

Most direct marketing activities must comply with the requirements of the Data Protection Act 2002 (DPA) and, where that direct marketing is communicated by electronic mail, telephone or fax, with the requirements of the Unsolicited Communications Regulations (the Regulations).

Direct marketing is defined in the DPA as

"the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals".

Letters addressed to "The Occupier", or email sent to generic email addresses, for example "enquiries@xyz.com", are not "directed to particular individuals" and are not, therefore, subject to the DPA or the Regulations.

"Direct marketing" is not limited to advertising goods or services for sale. It also includes promoting an organisation's aims and ideals.

This means that the direct marketing rules in the DPA and the Regulations will apply to the promotional and campaigning activities of not-for-profit organisations. For example, a charity or political party contacting particular individuals to appeal for funds or votes, or contacting supporters to encourage them to write to their MHK or attend a public meeting or rally, would be covered by the direct marketing rules.

Not-for-profit organisations will not be able to send campaigning texts or emails without specific consent, even to existing supporters, as this is not the commercial marketing of services or products.

This guidance contains advice and 'getting it right' tips on marketing by post and using electronic mail, phone or fax, including the following areas:

- Individuals Rights
 - Right to stop direct marketing
 - Rights to seek compensation
- Enforcement
- The Direct Marketing Rules
 - The Data Protection Act
 - The Unsolicited Communications Regulations
 - Effect of the Regulations
 - Getting consent for direct marketing
 - Electronic mail marketing
 - Viral marketing
 - Telephone marketing – live calls
 - Telephone marketing – automated calls
 - Fax marketing
 - Third party marketing lists

Some of the jargon you will come across is explained on page 11.

INDIVIDUAL'S RIGHTS

Right to prevent processing for purposes of direct marketing

Section 9 of the DPA gives individuals the right to prevent their personal data being processed for direct marketing. An individual can, at any time, give written notice to stop (or not to begin) using their details for direct marketing.

There are no exceptions to this rule.

If you fail to comply, you will contravene the DPA and they can apply to the courts for an order against you.

In other words, organisations must stop any marketing directed at a particular individual if that person writes and asks them to stop, irrespective of the media used for the direct marketing.

The organisation does not have to reply, but it is good practice to acknowledge the request and confirm that the marketing will stop. The organisation must stop marketing within a reasonable period. For example, if a specific mass marketing campaign is already underway, it might be difficult to prevent one individual from receiving any further materials.

In most circumstances we expect that calls, texts or other electronic communications should stop within 28 days of receiving the objection, and postal communications should stop within two months. If the organisation can reasonably stop sooner, it must.

Rights to seek compensation

Individuals also have a right under the DPA to seek compensation if you have contravened any requirement of the DPA and this has caused them damage. This includes failing to comply with their request to stop, or not begin, direct marketing.

Individuals also have a right under the Regulations to bring proceedings against a person who has caused them damage by reason of any contravention of the Regulations.

ENFORCEMENT

The Information Commissioner ("Commissioner") has enforcement powers in respect of both the DPA and the Regulations. The enforcement functions of the Commissioner, set out under the provisions of part 5 of the DPA, are extended to the Regulations by virtue of Regulation 12.

A contravention of the data protection principles or Regulations is not an offence; however, the Commissioner may serve an Enforcement Notice upon any person who is found to have contravened the DPA or Regulations. Failure to comply with an Enforcement Notice is an offence.

THE DIRECT MARKETING RULES

Direct marketing activities are subject to the DPA and, in addition, when electronic mail (including email, sms and picture messaging), telephone or fax is used, to the Regulations.

THE DATA PROTECTION ACT

When does the Data Protection Act apply to direct marketing activities?

The DPA applies when "personal data" is "processed".

Names, addresses, email contact details and telephone numbers of individuals are typically held in databases or spreadsheets. Direct marketing involves obtaining and using (processing) this information to generate direct marketing material, and the DPA, therefore, applies. If the information about individuals is held only in a manual format and letters and envelopes are handwritten, or typed using a manual typewriter, the DPA will not apply.

