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REGULATORY

Going nowhere fast, proposed amendments to the direct marketing regulations under the CPA published, and your comments are sought!

5 November 2024 *8 min read*

On October 28, 2024, the Department of Trade, Industry and Competition (dtic) published draft amendments to the regulations under the Consumer Protection Act 68 of 2008 (CPA). Comments on these amendments are invited until January 15, 2025. The proposed changes aim to revise regulations 1 and 4 of the CPA regulations established in 2011.[1] It appears that significant attention is finally being given to legislation empowering individuals to block unwanted direct marketing communications. What do these proposed amendments mean for the direct marketing industry and consumers? It's time to assess whether these changes will have any real impact or if we will remain stagnant for another 13 years.

The proposed amendments are a response to various initiatives by the Information Regulator (Regulator) and direct comments from Adv. Pansy Tlakula regarding direct marketing under the Protection of Personal Information Act 4 of 2013 (POPIA). In this context:

- The Regulator recently issued its first enforcement notice against FT Rams Consulting (FT Rams) for non-compliance with the direct marketing provisions of POPIA. This enforcement notice was prompted by a complaint from a data subject who received numerous direct marketing messages, particularly emails, from FT Rams, despite multiple attempts to opt-out and requests to be removed from their mailing list. The Regulator determined that FT Rams had ignored these opt-out requests, thereby violating the lawful processing conditions for personal information and section 69 of POPIA.
- The Regulator has also indicated that it will publish a guidance note on direct marketing to clarify the scope and application of POPIA in relation to direct marketing and telemarketing. To this end, Adv. Pansy Tlakula remarked that –

"That is why we needed to take a decision and it took us a long time to take that decision when we finalised the direct marketing guidance note. We took a decision to say once and for all that a telephone is an electronic communication."[2]

Before delving into the proposed amendments, it is essential to remind ourselves that section 11(1) of the CPA directly addresses the privacy of consumers and direct marketing –

"(1) The right of every person to privacy includes the right to –

- *refuse to accept;*
- *require another person to discontinue; or*
- *pre-emptively block,*

any approach or communication to that person, if the approach or communication is primarily for the purpose of ***direct marketing***." [Emphasis bolded]

Since the enactment of the CPA in 2011, provisions have been established for the National Consumer Commission (Commission) to create or recognise an authoritative registry. This registry allows individuals to register a pre-emptive block against any direct marketing communications, either generally or for specific purposes.[3]

The proposed amendments, now open for public comment, aim to improve the operational aspects of the CPA regulations. They outline the procedures regarding when, who, how, and where individuals can register a pre-emptive block and the establishment of an opt-out registry. These amendments are significant for both consumers and direct marketers, as they could directly influence the dynamics of their interactions and the future of direct marketing activities. The proposed amendments introduce the following important definitions not previously defined in the CPA –

Word	Definition

Cleansing	The process whereby the direct marketer cleanses data sets of consumers who have registered a pre-emptive block from their database.
Pre-emptive block	The registering of a block on the opt-out registry established by the Commission to prevent any unwanted electronic communication from direct marketers.

For consumers, the proposed amendments include the following provisions:

– A consumer can register a pre-emptive block by completing a form that requires personal information, including the consumer's identity or passport number, full name, gender, marital status, email address, cell phone number, landline number, and either work or physical address.

– Consumers must ensure that their information in the opt-out registry is always up to date. However, the proposed amendments do not specify how consumers are required to keep their information updated in the opt-out registry. Additionally, it is unclear whether this responsibility also extends to the Commission, which oversees the establishment of the opt-out registry, or to direct marketers who may possess the consumer's information.

