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The Privacy Notice and Protection of Personal Data (Recent Publication of the Privacy Notice Guidelines)

More than three years have passed since the addition¹ to article 16 of the Political Constitution of the United Mexican States of a second paragraph recognizing as a fundamental right the protection of personal data or, said in other words, the protection of persons in relation to the utilization of their personal information in the private sphere.

“Every person has the right to the protection of their personal data, to access, correction and cancellation thereof, as well as to state their opposition, in the terms set forth in the law, which will establish the premises of exception from the principles that govern the processing of data, for national security reasons, public order provisions, security and public health or to protect the rights of third parties”.

In this period the personal data protection law, new in our legal system, was regulated first by the Federal Act for Protection of Personal Data in Possession of Private Parties published in the Official Federal Gazette on July 5, 2010 (hereinafter the “Law”) and then, in greater detail, by the Regulation of the Federal Act for Protection of Personal Data in Possession of Private Parties published on December 21, 2011 also in the Official Federal Gazette (hereinafter the “Regulation”).² Both the Law and the Regulation establish not only an important catalog of definitions related to the right of protection of personal data but also a series of principles regarding the processing of personal data and the inherent rights of the data subject. In other words, a significant range of obligations for all those private individuals or entities that make decisions regarding the processing of personal data, which is to say the obtaining, use³, disclosure or storage of any information concerning an identified or identifiable individual. Such obligations include “making available to the data subjects a document that is known as the Privacy Notice” through which the information principle, which provides that “the data controller shall inform the data subject of the existence and principal characteristics of the processing that his/her personal data will be submitted to”, is complied with.

The Privacy Notice, then, is a document physical, electronic or in any other format generated by the data controller and that is made available to the data subject prior to processing his/her personal data. This document should contain, at a minimum, the information that is indicated in articles 8 (last paragraph), 15, 16 and 36 (second paragraph) of the “Law” and that refer to the identity and domicile of the data controller, the information that is collected, the purposes of the processing, the options and means that the data controller offers in order to limit the use or disclosure of the data, the

¹The Decree adding a second paragraph, moving forward the subsequent paragraphs in order, to article 16 of the Political Constitution of the United Mexican States was published in the Official Federal Gazette on June 1, 2009.

²It is worth mentioning the existence of other provisions in this area such as, for example, the General Criteria for the Implementation of Countervailing Measures without the express authorization of the Federal Institute of Access to Information and Protection of Data published in the Official Federal Gazette on April 18, 2012, as well as the existence of various documents issued by such Institute, also known as IFAI, in order to facilitate the knowledge and understanding of this right and of the obligations that go with it, among which can be mentioned the Practical Guide to generating the Privacy Notice, the Recommendations for the appointment of the Personal Data Person or Department, the Practical Guide for exercising the ARCO Rights and the Practical Guide for exercising the Right to Protection of Personal Data.

³According to section XVIII of article 3 of the “Law” the use of the personal data covers any action of access, handling, taking advantage of, transfer or disposition thereof.



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means (and procedures) for exercising the rights of access, correction, cancellation or opposition known as ARCO rights or to revoke their consent to the processing, the transfers⁴ that are made of the collected personal data (and the consent of the data subject) and the procedure and means by which the data controller communicates any update or modification to such document. It should be emphasized that this minimum information with respect to the Privacy Notice is mandatory and that failure to provide it is sanctioned as indicated in articles 63 and 64 of the “Law” which provide that the failure to provide one or all these elements constitutes an infringement and it will be sanctioned with a fine of 100 to 160,000 days of the minimum wage in effect in the Federal District.

Now, while it is true that the minimum information a Privacy Notice must contain is established by the “Law” it is also true that, being a law, it does not contain further explanations. Thus, its detailed regulation came later with the “Regulation”. Nevertheless, it should be mentioned that even though the “Regulation” clarifies to a large extent the scope of the information required at a minimum, there were still some ambiguous and even some undefined points. In this context, this past January 17, the Ministry of Economy published in the Official Federal Gazette the Privacy Notice Guidelines in order to establish the content and scope of these documents in accordance with both the “Law” and the “Regulation”; such Guidelines are also binding throughout the Mexican Republic and enter into force three months after their publication in the Official Federal Gazette (April 17, 2013).

The Privacy Notice Guidelines are composed of the following five chapters: (i) General Provisions, (ii) Privacy Notice, (iii) Making the Privacy Notice Available, (iv) Forms of the Privacy Notice and (v) Content of the Privacy Notices. Such Guidelines also include an Annex that describes best practices⁵ in relation to the Privacy Notice that are optional for the data controllers.

In this respect, the following are among the most important points of the Guidelines:

- Eight new definitions that seek to complement those previously provided and among which we would point out one regarding the obtaining of personal data personally, directly and indirectly. Specifically, the third Guideline defines these in the following manner: (i) to obtain the personal data personally is the act in which the data subject provides the personal data to the data controller, or to the individual designated by the data controller, with the physical presence of both, (ii) to obtain the personal data directly is the act in which the data subject his/herself provides the personal data by some means that permits their delivery directly to the data controller, including among others, electronic, optic, sound or visual means or any other technology such as by post, internet or telephonically and (iii) to obtain the personal data indirectly is the act in which the data controller obtains the personal data without the data subject having provided them to it, personally or directly, such as for example through a source with public access or a transfer.

