Information Commissioner's Office

Promoting public access to official information and protecting your personal information

Guidance for marketers on the Privacy and Electronic Communications (EC Directive) Regulations 2003

Part 1: Marketing by electronic means

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Introduction – General questions 3
Automated calling systems (Regulations 19 and 24)) 6
How do the Regulations apply to automated calling systems? 6
Telephone marketing (Regulations 21 and 24) 8
How do the Regulations apply to telephone marketing? 8
What is the TPS? 8
Does TPS registration apply to mobile numbers? 8
Fax marketing (Regulations 20 and 24) 13
How do the Regulations apply to fax marketing? 13
What is the FPS? 13
Electronic mail (Regulations 22 and 23) 15
How do the Regulations apply to marketing by electronic mail? 15
What is the difference between a 'solicited marketing message' and an 'unsolicited marketing message that you consent to receiving'? 16
How does the Information Commissioner interpret 'in the course of a sale or negotiations for the sale of a product or service'? 17
How does the ICO interpret 'similar products and services'? 17
Marketers' FAQs 18
Text, picture and video messaging 18
Third party electronic mailing lists 20
Viral marketing 23
Appending email addresses/mobile numbers 24
Email tracking 25
Group companies/trading names 25
Loyalty schemes 26
Business to business 27
Electronic mail marketing to partnerships 28
Electronic mail marketing to sole traders 30
Pan-European marketing 30
Marketing by more than one medium 30
Charities, political parties and not-for profit organisations 31
Contact us 30
Appendix 1: Summary of changes to Version 2 (November 2003) 32

Introduction – General questions

Do these Regulations apply to all marketing?

They apply to the sending of direct marketing messages by electronic means such as by telephone, fax, email, text message and picture (including video) message and by using an automated calling system. The Regulations are designed to be more 'technology neutral' than the Telecommunications (Data Protection and Privacy) Regulations 1999 (the 1999 Regulations) and in order to cover any new developments there may be in electronic communications.

What is the definition of direct marketing?

Section 11 of the Data Protection Act 1998 (the DPA) refers to direct marketing as 'the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals'.

We regard the term 'direct marketing' as covering a wide range of activities which will apply not just to the offer for sale of goods or services, but also to the promotion of an organisation's aims and ideals. This would include a charity or a political party making an appeal for funds or support and, for example, an organisation whose campaign is designed to encourage individuals to write to their MP on a particular matter or to attend a public meeting or rally. This view was supported by the UK Information Tribunal ruling when they dismissed an appeal by the Scottish National Party who argued that political campaigns were not covered.

These Regulations have been amended since introduction. What are the changes?

The Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2004 (the 'Amendment Regulations') amend one small part of the Regulations. This relates to Telephone Preference Service (**TPS**) registration. From 25 June 2004, corporate subscribers have been allowed to register their numbers on the **TPS**. For more information see the section on **telephone marketing** which has been updated to include guidance on this amendment.

Are there any other changes or additions to this guidance?

Yes. For a summary, please see our **Summary of changes** in Appendix 1.

Which law should we comply with – these Regulations or the Data Protection Act?

If you process personal data for marketing, you will need to comply with both.

When sending direct marketing by electronic means, you must comply with the Regulations. If you are processing personal data (that is, if you know the name of the person who will receive your message), you must also comply with the DPA. In fact, Regulation 4 reminds marketers that you must remember your obligations under the DPA (if applicable) as well as your obligations under these Regulations. For

more information about your obligations under the DPA, please refer to our **website**. (See also "The Guide to Data Protection" chapter C 1c.)

The important point to note is that you do not need to know individuals' names in order to carry out a direct marketing exercise. For example, you may only have a list of telephone numbers to call with marketing messages. If you only hold telephone numbers and don't know the name of the person who can be reached on that telephone number, the DPA does not apply. However, you must comply with these Regulations when you make those marketing calls. Once you know the name of the person who can be reached on that telephone number, you must also comply with your obligations under the DPA.

Doesn't the recent Durant –vs – Financial Services Authority Appeal Court Ruling mean that mailing lists of named individuals are no longer caught by DPA?

No, it does not. The Commissioner has issued **guidance** on the Court of Appeal decision. That guidance also takes into account a decision by the European Court of Justice. Marketing lists which contain names and contact details are almost invariably lists of those who have shown an interest in a particular product or service or who fall into a particular category. Our guidance makes clear that such lists will be personal data.

How do the defined terms apply to marketing?

The Regulations refer to 'person', 'caller', 'subscriber', 'individual subscriber', and 'corporate subscriber' among other defined terms.
when the Regulations say:

'person' – this means a legal person, for example, a business or a charity, **or** a natural person, that is, a living individual.

'caller' – this means the instigator of a call. This is usually a legal person. The call would not be made or the fax, email, text or picture message would not be sent unless this caller paid for it to be made or sent.

'subscriber' – this means the person that pays the bill for the use of the line (that is, the person legally responsible for the charges incurred).

'individual subscriber' – this means a residential subscriber, a sole trader or a non-limited liability partnership in England, Wales and Northern Ireland.

'corporate subscriber' – this includes corporate bodies such as a limited company in the UK, a limited liability partnership in England, Wales and Northern Ireland or any partnership in Scotland. It also includes schools, government departments and agencies, hospitals and other public bodies, for example, the Information Commissioner's Office.

What is the difference between a 'solicited marketing message' and an 'unsolicited marketing message that the subscriber consents to receiving'?

Put simply, a 'solicited message' is one that is actively invited. We accept that this invitation can be given via a third party (see **Third party electronic mailing lists**). An 'unsolicited marketing message that a subscriber has opted into receiving' is one that they have not invited but they have indicated that they do not, **for the time being**, object to receiving it. If challenged, you would need to demonstrate that the subscriber has positively opted in to receiving further information from you.

Does consent mean ticking a box?

It is true that you need to have a positive indication of consent, but it is not true that this must be obtained by the individual ticking a box.

Recital 17 of the Directive on which these Regulations are based (2002/58/EC) gives the ticking of a box on an internet site as an example of an 'appropriate method' to give consent but it is only an example. It is not the only method by which consent can be obtained.

Directive 95/46/EC (the Data Protection Directive on which the UK Data Protection Act is based) defines 'the data subject's consent' as:

> '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'.

In our view, therefore, there must be some form of communication where the individual knowingly indicates consent. This may involve clicking an icon, sending an email or subscribing to a service. The crucial consideration is that the individual must fully understand that by the action in question they will be giving consent.

'Opt-in' and 'opt-out'

We are concerned that the terms 'opt-in' and 'opt-out' can be misunderstood. Marketers have traditionally favoured the latter, that is, where the default (an unticked 'opt-out' box) indicates a failure to register an objection. The fact that someone has had an opportunity to object which they have not taken only means that they have not objected. It does not mean that they have consented. We also note that the terms 'subscribe' and 'unsubscribe' are commonly used to indicate agreement or objection.

