards of notice and opt-out.

Other Obligations for Users.

There are three other obligations for Users of personal information that are worthy of note. All fulfill obligations to principals, yet are designed to not be overly burdensome on the users.

The first states it is necessary for any entities handling personal information to make a personal record available to the principal upon (the principal's) request. The Bill draws the important distinction that only the User that collected the information is responsible to disclose the data. So if User A rents its list to Company B for prospecting purposes and after the mailing Company B receives a request from a principal to disclose the data record, Company B has no obligation to disclose such information to the principal, but User A does.

Furthermore, if User A can demonstrate that disclosing such record would "meaningfully impact its ability to do business," than it is not necessary to disclose the data. Here again, the standard of what constitutes, "meaningfully impact its ability to do business" is a standard that will ultimately be left to METI's discretion.

The second obligation states that the user must upon request by the principal correct any aspect of the data record that may not be accurate.

Finally, while the Bill does not require the user adopt a formal privacy policy other than to the extent it must provide notice of the purpose of use as mentioned above, it does state the user must maintain certain standards for the maintenance of the data. The law states that the data must be kept up to date. The user must adopt appropriate security measures and it must maintain proper supervision of those designated to manage the data.

Oversight

As stated above, the Bill was ratified on May 30, 2003. It must be implemented two years from this date. The first step is for the Prime Minister's Cabinet Office to pass a cabinet ordinance. This basic policy statement is likely to be prepared in April of 2004 and then each ministry will prepare its own guidelines.

The latest estimates are that the cabinet ordinance should be finished by April 2004. Once the cabinet ordinance has been passed then METI will draft its guidelines and after this JADMA will finalize standards for the direct marketing industry. In discussions, JADMA has expressed that so long as the guidelines remain consistent with the current interpretation of the Bill as offered by METI, it does not anticipate that major changes will need to be made to its existing privacy policy, Guidelines for Personal Data Protection in the Direct Marketing Business (http://www.jadma.org/e_page/guide_2e.html). Once the Bill is implemented, specific oversight for the direct marketing industry will fall to METI's Consumer Policy Division.

Penalties

The penalty provisions are another relatively user-friendly yet ambiguous aspect of the Bill, with both positive and negative aspects. The area of greatest concern is that METI will be responsible for oversight of the direct marketing industry and as such have discretion in determining if a company is in violation of the spirit of the Bill. The bright side is that should METI determine that a direct marketer has run afoul of the letter or spirit of this new privacy legislation, its first step is simply to notify the user they are doing something wrong. The next step is to merely admonish the user to cease such conduct.

The Bill is vague on the timing as to when such corrective action must be taken. It does specify that if the Minister should deem immediate action is warranted due to a significant violation of an individual's right or welfare, the user must cease such conduct right away.

Should the user continue to use the personal information in violation of the admonition from METI, it would then be subject to imprisonment for no more than six months or a fine of not more than 300,000 yen (roughly US\$ 2,700).

Summary

The Bill on the Protection of Personal Information will benefit direct marketers by laying the foundation for the exchange of lists in Japan. Prior to its introduction, due to the absence of any clear guidelines, industry players were nervous about potential negative consequences of sharing personal information and they often refused to take full commercial advantage of these valuable assets.

While the spirit of the Bill supports greater exchange of personal information, a number of aspects of implementation remain vague and most likely will remain so even after the guidelines are formulated. The government must balance two opposing interests in its implementation: the need to support industry's use of the data and the individual's right to privacy protection. The government appears supportive of industry, but as in any democracy, a sharp change in public sentiment can quickly shift the balance.

The direct marketing industry in Japan is closely watching these developments, eager for the chance to more actively utilize customer data. It is reasonable to expect that most will remain cautious. However, with time, there is no question that this new legislation will eventually clear the way for more active exchange of customer data. This will greatly benefit everyone trying to build their direct marketing businesses in Japan.