

Short notes on:

SPAM EMAIL, SALES CALLS – ENOUGH TO DRIVE ANYONE MAD!

WHAT SHOULD YOU KNOW AS A BUSINESS OWNER ON THE GIVING END?

Introduction

The Consumer Protection Act No 68 of 2008, as amended (CPA), provides for the establishment of an “Opt-Out Registry”. As we speak, this is being ironed out by the National Consumer Commission (the NCC). This could mean that consumers that do not want to be targeted, would list their details there, and, in a perfect world, would never receive these again.

What should you know as a business owner or potential marketer?

Opt out

According to Madelein Truter,¹ “direct marketers will be required to ‘spool’ their databases against the Opt-Out Registry before engaging in direct marketing with a consumer. There has been considerable debate among policy makers regarding an appropriate mechanism to protect persons against the unsolicited electronic communications and spam that are associated with direct marketing.”

Direct marketing is a very broad concept in terms of the CPA, but be that as it may, the consumer’s right to privacy is dealt with here and in the Protection of Personal Information Act 4 of 2013 as amended (POPI) amongst other bodies of regulations. It is this right that enshrines the consumer’s rights not to be subjected to or to refuse to accept or to terminate any contact with regards to marketing.

On the part of the supplier, who is authorizing or conducting any direct marketing, he/she must implement appropriate procedures to ensure that they have the required consumer consent and proof thereof. This, according to Truter, is where an opt in mechanism may prove very useful. “If the direct marketer has made use of an opt-in provision, it should be relatively simple to provide proof that the consumer expressly consented to receiving direct marketing from the direct marketer.”

¹ <https://www.derebus.org.za/national-consumer-commissions-planned-opt-registry/> : Accessed 17/10/2017

Opt-out versus opt-in

The inverse of the opt-out system, is the opt-in approach. This requires express consent before a communication is sent to a consumer. From a technical perspective, for opt-in e-mail address authentication is the minimum degree necessary for any e-mail advertising or other ongoing e-mail communication.

In terms of the POPI an opting in approach is introduced. POPI's opt-in system means that a business is not allowed to conduct direct marketing unless prior consent is obtained from a consumer. The business may contact a new customer once to obtain this consent. According to Truter, in terms of POPI, you do not have to ask for consent if you want to market to existing customers if –

- “the business obtained the customer’s contact details in the context of a transaction;
- the contact details are used for the purpose of marketing similar products or services to the customer;
- the customer was given a reasonable opportunity to object to receiving direct marketing, free of charge and without having to go through too much red tape; and
- every time thereafter that marketing material is sent to that customer (in other words, the customer must be given the opportunity to opt-out or unsubscribe every time)”².

Furthermore, POPI provides that the consent must conform to the following standards:

- explicit;
- voluntary;
- specific; and
- informed.

POPI and the CPA will apply to direct marketing, and the issues surrounding obtaining consent, and we can therefore assume that practical implementation will be concurrent, or where this fails – the interpretation favoring the customer will apply.

^{2 2} <https://www.derebus.org.za/national-consumer-commissions-planned-opt-registry/> : Accessed 17/10/2017

As a general point, consumers are more reluctant to tick an 'opt-in' box, than they are to tick an 'opt-out' box. As such, it would seem that this is a more preferred methodology of running legitimate campaigns.

According to Truter, "the administration of the Opt-Out Registry will no doubt be a costly exercise. There is a real possibility that the Opt-Out Registry will become another bureaucratic institution, which does not provide good regulation, it being understood that 'good regulation' would be a regulatory mechanism which is cost effective and which does not overlap or contradict any other regulators or legislation".

Conclusion

We recommend an opt-in approach where the consent is obtained to POPI's standards. Contact an expert at SchoemanLaw for assistance today.