By itself, failing to register an objection will be unlikely to constitute valid consent. However, in context, failing to indicate objection may be **part of** the mechanism whereby a person indicates consent. For example, if you provide a clear and prominent message along the following lines, the fact that a suitably prominent opt-out box has not been ticked may help establish that consent has been given. For example, 'By submitting this registration form, you will be indicating your consent to receiving email marketing messages from us **unless** you have indicated an objection to receiving such messages by ticking the above box'.

In summary, the precise mechanisms by which valid informed consent is obtained may vary. The crucial consideration is that individuals must fully appreciate that they are consenting and must fully appreciate what they are consenting to.

Does the phrase 'for the time being' mean consent only lasts a finite period of time?

Many of the Regulations refer to consent being given 'for the time being'. We do not interpret the phrase 'for the time being' as meaning that consent must inevitably lapse after a certain period. However, it will remain valid until there is good reason to consider it is no longer valid, for example, where it has been specifically withdrawn or it is otherwise clear that the recipient no longer wants to receive such messages. The initial consent will remain valid where there are good grounds for believing that the recipient remains happy to receive the marketing communications in question, for example, where the recipient has responded **positively** (that is, other than to object) to previous, reasonably recent marketing emails.

The phrase 'for the time being' is also used in the Regulations in respect of notifications of objection. For example, Regulation 21(1) (a) (see **Telephone marketing**) provides that **unsolicited** direct marketing calls should not be made where the subscriber has notified that such calls should not be made 'for the time being'. We do not believe that this means the objection will lapse automatically. The objection will remain valid until there is good reason to ignore it, for example, where the individual has changed their mind and indicated that they now consent to receiving such calls.

Automated calling systems (Regulations 19 and 24))

How do the Regulations apply to automated calling systems?

The Regulations restate the requirement of the 1999 Regulations in respect of marketing by automated calling systems.

However, Regulation 19(4) clarifies the definition of 'automated calling system'. It refers to a system which is 'capable of automatically initiating a sequence of calls to more than one destination in accordance with instructions stored in that system' and which transmits 'sounds which are not live speech for reception by persons at some or all of the destinations so called'. The UK Information Tribunal **ruled** on a case where automated calls had been used to promote the Scottish National Party in the lead up to the 2005 General Election.

It is important to note that automated calling systems do **not** cover marketing by text, picture or video message, by fax or by email, nor do they cover the technology used by some call centres to dial target numbers automatically in order to facilitate live telephone conversations, so called 'power dialling'. Text, picture and video messages, faxes, live voice telephone calls and emails are covered elsewhere in the Regulations and elsewhere in this guidance.

This is what the law requires.

- Marketing material cannot be transmitted by such a system without the **prior consent** of any subscriber. This is where the subscriber has told the caller that they consent, **for the time being**, to such communications being sent on that line, by or at the instigation of the caller (Regulation 19(1) and (2) refer).
- A subscriber must not permit their line to be used to contravene Regulations 19. (Regulation 19(3) refers).
- All marketing messages sent by this method of communication must include the identity of the caller and a contact address or Freephone number (Regulation 24(1)(a) refers).

The mischief that Regulation 19 seeks to address is where a subscriber receives a marketing call which is a recorded message and where there is no opportunity to speak to a 'live' person. Such calls are particularly intrusive and can be unsettling for the recipient. We will therefore be taking a firm line on this point. In our view, even if an opportunity is provided at some point in the message, for example, 'to speak to a live operator, press 1', such a call would still be covered by the prior consent rule because not all telephones are 'touch tone' phones.

A subscriber is not registered with TPS and has not contacted us to tell us that they object to us marketing them by telephone, can we call them with a pre-recorded marketing message?

No. You would need their prior consent to use this particular medium for marketing.

The regulation on automated calling systems does not spell out our obligation to respect an opt-out request from a subscriber? Does this mean we don't have to comply with such requests?

In our view, if you can only send marketing by automated calling systems to any subscriber where that subscriber has given their consent to such a call, implicit in this is the option for consent to be withdrawn at a later stage. We would cite the inclusion of the phrase '**for the time being** ' (Regulation 19(2)) in support of our view. We are likely to take enforcement action against those companies within the UK jurisdiction who persistently fail to comply with opt-out requests from subscribers.

Telephone marketing (Regulations 21 and 24)

How do the Regulations apply to telephone marketing?

The Regulations restate the 1999 Regulations with respect to marketing by telephone with two significant changes. First, from 11 December 2003, corporate subscribers have had an enforceable right to opt out from receiving marketing calls which they can exercise by asking the caller to cease making further marketing calls to a particular number or particular numbers. Second, and with effect from 25 June 2004, **corporate subscribers** have been allowed to register their numbers on the TPS.

This is what the law requires.

1. If any subscriber has told you to stop making telesales calls to their number, you must comply with that request (Regulation 21(1)(a) refers).
2. You cannot make or instigate the making of **unsolicited** telesales calls to any number listed on the TPS register (Regulation 21(1)(b) refers).
3. TPS registration takes 28 days to come into force. Calls can be made to a number during the registration period unless an opt-out request has also been made to the caller (see 1 above) (Regulation 21(3) refers).
4. You can make or instigate the making of unsolicited telesales calls to a TPS registered subscriber where that subscriber has notified you that, **for the time being**, they do not object to receiving such calls on that TPS registered number (Regulation 21(4) refers).
5. A subscriber can withdraw that overriding **consent** at any time, in which case, further telesales calls must not be made to that number (Regulation 21(5) refers).
6. You must identify yourself when making a telesales call. If asked, you must provide a valid business address or Freephone telephone number at which you can be contacted. When 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) (Regulation 24(1)(b) refers).
7. Subscribers must not let their lines be used to contravene Regulation 21 (Regulation 21(2) refers).

What is the TPS?

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. From 25 June 2004, **corporate subscribers** have been allowed to register their numbers on the Corporate Telephone Preference Service (CTPS). See our **good practice note** for more information on the rules about calling corporate subscribers.

Does TPS registration apply to mobile numbers?

Any mobile number can be registered on the TPS to block unwanted 'live' calls. Those who wish to market by text, picture or video message do not need to screen against the TPS but they need to obtain prior **consent** before sending such

messages. The rules on marketing by text, picture or video message are covered in the **Electronic mail** section of this guidance.

We pay a subcontractor to make the calls for us. Isn't it their responsibility to make sure we don't break the rules?

No, under the Regulations it's your responsibility as the instigator of the call. They may have a contractual obligation to make sure you don't break the rules but if they let you down, **you** are responsible under the Regulations as the person who instigated the call. If we were to take enforcement action, we would usually take it against **you** and not your subcontractor. You should check you have appropriate contracts in place to guard against such failures. If your subcontractor's failures cause you to break the rules, seek legal advice about an action for breach of contract and find another subcontractor who will make sure you don't break the rules.

It would be possible for the Commissioner to take action against subcontractors who allow their lines to be used in contravention of the Regulations (Regulation 21(2) refers), but this is more likely to apply where the subcontractor and their clients work in concert to disregard the Regulations. It is unlikely that this would apply, for example, to telemarketing activities conducted by individuals working at home on commission on behalf of a company using telephone lists provided by that company. This is because that individual could not be expected to know the full extent of the legal obligations by which that company is bound under these Regulations.

Do the rules mean that our call centre staff have to give out their names?