⁴The transfer of data is the communication of the personal data to a person other than the data controller or the data processor. Such transfer, whether national or international, must be consented to by the data subject unless it falls under one of the exceptions indicated in article 37 of the “Law”. It is important to have in mind that a transfer should not be confused with the sending of personal data, the latter being the communication between the data controller and the data processor which obviously acts on behalf of the former and which does not require consent from the data subject.

⁵Among the most important best practices recommended are related to the processing by the data controller of personal data of minors or persons in interdiction or incompetent and with respect to which it is suggested to indicate the mechanisms that have been implemented to get the consent of those having guardianship or the legal representative and the special actions, measures and provisions that characterize this type of processing and that the data controller implements in order to safeguard the right to the protection of personal data of this group of persons. Also relevant is the suggestion to include, additionally, the trade name of the data controller or the name it is commonly known by the public and other data such as its web page, email, fax or telephone number. In addition, the best practice of informing the data subject of the right he/she has to go before the IFAI if he/she considers that his/her right to the protection of personal data has been violated.



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Also important are the definitions regarding the “cookies” or the “web beacons” since they are mechanisms that allow the collection of personal data automatically and simultaneously and that are used frequently.

- The restating that the Privacy Notice should be an efficient and practical information mechanism that is presented to the data subjects simply, with necessary information and drafted in Spanish, in clear and understandable language and with a structure and design that facilitates its understanding. For this purpose the Guidelines also provide that the Privacy Notice (i) should not use inexact, ambiguous or vague phrases⁶, (ii) its drafting should not take into account the profiles of the data subjects, (iii) it should not include text or formats that induce the data subject to choose a specific option, (iv) if they include boxes, they should not already be filled in and (v) they should not send the data subject to texts or documents that are not available to the data subject.
- The indication of the existence of three forms of Privacy Notice: full, simplified and short.⁷ Furthermore, it should be indicated when each of these forms will be made available to the data subjects, regardless of, in the last two cases, the obligation of every data controller to have a full Privacy Notice that contains the informational elements that the twentieth Guideline describes in twelve sections.
- The identification and distinction between the purposes that gave origin or are necessary for the existence, maintenance and fulfillment of the legal relationship between the data controller and the data subject and those that are not. As well as the obligation to indicate the mechanisms implemented by the data controller so that the data subject can manifest his/her denial with respect to the processing for the purposes that are not necessary.
- The need, in the case of a national or international transfer, to include the information regarding third party recipients or addressees of the personal data (either identifying each of them by their name or indicating their type, category or sector of activity) and the purposes that justify such transfers distinguishing between those that require the consent of the data subject to be carried out and those that can be carried out without such consent.
- The minimum information that should be included with respect to the procedures to exercise the ARCO rights (and, if applicable, for the revocation of consent) and among which are the requirements and mechanisms for evidencing the identity of the data subject and the legal capacity of his/her representative, the time periods applicable to the procedure and the means for responding.
- The list of possible options and means for limiting the use or disclosure of the personal data contained in the thirtieth Guideline and which includes those related to the Public Registry of Consumers, the Public Registry of Users or the exclusion lists of the data controller.
- The requirement of a new Privacy Notice, an update or an amendment to the existing one not being sufficient, when: (i) the identity of the data controller changes, (ii) it is necessary to collect sensitive, economic or financial personal data additional to those provided originally, (iii) the purposes of the processing change or (iv) the conditions of the transfers are changed or transfers not initially expected are to be made.

⁶In fact, in the twenty-second and twenty-fourth Guidelines it is mentioned that when indicating the personal data that the data controller will process or describing the purposes of the processing, phrases such as “among others”, “for example” or “analogous” should not be included.

⁷Guidelines thirty-four and thirty-eight indicate the informational elements that the Privacy Notices should contain in the simplified or short form.



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Finally, it is equally important to return to the idea that while the Privacy Notice is one of the most important obligations established by this new personal data protection regulation, it is not the only obligation. In addition to the information principle there are other data protection principles such as those of illegality, consent, quality, purpose, honesty, proportionality and responsibility.

This regulation also provides for compliance with the duties of confidentiality and security, as a result of which regarding the duty of security contained in article 19 of the “Law” and that is described in detail in Chapter III of the “Regulation” there is also a deadline of June of this year for the adequate implementation of security measures⁸ in the processing of personal data, a matter we will discuss on another occasion.

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Sincerely,

Von Wobeser & Sierra

Mexico City, Abril 4th , 2013.

⁸Article 57 of the “Regulation” establishes that the data controller and, as the case may be, the data processor must establish and maintain the administrative, physical and technical security measures for the protection of personal data, these being understood as the control or group of controls of security to protect personal data.