



# the consumer protection act

## DIRECT MARKETING

*Applicable sections of the Consumer Protection Act, 68 of 2008: S 11, 12, 16, 32*

*Applicable sections of the Consumer Protection Act Regulations: R 4, Notice – Prohibited time for contacting consumers*

In terms of the Consumer Protection Act, every person has the right to privacy. This right to privacy includes the right to refuse to accept, to require another person to discontinue or in the case of an approach other than in person to pre-emptively block any approach or communication for the purpose of direct marketing.

A consumer may during or within a reasonable time after a direct marketing approach demand from the marketer to desist from making any further or future approaches. Practically this means that a **consumer may “opt-out” from receiving any direct marketing communications** from specific suppliers or marketers.

The National Consumer Commission (NCC) may also establish or recognise as authoritative a registry in which any **person may register a pre-emptive block** against any direct marketing communication or approach. A pre-emptive block becomes effective 30 days after being placed. The NCC has already requested submissions from service providers in this regard. Regulation 4 contains various guidelines regarding the operation and administration of the registry.

A person authorising, directing or conducting direct marketing must keep a record of all “opt-outs” received from consumers and ensure that no direct marketing is done to these consumers and those consumers who have registered a pre-emptive block in the registry (often referred to as the “do not call” registry) [once established]. Internal CRM processes must ensure that “opt-outs” are respected.

Practically this means that any person or business that engages in direct marketing activities would have to register as a direct marketer with the registry administrator and then prior to sending any direct marketing communication to its customers or list, submit a list of intended recipients for vetting. Anybody who has registered a pre-emptive block would then have to be removed from the list of intended recipients. A direct marketer must assume that a comprehensive pre-emptive block has been registered by a consumer unless the direct marketer has proof that **the consumer, an existing customer, has expressly consented (on or after 1 April 2011) to the receipt of direct marketing communications from the direct marketer** or the administrator of the registry has in writing confirmed that a pre-emptive block against that particular consumer has not been registered.

Furthermore, suppliers cannot merely assume that existing clients to whom they have previously sent direct marketing communications have consented to the receipt of future direct marketing communications. The regulations impliedly require that express consent is obtained from consumers on or after 1 April 2011. All future transactions or agreements entered into should therefore contain a selection clause requesting from the consumer his express consent to receive information regarding product updates, special offers or promotions, product launches and the like. Not only may consumers “opt-out”, suppliers are required to obtain an “opt-in” from consumers unless they do a look-up to the “do not call” registry and the consumer is not listed.

A consumer **may not be charged for an “opt-out”** or registering a pre-emptive block. The consumer carries the cost of submitting his demand to “opt-out”. For example, if a consumer opts out by way of a reply SMS, then the consumer may not be charged for this other than the normal network charge to the consumer for the submission of the SMS.

A supplier may not engage in any direct marketing directed to a consumer at home on Sundays or public holidays, Saturdays before 09h00 and after 13h00 and all other days between 20h00 and 08h00 the following day unless the consumer has requested or agreed otherwise. The above is also applicable to the delivery of direct marketing communications. Direct marketing which was submitted outside of the prohibited times and received by the consumer within the prohibited times does not necessarily constitute a breach of this provision on the part of the direct marketer. The onus to prove that the communication was dispatched during the allowed time rests on the direct marketer. Suppliers and direct marketers should desist from queuing direct marketing messages for delivery at “cheap rate” times as delivery of these messages will almost always fall outside of the allowed times.

Please also remember that a consumer may rescind (cancel) a **transaction resulting from any direct marketing without reason or penalty** within the cooling-off period. The consumer must **within 5 business days** of the latter of the date on which the transaction or agreement was entered into or the date on which the goods were delivered to the consumer, **advise the supplier in writing** or another recorded manner and form that he is rescinding the agreement. The consumer must then return any goods delivered within 10 business days of the delivery of such goods. The supplier must refund the consumer within 15 business days of the latter of notice of cancellation or return of the goods. Goods are returned at the risk and expense of the consumer. See the article titled “The cooling-off period” for more information about this.

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*The views and opinions expressed above do not represent qualified legal opinion, but is merely a personal view based on my understanding and interpretation of the Consumer Protection Act.*