No. The rules mean that they have to give out the name of the company whose products or services they are promoting. If asked, they must also provide a valid address or Freephone number at which that company can be contacted with an opt-out request.

If the subcontractor is making the calls on our behalf, do they have to provide their identity or ours?

They must provide your identity because you have instigated the call, that is, the call would not be made unless you paid for it to be made. If asked, your subcontractor or their call centre staff must provide a valid address or Freephone number at which you can be contacted with an opt-out request.

We delete numbers from our database whenever we get an opt-out request. Are we doing enough?

No. You must **suppress** details when you receive an opt-out request, not delete them. If you delete them, you have no record to show that you should not call that number. You or your subcontractor might collect it again from a list broker. The only way you can legally call that number again is if the subscriber tells you directly that they have changed their mind and are now happy to hear from you again.

If you use subcontractors, you must make sure that they don't call numbers on your suppression list as well as making sure they don't call numbers registered on the TPS.

Several members of a household use the same telephone number and may make different choices about who they want to hear from. How does the law apply?

If the subscriber to that phone line (that is, the person who pays the bill) has registered the number on the TPS, this indicates a general objection to receiving any unsolicited marketing calls on that number. This objection applies to the whole household but does not apply to calls which are 'solicited'.

Individual members of the household may invite, that is, **solicit**, marketing calls from different companies but those calls can only be made to the individual who has issued the invitation, not to other members of the household. This invitation can be revoked at any time.

Individual members of the household may also have existing relationships with a number of companies which pre-date TPS registration. Unsolicited marketing calls from those companies may be a feature of that relationship. If those individual members of the household wish to prevent marketing calls from any of those companies, they must each contact the company concerned directly to advise them that they no longer wish to receive marketing calls from them.

We have bought / rented a list of numbers where the subscribers have consented to receiving unsolicited marketing calls from third parties, some of the numbers are TPS registered, can we call them?

As outlined above, TPS registration indicates a general objection to receiving unsolicited marketing calls. The TPS list is a statutory list. Subscribers can give **consent** to receiving unsolicited marketing calls which overrides TPS registration but this is only valid where that overriding consent is given to the specific caller in question.

If you obtain a list of numbers where you are assured that the subscribers consent to receiving unsolicited marketing calls, you should make sure that the list is screened against the TPS and your own suppression list before making any telesales calls. If you buy or rent a list, regardless of the assurances you have been given, you will still breach the Regulations if you call a number that is listed on the TPS.

We are a charity / We are a fundraiser / We lobby for particular causes. Do we have to screen against the TPS when we conduct a telephone campaign?

Yes, you do. There is no exemption from the TPS rules for not-for-profit organisations. The Commissioner regards the term 'direct marketing' as covering a wide range of activities which will apply not just to the offer for sale of goods or services, but also to the promotion of an organisation's aims and ideals. This would include a charity or a political party making an appeal for funds or support and, for

example, an organisation whose campaign is designed to encourage individuals to write to their MP on a particular matter or to attend a public meeting or rally

We only do business-to-business telesales and have a list of established contacts that we regularly call; do we need to screen that list against the TPS list?

Are they all contacts to whom you regularly make a sale? Are you sure that any sales calls you make to those numbers would be welcomed? If so, you do not need to screen the list against the TPS or CTPS. You should remember that if those contacts change their mind and tell you that they no longer wish you to call them, you are legally obliged to respect that request. Make sure you **suppress** rather than delete their numbers.

In any other case, you should screen the list against the **TPS and CTPS** lists.

We have a list of business-to-business telephone contacts that we call regularly. They haven't told us to stop calling them before now but we haven't sold anything to them yet. Do we have to screen that list against the TPS lists?

Unless you can satisfy yourself that all those contacts would be happy to hear from you, you should screen that list against the TPS lists. If a company registers their numbers on the TPS list, that suggests they are unlikely to respond positively to telesales calls. If you have not had a positive response from that company in past, it would be difficult to see how you could argue that they would be happy to hear from you in the future bearing in mind their TPS registration. If they have registered their numbers on the TPS list, you risk contravening the Regulations (and damaging your reputation) if you do not check whether they have registered or not.

We have a mix of established and potential business-to-business telephone contacts on our list. Do we still have to screen that list against the TPS lists?

You should screen your list of potential contacts against the TPS lists. You should note our comments above regarding established contacts.

One of our potential business-to-business contacts has now registered their numbers on the TPS. Since then, one of their other employees has expressed an interest in our products and asked us to call with a quote. Can we call that employee?

Yes, that would be a **solicited** call. TPS registration prevents **unsolicited** calls. If you want to make subsequent unsolicited calls to that company, you should explain the situation to your new contact at the company and check whether they wish to give **consent** on behalf of their employer which would override TPS registration. You should make a note of details in case you are challenged in the future.

How do we know whether a person is authorised to give consent on behalf of their employer?

Unless you have reason to think they would not be authorised, you could expect to take their authorisation in good faith. You may wish to take a note of their name and the date any authorisation was given.

Fax marketing (Regulations 20 and 24)

How do the Regulations apply to fax marketing?

The Regulations duplicate the 1999 Regulations with respect to marketing by fax.

However, as a reminder, this is what the law requires.

1 You cannot send or instigate the sending of an unsolicited marketing fax to the line of an **individual subscriber** without that individual subscriber's prior **consent** (Regulation 20(1)(a) refers).
2 You cannot send or instigate the sending of an unsolicited marketing fax to the line of a **corporate subscriber** where that subscriber has asked you not to fax on that line (Regulation 20(1)(b) refers).
3 You cannot send or instigate the sending of an unsolicited marketing fax to any number listed on the **FPS** register (Regulation 20(1)(c) refers).
4 FPS registration takes 28 days to come into force. Faxes can be sent to a subscriber's number during the registration period unless an opt-out request has also been made to the caller (see 2 above) (Regulation 20(4) refers). If the subscriber is an individual subscriber, you cannot do so unless you have their prior consent (see 1 above).
5 You can send unsolicited marketing faxes to an FPS registered subscriber where the subscriber has notified you that, **for the time being**, they do not object to receiving such calls (Regulation 20(5) refers).
6 A subscriber can withdraw that overriding consent at any time, in which case, further marketing faxes must not be sent to that number (Regulation 20(6) refers).
7 You must provide your identity (that is, the name of the business being promoted) **and** a valid business address or Freephone telephone number at which you can be contacted on each fax you send (Regulation 24(1)(a) refers).
8 A subscriber must not allow their line to be used to contravene Regulation 20 (Regulation 20(3) refers).

What is the FPS?

The **Fax Preference Service** list is a statutory list of telephone numbers where the subscriber to that number has registered a general objection to receiving unsolicited marketing faxes on that number.

We delete numbers from our database whenever we get an opt-out request. Are we doing enough?

No. You must **suppress** details when you receive an opt-out request not delete them. If you delete them, you have no record to show that you should not fax that number. You or your subcontractor might collect it again from a list broker. The only way you can legally fax that number again is if the subscriber tells you directly that they have changed their mind and are now happy to hear from you again.

If you use subcontractors, you must make sure they screen against your suppression list as well as ensuring they don't fax numbers registered on **FPS**.