How do I comply with the Data Protection Act?

When personal data is processed for the purpose of direct marketing, irrespective of the media used, the DPA, and all the data protection principles, must be complied with.

The most relevant data protection principles are:

- The first principle: organisations must process personal data fairly and lawfully.

In particular, they will usually need to tell the individuals concerned who they are and that they plan to use those details for marketing purposes. They will also need to tell people if they plan to pass those details on to anyone else, and are likely to need their consent.

Organisations must not do anything with individuals' details that people would not reasonably expect or which would cause them unjustified harm.

- The second principle: organisations must only collect personal data for specified purposes, and cannot later decide to use it for other 'incompatible' purposes.

Individuals' details cannot be used for marketing purposes if the details were originally collected for an entirely different purpose, unless they seek, and obtain, the consent of the individuals for that new use.

- The fourth principle: organisations must ensure that personal data is accurate and, where necessary, kept up to date.

A marketing list which is out of date, or which does not accurately record people's marketing preferences, could breach the DPA.

Further guidance about complying with the requirements of the DPA and the data protection principles is available on the website.

POSTAL MARKETING – getting it right

Postal campaigns and 'junk mail' can form an important part of any organisation's overall marketing strategy. From simple flyers and response forms to competition entries and interactive CDs, postal campaigns can generate important new leads and business.

If personal data is processed for the purpose of postal marketing, you must comply with the Act, and the data protection principles, if the direct marketing is "directed to particular individuals".

Individual's rights must also be respected - if the person you are targeting asks to be taken off your mailing list, i.e. they wish to opt out from receiving further communications, you must comply with their request.

THE UNSOLICITED COMMUNICATIONS REGULATIONS

The Regulations came into effect in the Isle of Man on 1st October 2005. The Regulations are based on regulations 19 to 33 of the UK's Privacy and Electronic Communications (EC Directive) Regulations giving effect to the EC Directive 2002/58/EC. The Regulations and the Order are available on the website.

The EC Directive concerns the processing of personal data and the protection of privacy in the electronic communications sphere. There is, therefore, a crossover between the requirements of the DPA and the Regulations.

Effect of the Regulations

If you are direct marketing by email, text or picture message (including video), telephone, fax, or by using an automated calling system, whether you are transmitting, or instigating the transmission of such communications, the Regulations impose varying rules on you depending on the media used.

However, getting the customers agreement (consent) to receive direct marketing is the first step.

Getting consent for direct marketing

If an individual contacts you and asks to be sent marketing material, this is solicited marketing.

Marketing is unsolicited if the individual has not requested it and has not objected to receiving it for the time being.

Consent can be withdrawn by the individual at any time.

If you are contemplating buying or renting a third party direct marketing list, you should carefully consider whether valid consent to direct marketing by third parties has properly been obtained. Guidance on consent is available on the website.

Getting consent right for your customers

Direct marketing can be by more than one media.

You must ensure that the individual understands what choice they have made and, as the rules vary on consent for the different marketing methods, that you appreciate whether or not you can send marketing in that particular media.

It is currently your decision as to whether you get your customers to opt in to, or opt out from, marketing, although this is likely to change to opt in only when the new EU Data Protection Regulation is brought into force.

Whichever method is chosen, it must be clear to your customers that they are going to be sent direct marketing by a particular method(s).

The best way to achieve this would be to give your customers the choice as to which, if any, method of direct marketing they would prefer. For example,

"Please contact me with details of your future promotions by (tick box(es) as appropriate)

Email ***telephone*** ***text message*** ***post*** "

You should be aware that you could only then market by the methods chosen.

If no preference is given, consent to marketing cannot be assumed.

ELECTRONIC MAIL MARKETING – email, sms and picture messaging

You may only transmit, or instigate the transmission of, electronic mail direct marketing if the person you are marketing has given **you** their permission (consent).

There is one exception to this rule.

