

MARKETING METHODS CAN COST YOU

Information Regulator's Enforcement Notice, 27 February 2024

The Information Regulator issued a first Enforcement Notice last week to FT Rams Consulting. This was the outcome of an investigation into a complaint received from an individual who became utterly annoyed by FT Rams' countless direct marketing messages to him, regardless of his multiple attempts to opt out and requests to be removed from the company emailing list.

[The Enforcement Notice.](#)

SUMMARY OF THE PROVISIONS THAT APPLY IN RESPECT OF ELECTRONIC DIRECT MARKETING

Finding that FT Rams had contravened certain provisions of the Protection of Personal Information Act ('the POPIA'), the company was ordered, amongst other things, to stop sending the messages insofar as they constitute unsolicited direct marketing. In addition, should they continue with this practice despite the Notice, they risk attracting a fine which can reach a maximum of R10 million.

The issuing of the Enforcement Notice is a step in the right direction. Unfortunately, some of the pronouncements that the Regulator made in the Notice regarding electronic direct marketing, were wide and may cause confusion regarding when consent is required. We highlight the rules below.

DEFINING ELECTRONIC DIRECT MARKETING

Section 69 of the POPIA regulates direct marketing sent over **electronic communication** only. In this regard, two definitions are important. The first is "direct marketing" which means "to approach a data subject ... by electronic communication, for the direct or indirect purpose of Promoting or offering to supply, in the ordinary course of business, any goods or services to the data subject ... or requesting the data subject to make a donation of any kind." The second one is the definition of "electronic communication, which means "any text, voice, sound or image message sent over an electronic communications network which is stored in the network or in the recipient's terminal equipment until it is collected by the recipient."

By definition, this excludes communications over the telephone as marketing messages cannot be stored in the network or in the recipient's terminal equipment.

In other words, for purposes of POPIA, electronic direct marketing is communication that is:

- (i) *directed at a person* (not an email sent to, for example, a company's *contact@*-email address);
- (ii) that promotes or offers to supply any goods or services, or requests donations from that person; and
- (iii) that constitutes *marketing*. (In other words, general communication or advices sent via electronic communication cannot, without more, be said to constitute marketing in this sense.)

Examples where POPIA's strict rules will apply, are marketing directly to a person by way of emails, SMS messages, direct messages sent via social media platforms and advertising sent to a *custom* audience on a social media platforms.

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CONSENT

Once it is established that the communication is 'direct marketing', consent may be required. Consider the following:

- If it is the first time that you will be marketing directly to a specific individual, you are required to obtain consent, if the marketing is unsolicited. This means that consent must be obtained if you want to send electronic marketing to that individual which he or she did not request. The consent must be voluntary, specific, and informed expression of will, according to the POPIA. The Form 4 (in the regulations to POPIA) must be followed when consent is obtained. The use of pre-ticked opt-in boxes, or double negatives are not allowed.
- You do not need an opt-in consent if there is an existing business relationship with that individual. For example, if the individual had previously made use of your services and advised that you may in future send material to him or her, or subscribed to your newsletters before, you do not need additional consent. Be mindful that the direct marketing must then relate to your own goods or services not that of a third party; and must be similar to the goods or services that the person had previously engaged with you about. You must always offer an option to the individual to opt-out (and then adhere to the request if received).

It is apparent from the above that certain rules apply where the electronic communication constitutes "direct marketing" as defined in POPIA, but there are instances where the communication would not fall within that definition or where consent is not a prerequisite. Contact us should you require assistance.

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