We pay a subcontractor to send faxes for us. Isn't it their responsibility to make sure we don't break the rules?

No, under the Regulations it's your responsibility. They may have a contractual obligation to make sure you don't break the rules but if they let you down, **you** are responsible under the Regulations as the person who instigated the sending of a fax. If we were to take enforcement action, we would usually take it against **you** and not your subcontractor. You should check you have appropriate contracts in place to guard against such failures. If your subcontractor's failures cause you to break the rules, seek legal advice about an action for breach of contract and find another subcontractor who will make sure you don't break the rules.

It would be possible for the Commissioner to take action against subcontractors who allow their lines to be used in contravention of the Regulations (Regulation 20(3) refers) but this is more likely to apply where the subcontractor and their clients work in concert to disregard the Regulations. It is unlikely that this would apply, for example, to fax marketing activities conducted by individuals working at home on commission on behalf of a company using contact lists provided by that company. This is because that individual could not be expected to know the full extent of the legal obligations by which that company is bound under these Regulations.

If the subcontractor is sending faxes on our behalf, do they have to provide their identity or ours?

They must provide your identity **and** a valid address or Freephone number at which you can be contacted with an opt-out request.

We have bought / rented a list of fax numbers where the subscribers have consented to receiving unsolicited marketing faxes from third parties, some of the numbers are FPS registered, can we fax them?

As outlined above, FPS registration indicates a general objection to receiving unsolicited marketing faxes. The FPS list is a statutory list. Subscribers can give consent to receiving unsolicited marketing faxes which overrides FPS registration but this is only valid where that overriding consent is given to the specific caller in question.

If you obtain a list of numbers where you are assured that the subscribers consent to receiving unsolicited marketing faxes, you should make sure that you screen the list against the FPS list and your own suppression list before sending any marketing faxes. If you buy or rent a list, regardless of the assurances you have been given, you will still breach the Regulations if you call a number that is listed on the TPS.

Electronic mail (Regulations 22 and 23)

How do the Regulations apply to marketing by electronic mail?

The Regulations define electronic mail as 'any text, voice, sound, or image message sent over a public electronic communications network 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' (Regulation 2 'Interpretation' refers).

In other words, both email and text, picture and video marketing messages are 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.

We consider that this rule also applies to voicemail and answerphone messages left by marketers making marketing calls that would otherwise be 'live'. Therefore, there are stricter obligations placed upon those marketers who make live calls but who wish to leave messages on a person's voicemail or answerphone.

Faxes are not considered to be 'electronic mail'. **Fax marketing** is covered elsewhere in the Regulations. Also, so-called '**silent calls**' or calls where a fax or other electronic signal is transmitted are not covered by these Regulations. This is because no marketing material is transmitted during these calls.

This is what the law requires.

1 You cannot transmit, or instigate the transmission of, unsolicited marketing material by electronic mail to an **individual subscriber** unless they have previously notified **you**, the sender, that they **consent**, **for the time being**, to receiving such communications. There is an exception to this rule which has been widely referred to as the '**soft opt in**' (Regulation 22(2) refers).

2 You cannot transmit, or instigate the transmission of, any marketing by electronic mail (whether solicited or unsolicited) to **any subscriber** (whether corporate or individual) where:

- the identity of the sender has been disguised or concealed; or
- a valid address to which the recipient can send an opt-out request has not been provided. (Regulation 23 refers)

3 A subscriber must not allow their line to be used to breach Regulation 22(2) (Regulation 22(4) refers).

What is the difference between a 'solicited marketing message' and an 'unsolicited marketing message that the subscriber consents to receiving'?

Put simply, a 'solicited message' is one that is actively invited. We accept that this invitation can be given through a third party (see below **Third party electronic mailing lists**). An 'unsolicited marketing message that a subscriber has opted into receiving' is one that is not invited but that the subscriber has indicated they do not, **for the time being**, object to receiving. If challenged, you would need to demonstrate that the subscriber has positively opted into receiving further information from you.

What would constitute a 'valid address' for the purpose of Regulation 23?

In an on-line environment, this could be a valid email address. We accept that short code numbers could be used as a 'valid address' in text messages as long as they do not incur costs other than the cost of sending the message (that is, using the short code does not incur premium rate charges). As good practice, a valid website address (where further valid contact details can be found) or a valid PO Box number should be included in any promotional text message.

Is there any difference between an individual subscriber and the recipient of marketing material by electronic mail (Regulation 22(2))?

Yes, there is a difference.

The Directive which these Regulations implement says that unsolicited marketing should not be sent by electronic mail to an individual subscriber unless the **subscriber** has given **consent**. However, this Regulation refers to the consent of the **recipient**. We consider that the practical interpretation of the meaning of 'the recipient' is the **intended** recipient. Where a household member has an individual email address then the consent of that individual is required unless the **soft opt in** criteria are satisfied. Where a household has a household email address (for example, familyname@domainname.com) then the consent of someone whom it is reasonable to believe does speak on behalf of the family is sufficient unless the **soft opt in** criteria are satisfied.

What is 'soft opt-in' (Regulation 22(3))?

This is what the law states.

You may send or instigate the sending of electronic mail for marketing purposes to an **individual subscriber** 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 that recipient;

2 the direct marketing material you are sending relates to your similar products and services only; **and**

3 the recipient has been given a simple means of refusing (free of charge except for the cost of transmission) the use of their contact details for marketing purposes at the time those details were initially collected and, where they did not refuse the use of those details, at the time of **each subsequent** communication.

In other words, if you satisfy these criteria, you do not need prior consent to send marketing by electronic mail to individual subscribers. If you cannot satisfy these criteria you cannot send marketing by electronic mail to individual subscribers without their prior consent.

How does the Information Commissioner interpret 'in the course of a sale or negotiations for the sale of a product or service'?

A sale does not have to be completed for this to apply. It may be difficult to establish where negotiations begin. However, where a person has actively expressed an interest in purchasing a company's products and services and not opted out of further marketing of that product or service or **similar products and services** at the time their details were collected, the company can continue to market them by electronic mail unless and until that person opts out of receiving such messages at a later date.

We do not consider that 'negotiations for the sale of a product or service' includes the use of cookie technology to identify a person's area of interest when they are browsing your website. Unless that person has expressly communicated their interest to you by, for example, asking for a quote, no 'negotiations' can be said to have taken place for the purpose of these Regulations.

As another example, if you are a national retailer and you receive an email asking if you are going to open a branch in their town, the expected response would be 'yes' with details or 'no' perhaps with details of your other stores in that area. This query does not, however, constitute part of a negotiation for the sale of a product or service. It does not constitute an invitation to you to send the person further information about your products or services. Nor does it indicate consent to receive further promotional emails from you. You could send a person emails promoting your products and services if they:

- expressly invited you to;
- consented to your suggestion that you send them promotional emails; or
- did not object to receiving emails in the course of a sale or negotiations for a sale.

How does the ICO interpret 'similar products and services'?