You may send electronic mail if all the following conditions are met:-

- a person's details are obtained by **you** in the course of a sale, or negotiations for a sale, of a product or service **you** offer; and
- the messages are only marketing **your** similar products or services; and
- the person was given a simple opportunity to refuse marketing **when their details were first collected**, and they didn't opt out at that point

Whether your marketing is solicited or unsolicited, your messages must always:

- **inform the recipient who you are**
 - you cannot conceal or disguise your identity.

If you are using a subcontractor to do your marketing, it must still be your name that is advised to your customers, for example, "We are ABC Ltd marketing XYZ Ltd' product".

- **provide valid unsubscribe contact details**
 - a simple, free method to unsubscribe from future marketing must be provided to enable the recipient of the communication to request that such communications cease.

These rules don't apply to emails sent to non-personal generic email addresses, for example, enquiries@xyz.com. However, they will apply to those sent to john.smith@xyz.com

Getting electronic mail marketing right for your customers - Points to consider:

- Are your marketing communications directly invited (i.e. solicited), unsolicited or a mixture of both?
 - How do you record the different categories?
- By what mechanism have subscriber details been obtained?
 - How do you determine whether the details have been provided with the intention that you should send the subscriber direct marketing communications?
- Do you have opt-in consent?
- How do you collect, audit and verify the accuracy of your opt-in records?
- Can you describe how opt-out mechanisms will be provided?

VIRAL MARKETING

What is 'Viral Marketing'?

The Committee of Advertising Practice (CAP) describes viral marketing as follows:

"Advertising virals are e-mail, text or other non-broadcast marketing messages that are designed to stimulate significant circulation by recipients to generate commercial or reputational benefit to the advertiser from the consequential publicity. They are usually put into circulation ("seeded") by the advertiser with a request, either explicit or implicit, for the message to be forwarded to others. Sometimes they include a video clip or a link to website material or are part of a sales promotion campaign."

Some companies mistakenly see viral marketing as a way of avoiding the prior consent rule.

This is incorrect and the Regulations still apply.

Viral marketing is usually incentivised, but not in all circumstances.

You engage in viral marketing in the following scenarios:-

1. **Send to a friend** - you ask a person to send the original marketing message to a friend or friends; or
2. **Recommend a friend** - you ask a person to give you their friends' contact details

In the above scenarios, you are either:

1. Instigating the transmission of the marketing by encouraging one of your customers to break the law to promote your business (sending an unsolicited message to an individual subscriber without prior consent – **send to a friend**), or
2. Transmitting the marketing - sending a message to someone who you assume has consented through a third party (**recommend a friend**).

In either case, **you** will remain liable under the Regulations.

Remember:

- the person transmitting, or instigating the transmission of, the message is liable for sending that message under the Regulations.
- anyone who allows their line to be used to break the law may also be liable under the Regulations (i.e. your customer who is sending your marketing to a friend).

If you are considering using '**recommend a friend**' you may still breach the Regulations even if you undertake all the following:

- Ask your customer to confirm to you that they have obtained the consent of the recipient whose details they are passing on
- Check that the recipient hasn't already asked you to suppress their details
- Tell your customer that you propose to let those recipients know how you got their details. The DPA does not prevent you doing this, and requires you to do so if an individual asks. This is particularly important if you propose to offer your customer incentives for passing their friends' details to you.

We recognise that your customer may check with their friends first before passing their details to you - people tend to do so when acting in good faith and in the interests of their friends.

However, you should also bear in mind that a person could be acting maliciously in giving third party consent. For example, someone could give the contact details of another person to a whole range of companies as a prank, or to cause annoyance.

Although it is hard to see how you are directly responsible for the malicious activities of that person, you should consider the reputation of your organisation and bear in mind that, at the very least, the recipient may continue to associate your organisation with that unpleasant experience.

TELEPHONE MARKETING

Live voice calls

You may **not** make unsolicited marketing live calls if:

- The subscriber has previously notified you that such calls should not for the time being be made to that line.
- The number of the called line is one listed on the Telephone Preference Service.