For direct marketers, the proposed amendments state that to enable the effective operation of the opt-out registry, a direct marketer must:

- annually register on the opt-out registry by completing a form which requires information relating to –
    - company name and registration number;
    - VAT number;
    - company directors;
    - contact details of a contact person;
    - company contact details; and
    - BBB-EE certificate and a valid tax certificate.
- ensure that a consumer who receives direct marketing material is able to identify the name, electronic address, physical address and contact number of the direct marketer;
- ensure that information kept on the opt-out registry is up to date. It is not clear how information must be kept up to date and whether such information relates to that of the consumer or direct marketer or both;
- be identifiable on public platforms. It is not clear what is meant by this requirement, specifically regarding how a direct marketer may be identifiable on public platforms;
- not disseminate any electronic communication from a public platform where the originator of the electronic communication is unidentifiable;
- ensure that any form of electronic communication transmitted to the consumer's device is identifiable;
- not directly market any goods or services to any consumer who has registered a relevant pre-emptive block; and
- "cleansing", on a monthly basis, all data of persons who have registered a pre-emptive block with the Commission; and
- not engage in direct marketing unless the direct marketer has been registered as a direct marketer on the opt-out registry.

A review of the proposed amendments indicates that direct marketers are prohibited from sending marketing communications to consumers who have opted out by registering a pre-emptive block. Failure to comply with this requirement could result in the direct marketer violating the CPA and its regulations. If this happens, a complaint may be filed against the direct marketer for non-compliance with the CPA and Commission. In terms of section 112 of the CPA, the National Consumer Tribunal can impose an administrative fine for prohibited or required conduct. An administrative fine may not exceed the greater of –

- 10% of the wrongdoer's annual turnover during the preceding financial year; or
- R1 million.

The proposed amendments also put forward the following fee structure –

Fees	**2024**	**2025**	**2026**
Registration fee	R2,452.00	R2,574.00	R2,702.70
Annual renewal fee	Nil	R1,930.50	R2,027.03
Cleansing registration fee	R0.10	R0.12	R0.14

Thirteen years have passed since the CPA became operational, yet it still lacks an opt-out registry. The Direct Marketing Association of South Africa (DMASA) has created its own opt-out database; however, this database is only accessible to DMASA members.[4]

The direct marketing landscape in South Africa is complex, with various competing interests, including those of consumers, direct marketers, and regulators.

In 2009, before the CPA came into effect, the South African Law Reform Commission (SALRC) acknowledged the various competing interests within the direct market landscape. The dtic made a strategic decision to promote call centres in South Africa and to offer incentives to attract call centre businesses to the country. This initiative aimed to ensure that vulnerable consumers have access to goods and services through telemarketing.[5] From this premise, the SALRC recommended that a –

"regulatory framework for direct marketing be promoted that will balance the rights of consumers not to be targeted unreasonably, with the right of business to communicate effectively with the public".[6]

Has this balance been achieved 15 years later?

It is argued that a delicate balance must be reached, which requires careful legislative regulation. This process involves weighing and balancing the competing interests of consumers, direct marketers, and regulators, as well as considering the direct marketing laws of South Africa, particularly the CPA and POPIA.

The direct marketing landscape in South Africa can be understood as a complex prism, where various competing interests represent different rays of light. Ideally, these should converge into a single, unified ray of light that signifies a balanced approach, protecting the interests of all stakeholders.

Considering that the proposed amendments aim to improve and strengthen the opt-out registry, this could serve as a constructive starting point.

Please feel free to contact us if you require assistance preparing comments and/or input to the proposed amendments to the CPA regulations. Public comment is due by 15 January 2025. Submissions can be sent to ssasayi@thedtic.gov.za for the attention of Mr Sibusiso Sasayi, Acting Director-General: Department of Trade, Industry and Competition.

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[1] GNR.293 of 1 April 2011: Regulations (Government Gazette No. 34180) ("**CPA regulations**").

[2] See https://www.itweb.co.za/article/exclusive-inforeg-cracks-whip-on-pesky-direct-marketing-calls/KzQenvjy6oeqZd2r, accessed on 05 November 2024.

[3] See section 11(3) of the CPA.

[4] The database is available at https://dmasa.org/page/register-opt-out-service, accessed on 05 November 2024.

[5] See page 357 of the SALRC Project 124 on Privacy and Data Protection 2009 Report at paragraph 5.1.73. Also see page 360 of the SALRC Report at paragraph 5.1.84.

[6] See page 362 of the SALRC Report.



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