We are taking a purposive approach here. In our view, the intention of Regulation x is to make sure an individual does not receive promotional material about products and services that they would not reasonably expect to receive. For example, someone who has shopped on-line at a supermarket's website (and has not objected to receiving further email marketing from that supermarket) would expect at some point in the future to receive further emails promoting the diverse range of goods available at that supermarket.

Ultimately, if an individual feels that the company has gone beyond the boundaries of their reasonable expectation that individual can opt out, something which most responsible marketers will be keen to avoid. For the time being, therefore, we will focus particular attention on failures to comply with opt-out requests. We will continue to monitor the extent to which marketers take the reasonable expectations of individual subscribers into consideration.

Marketers' FAQs

Regulation 22 does not spell out our obligation to respect an opt-out request from individual subscribers? Does this mean we don't have to comply with such requests?

In our view, if you can only send marketing by electronic mail to individual subscribers where they have provided prior **consent**, implicit in this is the option to withdraw that consent at a later stage. We would cite the inclusion of the phrase '**for the time being**' to support our view. We will take enforcement action against those companies within UK jurisdiction who persistently fail to comply with opt-out requests from individual subscribers.

Text, picture and video messaging

Surely SMS marketing can't be subject to the same rules as conventional email – after all, the standard mobile phone screen can only hold 160 characters!

The practical limitations of standard mobile screens do not mean that marketers can ignore the rules. Information about the marketing you intend to do can be given before you send a marketing message or even before you collect the mobile number in question. For example, in an advert, or on a website where the recipient signs up for the service.

Assuming the recipient has clearly consented to receiving messages, each message will have to identify the sender and provide a valid suppression address. Originally, we took the view that only a postal or email address would be valid for the purposes of satisfying this Regulation. Our concern was that 'pay as you go' mobile phone users may not have a permanent record of any opt-out message that they had sent (as opposed to an itemised bill available for users of contract phones which would, at the very least, constitute proof that a message of some kind had been sent). Given widespread use of 'pay as you go' mobile phones, particularly by children, we were concerned that 'pay as you go' users would not be able to present a strong case to us (or to a court if they sought to pursue an action for compensation) due to a lack of evidence showing they had asked the marketer to stop and that request was being ignored.

Many marketers have commented that a person is less likely to bother writing a formal letter and it would be easier for that person if they could text an opt-out back to a short code number given at the bottom of a message. This would be more consistent with our approach regarding valid addresses for emails.

We therefore reconsidered our position on this point and are prepared to allow the use of short codes as a valid address provided the sender makes sure that:

- they **clearly** identify themselves in the message (for example, 'PJ Ltd');
- using the short code does **not** incur a premium rate charge; **and**
- the short code is **valid.**

If you use a short code as a valid address, we suggest you use the format 'PJLtd2STOPMSGSTXT'STOP'TO (then add 5 digit short code)'.

Marketing messages which claim to be from 'a good friend' or from 'someone who fancies you' and so on, are unlikely to be compliant if the company whose goods and services are being promoted, for example, the dating agency, does not clearly identify themselves at some point in the message.

Do we have to screen against the TPS if we are sending unsolicited marketing by text, picture or video messages?

No. TPS registration indicates a general objection to receiving live marketing calls. Text, picture and video messages are defined as 'electronic mail' under the Regulations and they should not be sent without the prior consent of the individual subscribers unless the '**soft opt-in**' criteria are satisfied. You are, therefore, not obliged to screen against the TPS because you should already have established prior consent or satisfied the 'soft opt-in' criteria.

However, you must make sure you identify yourself in any text, picture or text messages that you send and provide a valid address to which opt-out requests can be sent. If you are sending the message on a soft opt-in basis, you are obliged to provide simple means of refusing further messages which is free of charge except for the cost of transmitting the refusal. If you only supply a premium rate or national rate number in these circumstances you would not satisfy this obligation.

We will collect email address or mobile phone numbers as part of a competition. Could this be considered as being 'in the course of negotiations for the sale of a product and service'?

A great deal will depend on the context and on what you tell the person when you collect their details. Arguably, where a competition is part of an inducement to raise interest in a product or service, this may constitute part of the negotiations for a sale. However, where you are unclear about what you will do with a person's email address or mobile phone number when you collect those details, or where this information is not readily accessible, you are less likely to be able to rely on the 'soft opt-in'. If you have collected a person's name with their email address and/or mobile phone number and you have not been clear about what you are going to do with that information, you may also breach the first data protection principle.

Third party electronic mailing lists

Do we always have to obtain any consent or invitation to market by electronic mail directly from the sender? If so, does this mean that we can never use bought-in or rented lists?

Despite our view about overriding consent, there is nothing in the Regulations which expressly rules out obtaining consent through a third party. However, if you are buying or renting a list from a broker, you will need to seek assurances about the basis on which the information was collected.

It is difficult to see how third party lists can be compiled and used legitimately on any other basis than one where the individual subscriber expressly invites, that is, **solicits** marketing by electronic mail. This is because unsolicited marketing can only be sent to an individual subscriber where he has 'previously notified the **sender** that he consents **for the time being** to such communications being sent by, or at the instigation of, the **sender**.' (Regulation 22(2) refers). Arguably, consent could be given through a third party but a great deal will depend on the clarity and transparency of the information given to the intended recipient when their contact details were collected by that third party.

If we buy in or rent a list can we use it?

We fail to see how the **soft opt-in** criteria could be satisfied with bought-in lists even if you have an existing relationship with the intended recipient 'off-line', as it were. This is because you can only satisfy the soft opt-in criteria if **you**, not some other person, collected the electronic mail contact details 'in the course of a sale or negotiations for a sale.' (Regulation 22 (3)(a) refers). If you didn't collect that email address or mobile number yourself, then you can't rely on the relaxation of the strict prior consent rule.

In short, if you wish to buy in or rent a list from a third party you can only use it if it was obtained on a clear prior **consent** basis, that is, where the intended recipient has actively consented to receiving unsolicited messages by electronic mail from third parties.

The following is a list of scenarios that may apply to a bought-in or rented list. It is by no means exhaustive.

1 List of individual subscribers who have invited contact from third parties on a particular subject

You can send marketing material by electronic mail to contacts on this list **provided** that:

- this person has not already sent an opt-out request to you;
- you do not conceal your identity when you contact them; **and**
- you make sure you have provided a valid contact address for subsequent opt-out requests.

Given individuals' increased caution over disclosing their contact details to third parties for marketing purposes, you should seek assurances on the accuracy of such a list, that is, are these genuine **invitations** for contact from **anyone** on a **particular** subject as opposed to 2 or 3 below.

As an example, if contact details were collected where that person ticked a box next to wording such as:

'I want to hear from other companies that offer gardening products. Please pass my details onto them so that they can contact me. ☐'

you could use such a bought-in or rented list.

2 List of individual subscribers who have invited contact from third parties on unspecified subjects

You can send marketing material by electronic mail to contacts on this list **provided** that:

- this person has not already sent an opt-out request to you;
- you do not conceal your identity when you contact them; **and**
- you make sure you have provided a valid contact address for subsequent opt-out requests.

Given individuals' increased caution over disclosing their contact details to third parties for marketing purposes, you should seek assurances on the accuracy of such a list, that is, are these genuine **invitations** for contact from **anyone** on **any** subject as opposed to 3 below.