When you make unsolicited marketing live calls **you must**:

- identify yourself and, if asked, provide a valid business address or Freephone telephone number at which you can be contacted
- if you are using a subcontractor, the subcontractor's call centre staff must identify the instigator of the call (that is, the organisation on whose behalf they are making the call)
- provide the subscriber with the opportunity to confirm whether they wish to receive further unsolicited calls.
- If subscribers ask you not to call them again i.e. they wish to opt out from unsolicited marketing live calls, the numbers should be **suppressed** from your calling list, not deleted. If numbers are deleted, you have no record to show who has asked you not to call and if you buy in a new third party marketing list you will not be able to check this against the subscribers who have asked you not to call.

Getting live voice telephone marketing right for your customers - Points to consider:

Are your marketing communications directly invited (i.e. solicited), unsolicited or a mixture of both?

- How do you record the different categories?
 - How do you audit and verify the accuracy of your subscriber records?
 - Does your company currently subscribe to the TPS?
 - If subscribers ask you not to call, how will you address withdrawal of their consent or a subscriber override of the TPS registration?
 - Do you offer subscribers the opportunity to decline further contact?

Using an 'automated calling system'

Regulation 2 refers to a system that is 'capable of automatically initiating a sequence of calls to more than one destination in accordance with instructions stored in that system' and that transmits 'sounds which are not live speech for reception by persons at some or all of the destinations so called'.

You cannot transmit or instigate the transmission of automated calls unless you have the consent of the subscriber to do so.

'Power diallers', i.e. systems used to dial target numbers automatically to initiate live telephone conversations, are not included as automated calling systems and fall within live voice calls.

Getting automated calling system marketing right for your customers

Points to consider:

Are your marketing communications directly invited (i.e. solicited), unsolicited or a mixture of both?

- How do you record the different categories?

If you are to use an **Automated Calling System** for marketing communications, do you have the prior consent of the subscriber?

- If you have the prior consent of the subscriber, how do you audit and verify the accuracy of your subscriber records?
- How will you address withdrawal of consent and suppression from your list?

FAX MARKETING

Unlike the other forms of unsolicited direct marketing, corporate subscribers as well as individual subscribers have rights under the Regulations in respect of fax marketing.

A person shall neither transmit, nor instigate the transmission of, unsolicited communications for direct marketing purposes by means of a fax where the called line is that of

- An individual unless that individual has consented to such marketing for the time being;
- A corporate subscribers who has previously opted out from such marketing
- Or the subscriber has registered their name and number with the Fax Preference Service.

If your company uses fax marketing, remember that you are legally obliged to ensure you do not send a fax to any number which is registered with the FPS or which you have been advised directly not to use for direct marketing faxes.

If you are requested not to send fax marketing the details should be suppressed from your lists not deleted. If the details are deleted you will not know who has previously opted out from marketing, particularly if you buy in or rent a new list.

Getting marketing by fax right for your customers

Points to consider:

Are your marketing communications directly invited (i.e. solicited), unsolicited or a mixture of both?

- How do you record the different categories?

If you are using **faxes** for marketing, do you have the prior consent of the subscriber?

If you have the prior consent of the subscriber,

- how do you audit and verify the accuracy of your subscriber records?
- Does your company currently subscribe to the FPS?
- How will you address withdrawal of consent or a subscriber override of the FPS registration?

THIRD PARTY MARKETING LISTS

Marketing companies offer lists of individuals' details for sale or hire, claiming that they have consented to direct marketing.

Such lists should only be used if you have sought assurances, and are satisfied, that the intended recipients have actively consented to receiving unsolicited direct marketing from third parties.

You will remain liable under the Regulations even if you have sought assurances.

The following points should be considered before buying or renting such a list:

- Electronic mail marketing

It is difficult to see how the use of third party lists will meet the requirements of the Regulations as you can only send electronic mail marketing to an individual subscriber who has 'previously notified **the sender** that they consent for the time being to such communications being sent by, or at the instigation of, **the sender**.' It is likely, therefore, that the use of third party marketing lists for any electronic mail marketing will breach the Regulations.

