

e-Business Factsheet E-mail Marketing, Spam and the Law

Definition

In a bid to reduce the problem of Spam - or Unsolicited Commercial E-mail (UCE) - new regulations came into force in the UK in December 2003. Anyone who sends direct marketing messages by e-mail must comply with these rules or face a possible fine of £5000 for each breach.

Although the regulations cover any unsolicited electronic marketing messages such as e-mail, fax, telephone, text and picture messaging, this factsheet concentrates on e-mail marketing. Its contents also reflect guidance from the Committee of Advertising Practice (CAP Code).

Overview

- Who can you e-mail?
- In what circumstances
- What is best practice?

Since the EU Directive on Privacy and Electronic Communication (DPEC) came into force in 2003 there has been some confusion with regard to interpreting its implementation in the UK.

This factsheet is intended to help you understand the rights and wrongs and best practice surrounding e-mail marketing.

Topic Areas

What the law requires

1. You cannot transmit unsolicited marketing material by e-mail to an individual subscriber (a consumer) unless the recipient has previously notified you, the sender, that he or she consents, for the time being, to receive such communications.

Exceptions to this rule ...

- a) The recipient has actively invited the communication via a third party.
- b) The recipient has been made aware he or she is likely to receive marketing messages but has not for the time being, objected to receiving them (through a simple and clear method).

2. You cannot transmit any marketing e-mail (whether solicited or unsolicited) to any subscriber (whether corporate or individual) where

- a) the identity of the sender has been disguised or concealed, or
- b) a valid address to which the recipient can send an opt-out request has not been provided.

Definition of an individual subscriber

A subscriber is defined in the regulations as "a person who is party to a contract with a provider of public electronic communications for the supply of such services".

They will have an email address like:

theirname@afreeservice.com

An individual is defined as "a living individual" (i.e. not a corporation). A living person who works for a corporation will not be a party to a telecoms/ISP contract; the corporation will be.

Therefore, corporations and employees of corporations may be sent marketing e-mails even if they have not consented to them.

Please note, however, that marketing e-mails should be restricted to "business products or services".

Is explicit consent always required?

Other than when the exceptions apply in "What the law requires" (above) you may send e-mail for marketing purposes to an individual subscriber without explicit consent where:

1. You have obtained the contact details of the recipient in the course of a sale or negotiations for the sale of a product or service to the recipient;
2. The marketing material you are sending is in respect of your similar products and services only; and
3. The recipient has been given a simple and clear means of refusing (free of charge except for the cost of transmission) the use of their contact details at the time those details were initially collected and at the time of each subsequent communication.

This is known as "soft opt-in".

The course of a sale or negotiations for the sale

Where a person has actively expressed an interest in purchasing a product or service and not opted out of receiving future related marketing messages (having been given a clear opportunity to do so), the company can continue to send them marketing material by e-mail until that person opts out.

Opt-out requests

No matter the means that consent may have been obtained and despite interpretation of the course of a sale or negotiations for the sale, particular attention is being paid to **failures to comply** with opt-out requests.

In other words, while the recipient may, directly or indirectly, have given consent, that has to be considered to be for the time being.

And it is essential that they be given the clear **opportunity to easily remove that consent** (to opt out) in every subsequent communication.

From the Information Commissioner's guidance: "We will take **enforcement action** against those companies within the UK jurisdiction who persistently fail to comply with opt-out requests from individual subscribers."

When an opt-out request is received, the contact details should be "suppressed" rather than deleted. This will ensure that person's request is recorded, retained and respected until such time as that person may provide new consent. This would also be useful evidence in the event of a complaint.

Lists compiled prior to December 2003

If these lists were compiled in accordance with privacy legislation in force at the time (e.g. the Data Protection Act 1998) AND have been used recently, they can continue to be used unless the recipient has opted out.

Business to business communication

Only individuals (see "Definition of an individual subscriber" above) have the enforceable right of opt-out under the new regulations.

However, where the sending of marketing material to the employee of a company includes the **processing of personal data** (i.e. the marketer knows the name of recipient), that individual has a right, under the Data Protection Act 1998, to request that no further material is sent.

And a valid address must be provided to which the recipient can send an opt-out request.

So, an **individual** would be:
person@theirhome.com

And an **identifiable employee** would be:
person_name@theircompany.com

Best Practice

1. If e-mail addresses are to be used for marketing purposes, this should be clearly stated at the point of collection.
2. Once informed, the user should be able to refuse permission for their e-mail to be used for marketing purposes (i.e. opt-out).
3. If e-mail is to be sent to those with whom a customer relationship exists, the content should be in reference to similar products and services.
4. If the e-mail addresses are to be shared with third parties, this should be clearly stated at the point of collection.
5. E-mail addresses should not be harvested (e.g. copied from websites) and used for marketing purposes without the recipients' knowledge.
6. Recipients should be able to refuse permission for further marketing messages to be sent to them at any time.
7. Your identity as the sender should never be disguised or concealed.
8. In every communication, recipients must be given a simple and clear means of opting out from receiving future e-mails.
9. When an opt-out request is received it must be honoured, with the contact details ideally being "suppressed" rather than deleted.

Web Resources

The Privacy and Electronic Communications (EC Directive) Regulations 2003

See Regulations 22 and 23

http://www.alias-url.com/email-spam_f_1.htm

The Committee of Advertising Practice

http://www.alias-url.com/email-spam_f_2.htm

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