As an example, if contact details were collected where that person ticked a box next to wording such as:

'I want to hear from other companies about their on-line offers. Please pass my details onto them so that they can contact me. ☐'

you could use such a bought-in or rented list.

3 List of individual subscribers who have consented to receiving unsolicited marketing material by electronic mail from third parties on a particular subject (that is, a list compiled on an opt-in basis)

You can send marketing material by electronic mail to contacts on this list **provided** that:

- this person has not already sent an opt-out request to you;
- you do not conceal your identity; **and**
- you make sure that you have provided a valid contact address for subsequent opt-out requests.

Given individuals' increased caution over disclosing their contact details to third parties for marketing purposes, you should seek assurances on the accuracy of such a list.

As an example, if contact details were collected where that person ticked a box next to wording such as:

'If you'd like us to pass your details onto other organisations working to protect the environment, tick here. ☐'

you could use such a bought-in or rented list.

4 List of individual subscribers who have consented to receiving unsolicited marketing material by electronic mail from third parties on unspecified subjects (that is, list compiled on an opt-in basis)

You can send marketing material by electronic mail to contacts on this list **provided** that:

- this person has not already sent an opt-out request to you;
- you do not conceal your identity; **and**
- you make sure you have provided a valid contact address for subsequent opt-out requests.

Given individuals' increased caution over disclosing their contact details to third parties for marketing purposes, you should seek assurances on the accuracy of such a list.

As an example, if contact details were collected where that person ticked a box next to wording such as:

'We'd like to pass your details on to other companies so that they can send you on-line offers too. If you agree to this, tick here. ☐'

you could use such a bought-in or rented list.

It may be difficult to demonstrate that the intended recipients have 'notified the sender' and a great deal will depend on the wording of any statement made when the information was collected.

To summarise, if there is no express invitation to send marketing messages to the recipient, you will need to consider whether any list you use constitutes a list of notifications of **consent** to **you**, the sender. Another point to consider is that the older the list that you buy or rent, the less likely it is that those contacts on the list are going to respond positively to marketing messages. It may even damage the reputation of your business to send poorly targeted unwanted marketing messages. You have a general obligation to make sure the recipient is provided with a valid address for opt-out requests in every message. Should you receive an opt-out request, you must make sure you **suppress** that individual's details immediately. We will pay particular attention to those companies that fail to respect opt-out requests.

Can we advertise the products and services of third parties by electronic mail?

If you are offering a 'host mailing' service, you are not disclosing your mailing list to a third party but you are willing, for a fee, to promote their goods and services alongside yours. It is unlikely you could send such messages on a '**soft opt-in**' basis because they are not **your** '**similar products and services**'. However, you could send such material on a clear 'opt-in' basis provided you identify that you and not the third party are the sender.

Can we pass our list of email addresses or mobile numbers on to a third party for them to use for marketing purposes?

If the email addresses or mobile numbers in question are those of individual subscribers, the third party will not be able to use them to send unsolicited marketing material unless the subscriber has consented to receiving it from that third party (that is, 'the sender'). You must make it clear who you are proposing to pass the details on to and what sort of products and services they will be offering.

For example, a positive response to a phrase such as 'We would like to pass your details on to specially selected third parties so that they can send you more information about holidays in America. Do you agree to this?' is likely to be sufficient to allow third parties to use those contact details for promoting holidays in America by electronic mail.

A phrase such as 'We will pass your details on to third parties unless you write to us and tell us that you don't agree' will not be sufficient. You should not use contact lists which have been obtained in these circumstances.

The decision about what happens to an individual's electronic contact details must rest with the individual. No disclosure can be made to third parties for their marketing purposes unless that individual actively consents to such a disclosure taking place.

Viral marketing

How do the rules apply to 'viral marketing'?

So-called 'viral marketing' is where:

1. a marketer asks a person to send the original marketing message to a friend or friends; or
2. the marketer asks a person to hand over their friends' contact details.

This process may or may not be incentivised in some way.

It has come to our attention that some companies mistakenly see either of these options as a way of getting around the prior consent rule.

We recognise that your customer might recommend a good deal to a friend whether you prompt them to or not. We also recognise that a customer may check with their

friends first before passing their details on to you. This is the sort of thing that individuals would do acting in good faith and in the interests of their friends.

Arguably, where 1 applies, you are encouraging one of your customers to break the law (that is, send an unsolicited message to an individual subscriber without prior consent) in order to promote your name. Clearly, this would be a bad way to promote your name and your products and services and you are strongly advised to tell your customers only to forward emails to those they are certain are happy to receive them. We would point out that where you incentivise them to do so, there is a strong argument that you are the 'instigator' of the message. They wouldn't do it without the promise of a reward from you. You are reminded that it is the instigator of the message who is liable for the sending of that message. A person who allows their line to be used to break the law (that is, your customer who is passing your message on) may also be liable in this scenario.

Where 2 applies, you will be sending a message to someone who you assume has consented through a third party (the third party being the friend who passed their details on to you) to receiving messages from you. It is quite clear that under the legislation you are liable for any messages sent to email addresses or mobile numbers obtained using b. As with all **Third party electronic mailing lists**, you cannot use this list unless you are satisfied that the recipient has notified you that they consent to receiving such messages from you. You should therefore ask your customer to confirm that they have the consent of the individuals whose details they are passing on. You should also check that the recipient hasn't already asked you to **suppress** their details. If those contact details appear on your suppression list you may have cause to question whether consent has been obtained at all. Finally, you should also tell your customer that you propose to let those individuals know how you got their details. The **DPA** would not prevent you from doing this. This is particularly important if you propose to incentivise your customer in any way.

Even if 1 or 2 is not incentivised, you should bear in mind that this mechanism may be used maliciously by one of your customers. For example, it is possible to envisage circumstances where, as a puerile trick, a person might hand the contact details of another person to a whole range of companies. While it is hard to see how you are directly responsible for the malicious activities of one of your customers, you should bear in mind that, at the very least, the recipient may forever associate your organisation's name with that unpleasant experience. In any event, you should make sure you rapidly suppress the recipient's contact details to avoid further distress.

Appending email addresses or mobile numbers

We have a list of established customers who haven't given us their mobile number or email address but those details have appeared on an opt-in list we have bought in. We'd like to start contacting them on-line or by text message. Can we do so?

The intended recipient has, for reasons of their own, not started doing business with you on-line or by text message. While you may be able to argue that this customer has notified you through a third party that they are happy to hear from you by email

or text message, you should consider the impact that an 'out of the blue' message such as this might have on your relationship with that customer. One of the most frequent comments made in complaints we receive is:

'Where did they get my email address or mobile number from? I certainly didn't give it to them'.

You may wish to send a 'low-key' message explaining where you have got their details from and double checking whether they are, in fact, happy to hear from you in this way. You could not assume consent from their failure to respond.

Email tracking

We put clear gifs in our marketing emails. They help us work out how successful our campaign has been. Is that activity caught by the Regulations?