- Suppression lists

Details of individuals who have advised you that they do not wish to receive marketing from you should be suppressed from your own marketing lists.

The details contained in the third party marketing lists must be screened against your own suppressed names, addresses and numbers, and where relevant, the suppression lists operated under the TPS or FPS.

If an individual's details appear on a suppression list for a particular media, you cannot market that individual using that media and **you** will breach the Regulations if you do.

- If the Commissioner receives a complaint, **you** must be prepared to justify the use of the list, and detail the steps **you** have taken to screen the list.
- If an individual asks where **you** got their details from, you **must** tell them - individuals have the right to ask for this information under the DPA.

JARGON

These are some of the words and concepts you will come across. Other words not listed here may be found in the relevant legislation.

Communication

"any information exchanged or conveyed between a finite number of parties by means of a public telecommunication system, but does not include information conveyed as part of a programme service, except to the extent that such information can be related to the identifiable subscriber or user receiving the information"

Consent

Consent to direct marketing must be upfront and clear to a reasonable person. The definition of consent in the Data Protection Directive (Directive 95/46/EC) applies when interpreting the Regulations. Consent is defined as follows:

"consent' shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed".

Direct marketing

"the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals". This includes hyperlinks in the body of email messages or behind images.

Electronic mail

"any text, voice, sound or image message sent over a public telecommunication system which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient, and includes messages sent using a short message service"

In other words, email, text, picture and video marketing messages are all considered to be 'electronic mail'. Marketing transmitted in WAP messages is considered to be 'electronic mail'. WAP Push allows a sender to send a specially formatted SMS message to a handset which, when received, allows a recipient through a single click to access and view content stored online, through the browser on the handset.

This also applies to voicemail and answerphone messages left by marketers making marketing calls that would otherwise be 'live'. However, the Regulations do not apply to Bluetooth messages as these are not sent over a public telecommunications network.

Fax Preference Service

The Fax Preference Service (FPS) operate a register of individuals who have expressed that they do not wish to receive direct marketing via fax. This register is operated on behalf of the Isle of Man Communications Commission under regulation 8.

Instigate the transmission

'Instigate' is not defined, but means to bring about the transmission, for example, whether that is by engaging a subcontractor or undertaking viral messaging through 'send to a friend' campaigns.

Opt out from future marketing communications

Individuals have the right to opt out from direct marketing communicated by any means. This right comes from the DPA.

The Regulations require that contact details to enable the individual to opt out from further communications, free of charge, must be provided. In the case of automated calls and fax,

this must be included in the communication. For live telephone calls, details of the free of charge contact must be provided upon request.

In the case of electronic mail, a simple means to opt-out from further communications must be included in the message. This must be free of charge, apart from the cost of transmission, for example an 'unsubscribe' button or alternatively a Freephone number. The use of premium rate telephone numbers or premium rate short codes for opting out from future marketing will breach the Regulations.

Solicited marketing message

A message that is actively invited by the subscriber – 'please send me details of ...'

Telephone Preference Service

The Telephone Preference Service (TPS) list is a statutory list of telephone numbers where the subscriber to that number has registered a general objection to receiving unsolicited marketing calls on that number. This is currently managed and maintained by the Direct Marketing Association (DMA) on behalf of OFCOM.

The Isle of Man Communications Commission is responsible for operating a register of Isle of Man subscribers who do not wish to receive unsolicited direct marketing. The TPS undertake this role on behalf of the Communications Commission. Isle of Man residents can register their home phone numbers and mobile phone numbers with the TPS.

Transmission

This is not defined in the regulations, but is taken as the usual definition of the act or process of transmitting, or the act or process of sending a message, picture, or other information from one location to another by means of radio waves, electrical signals, light signals etc. 'Transmitting' is defined as passing, or causing to go, from one place or person to another.

Unsolicited marketing message

A message that a subscriber has not actively invited but has opted into receiving and has indicated that they do not, for the time being, object to receiving. If challenged, you would need to demonstrate that the subscriber has positively opted in to receiving information from you.