Yes, it is. You should read Section 2 'Confidentiality of Communications' in **Part 2 of our Guidance** for more information about the rules on using clear gifs (also referred to as web beacons or web bugs) and similar so-called 'spy ware':

The important point to note is that if you are using such a tracking device in your marketing emails, you must let the recipient know about it in the message itself and explain to them how to switch the web beacon or clear gif off. You could provide this information next to your valid address for opt-out requests and include a link to a webpage which offers a fuller explanation. A link to your cookie and privacy policy alone is unlikely to be sufficient unless the section of that policy which relates to the use of web beacons or clear gifs is clearly signposted when you arrive at that page.

You may also wish to visit **www.allaboutcookies.co.uk** for more information about web beacons and clear gifs.

Group companies and trading names

How do the rules on marketing by electronic mail rule apply to marketing by different companies within a group of companies?

If you disclosed individual subscribers' contact information within your group in line with existing data protection rules prior to 11 December 2003 and those other group companies had already used that information before that date and have continued to use it and not received an opt-out request, that contact information can still be used by those other group companies as long as further opt-out opportunities are provided with every subsequent message.

Moving forward, you will, as a minimum requirement, have to ask individuals whether they consent to receiving unsolicited marketing by electronic mail from other group companies when you collect their contact details. In an on-line environment, you could provide a link listing those group companies. You may even want to consider providing separate opt-in opportunities for each company on that list to give the individual greater choice and to target your group's marketing more efficiently.

Another option you may want to consider is providing an opportunity for the individual to invite (that is, **solicit**) contact from other companies within the group.

Our company has a number of different trading names, surely an opt-in for one of the trading names is an opt-in for all the trading names because there is only one legal entity?

If you trade under several different names, particularly where those names are strong brands, you cannot assume that a customer who agrees to receive mailing from one trading entity is agreeing to receive marketing from your other trading entities. They may not even be aware of any connection between different trading names. Under the DPA, if you are collecting personal data then you will need to make sure that the different entities are clearly explained to your customers. You would need to make sure the individual is made aware that they will receive unsolicited marketing from all of your trading names when they opt in to receiving marketing from you. Similarly, when an individual opts out of receiving unsolicited marketing from one of your trading names, this opt-out applies to all of your trading names unless they make it clear otherwise.

If you are collecting information on a '**soft opt-in**' basis, you may have considerable difficulty in satisfying the '**similar products and services**' criteria, if you want to send further unsolicited marketing relating to your full range of trading names. You could avoid this difficulty by providing an opportunity for the individual to invite contact from the wide range of trading names within the company.

Loyalty schemes

We operate a loyalty scheme for our own products and services. How do the Regulations apply here?

If someone participates in a loyalty scheme, the minimum that they can expect to receive from you is an update about how many points or vouchers they have earned. In our view, under the '**soft opt-in**' rule, you can send them further information about other incentives that are available under the scheme unless and until they opt out of receiving such further information. Once they have opted out of receiving further information about other offers that are available under the scheme, you should not send such further information unless and until they opt back into receiving it again.

We operate a loyalty scheme in partnership with other companies. A great deal of information is transferred across the scheme and the partners do not necessarily offer similar products and services, how do the Regulations apply here?

Dealing first of all with the information you have already collected, we will assume that you have collected that contact information in line with your obligations under the Data Protection Act.

You may need to revisit the data protection and privacy wording of your application form where you are collecting information to conduct marketing exercises by electronic means. You must make sure individuals are fully aware of the nature of

the promotions you propose to send. The minimum that an individual can expect to receive from you is an update about how many points or vouchers they have earned. In our view, under the '**soft opt-in**' rule, you can send them further information about other incentives offered by all the participating companies in the scheme unless and until they opt out of receiving such further information. Where there are a number of partners in a loyalty scheme, you may find it easier to provide an opportunity for the individual to invite (that is, **solicit**) further marketing contact from each partner where those partners propose to contact the individual independently of this scheme.

Business to business

How do the Regulations apply to business-to-business marketing by electronic mail?

Your obligations are as follows.

- You **must not** conceal your identity when you send, or instigate the sending of, a marketing message by electronic mail to **anyone** (including corporate subscribers); **and**
- you **must** provide a valid address to which the recipient (including corporate subscribers) can send an opt-out request (**Regulation 23** refers).

Only **individual subscribers** have an enforceable right of opt-out under these Regulations. This is where that individual withdraws the consent that they previously gave to receiving marketing by electronic mail (that consent only being valid '**for the time being** ' (Regulation 22(2) refers)). **Corporate subscribers** do not have this right.

Although recipients who are corporate subscribers do not have an enforceable opt-out right under the Regulations, where the sending of marketing material to the employee of a company includes processing their personal data (that is, the marketer knows the name of the person they are contacting), that individual has a fundamental and enforceable right under DPA Section 11 to request that a company stops sending them marketing material (See "**The Guide to Data Protection**" **chapter C 1c**)

In our view, it makes no business sense to continue to send marketing material to a business contact who no longer wishes to hear from you. Arguably, by failing to respect a business-to-business opt-out request you may give the impression that you are unconcerned about your commercial reputation.

How do these Regulations apply to unsolicited marketing material sent by electronic mail to individual employees of a corporate subscriber where that material promotes goods and services which are clearly intended for their personal or domestic use?

We have no authority to take enforcement action based on the content of emails sent to corporate subscribers even though that content may be entirely inappropriate for business to business communications.

In the 'Spam' report of an Inquiry by the All-Party Parliamentary Internet Group (APPIG) there was a recommendation that the Information Commissioner set out clear guidance as to how business-to-business communications are to be distinguished from messages intended for individual subscribers. This recommendation was prompted by the observation of one of the witnesses to the inquiry that an invitation to buy Viagra sent to the sales address of a shipping company could only be construed as being sent to an individual since it would not be of any business relevance. The problem is that the 'opt-in' and '**soft opt-in**' rules do not extend to the sending of marketing emails to corporate subscribers. In the example quoted, the subscriber will be the shipping company because that is the person which is party to a contract with a provider of public electronic communications systems. This means, therefore, that even an email addressed to an individual within the company will not be covered by the Regulations although it may be subject to the DPA and an opt-out request under **Section 11** of the DPA could be issued. In other words, the fact that an email sent to a corporate subscriber's address is obviously aimed at an individual (because it promotes a product that is for personal or domestic use) is not relevant for the purposes of the Regulations. Email communications sent to a corporate subscriber are simply not covered by the Regulations except in so far as there is a requirement to identify the sender and to provide contact details. However they are likely to be covered by the individual's right to object to direct marketing under the DPA.

We understand that the CAP (Committee of Advertising Practice) Code restricts the sending of such emails to corporate email addresses. For more information on the CAP Code visit their website **www.cap.org.uk**.

How do the Regulations apply to the sending of text, picture and video messaging to mobile phones which are supplied to individual employees by corporate subscribers?

The law applies in exactly the same way as it does to the sending of emails to corporate subscribers.

Electronic mail marketing to partnerships

How do the Regulations apply to the sending of marketing messages by electronic mail to partnerships?

A non-limited liability partnership in England, Wales or Northern Ireland is an individual subscriber under these Regulations. This means that such a partnership (which may consist of several individuals and which may have a large number of employees) is afforded the same protection under these Regulations as a residential subscriber or a sole trader. This protection is not available to limited liability partnerships, to Scottish partnerships or to corporate subscribers which include small and medium sized limited companies.

Strictly speaking, marketers must get prior consent to send emails to any email address used by an unincorporated partnership unless the '**soft opt-in**' criteria apply. This may be the generic contact email address of the partnership, for

example, mail@partnershipname.com or it may be the separate email addresses used by individuals (partners, associates, other employees) working at that partnership.

This issue was the matter of some debate during the Department of Trade and Industry's consultation exercise prior to the implementation of these Regulations. (**http://www.dti.gov.uk/industries/ecommunications/directive on privacy electronic communications 200258ec.html**)

What does this mean in practice?

Although, strictly speaking, the partnership could be viewed as the commercial equivalent of a large household (see above comments on the issue of '**recipient**'), we recognise that there may be circumstances when the wishes of the subscriber, that is, the unincorporated partnership (which is legally responsible for charges incurred on its lines) might override the wishes of the employee. For example, an employer may insist that an employee keeps in regular contact with conference organisers. The employer's wishes in respect of unsolicited emails from conference organisers would override the wishes of the employee.

However, if one individual working at the partnership consents to receiving unsolicited marketing material from the organiser, this does **not** mean that every individual working at the partnership has consented to receiving such material from the organiser.

Marketers must also remember that where they know the name of the person they are seeking to contact, that person's contact details must be processed in accordance with the eight data protection principles of the DPA. For example, where the DPA applies, all individuals have a fundamental opt-out right under **Section 11**.

Who is able to give consent on behalf of individuals working at a partnership?

If you are targeting an individual working at a partnership, you must make sure you obtain the consent of the individual (or a person who can be reasonably assumed to be entitled to give consent on that individual's behalf, for example, a secretary or assistant) before sending unsolicited electronic mail to that individual unless the '**soft opt-in**' criteria apply.

Partnerships may wish to make sure that their key frontline staff, for example, switchboard operators, receptionists, administrators, secretaries are advised of any office policy regarding the disclosure of employee contact details.

Individuals employed by partnerships must remember that in respect of their work email address and mobile phone, it is ultimately their employer's consent choices which take precedence over their individual choices.

Who is able to give consent on behalf of the partnership?

Marketers must make sure they have obtained consent from a person working for that partnership who, it is reasonable to assume has the authority to give such

consent. Partnerships may wish to make sure that their key frontline staff, for example, switchboard operators, receptionists, administrators, secretaries, are advised of any office policy regarding the disclosure of office contact details.

Electronic mail marketing to sole traders

How do the Regulations apply to sending of marketing messages by electronic mail to sole traders?

Sole traders are also individual subscribers under the Regulations.

That said, we have recognised in earlier enforcement that marketers may have difficulty distinguishing sole traders from small limited companies, particularly where a sole trader's contact details are available in business directories. However, marketers should use their best efforts to make sure they do not send marketing messages by electronic mail to sole traders in breach of the Regulations. For example, it is possible to check free of charge on Companies House website **www.companieshouse.gov.uk** whether or not a trading entity is a limited company.

Pan-European marketing

We plan to conduct a pan-European marketing campaign. Which jurisdiction's rules do we need to comply with?

It is our understanding that you should also comply with the laws in other countries. However, you should bear in mind that when implementing the EU Directive, each member state was given the option to decide whether the rights given to individual subscribers should extend to corporate subscribers. Some jurisdictions have chosen to do so to a greater extent than the UK has done. You may create a negative impression about your business if you don't respect the laws of the country to which you are sending your messages. We cannot offer guidance on how to comply with the legislation of other jurisdictions and you should seek your own legal advice if you wish to conduct pan-European marketing campaigns.

Marketing by more than one medium

We collect individuals' addresses, telephone numbers, mobile numbers and email addresses for marketing purposes on a paper form. We have limited room on the form and we have to provide other information to comply with other legislation. What is the minimum amount of information we have to provide to comply with data protection rules?

You do not need to provide reams of legalese to comply with your data protection obligations. If you are collecting information to market a person by a variety of media, the simplest method is to adopt the highest standard and apply it even where you do not need to.

Under the DPA, the bare minimum that you are obliged to tell people is who you are and what you plan to do with their information, including any unexpected uses such

as processing for marketing purposes and disclosures to third parties. Because you plan to market by electronic means, you also need to provide consent options. The very highest standard would be to provide the individual with the opportunity to solicit information from you, for example:

'Please contact me by post ☐, by telephone ☐, by text/picture/video message ☐, by email ☐ with further information about your products and services (tick as applicable).'

However, if you use this wording, you cannot send marketing material to them by post, telephone, text message or email unless the individual ticks the box to invite further contact from you.

Charities, political parties, not-for profit organisations

We are a charity, political party, not-for profit organisation, can we take advantage of 'soft opt-in'?

No, not unless you are promoting commercial goods and services, for example, those offered by your trading arm. We recognise that this puts such organisations at a disadvantage and raised this point in our response to the consultation exercise conducted by the Department of Trade and Industry in advance of these Regulations However, the EU Directive from which these Regulations are derived specify that the soft opt-in rules on marketing by electronic means apply to commercial relationships.

You may wish to revisit the wording of your data protection and privacy statements so that a person would actively 'invite' promotional information from you through electronic mail. As outlined above there is a difference between a person actively soliciting promotional material by electronic mail and that same person consenting to receiving any promotional material you choose to send them by electronic mail (that is, unsolicited marketing material). Or, you could ask them if they consent to receiving unsolicited marketing material.

You are still obliged to identify yourself and to provide a valid address for opt-outs in each electronic mailing.

Contact us

Website	**www.ico.gov.uk**
Email	please use the online enquiry form on our website
Helpline	01625 545745
Fax	01625 524510

Address
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Appendix 1: Summary of changes to Version 2 (November 2003)

Page number	New FAQ or amended text
3	'These Regulations have been amended…?'
3	'Are there any other …?
4	'Doesn't the recent Durant-vs-FSA Appeal Court Ruling …?'
5	'We also note … agreement or objection'
7	DMA contact telephone number
7 to 8	'What enforcement action …?
10	OFCOM contact and website details
11	'Unfortunately … current enforcement powers.'
12 to 18	Section redrafted to included corporate registration on TPS
21	'Unfortunately … current enforcement powers.'
22	OFCOM contact and website details
25	'What would constitute a valid address …?'
27	'Originally we took the view … at some point in the message.'
28	'I've heard that the European Commission …?'
29	'Can you give a clearer idea …?'
29	'How long will we be allowed …?'
30	'We have been prepared to exercise … from third parties.'
31	'As an example … bought in/rented list' (Two examples)
32	'As an example … bought in/rented list'
32 to 33	'Where this consent was given after 11 December 2003 … are less clear.'
33	New section on Viral Marketing
34	New section on Appending Email Addresses/Mobile numbers
35	New section on Email Tracking
38	'We understand that … www.capcode.org.uk/.'
42	'Bear in mind that … support elsewhere.'
43	'Unfortunately … current enforcement powers.'