

The Opt-Out Register for Fax and Telephone - Guidance for Marketers

Guidance Note 11/13

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The Opt-Out Register for Fax and Telephone – Guidance for Marketers

- The Opt-Out Register for Fax and Telephone

The opt-out register (the “Register”) is a service provided by the Gibraltar Regulatory Authority (“GRA”), as the Data Protection Commissioner (the “Commissioner”), for fixed line and mobile subscribers who do not want to receive unsolicited direct marketing calls and/or faxes.

The maintenance of the Register, for the use of fax machines and telephones in direct marketing, is contained in Regulations 26 and 27 of the Communications (Personal Data and Privacy) Regulations 2006 (the “Regulations”).

Unsolicited direct marketing via fax

- Key Points and questions on Fax Marketing

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.
2. You cannot send or instigate the sending of an unsolicited marketing fax to the line of a business subscriber where that subscriber has asked you not to fax on that line.
3. You cannot send or instigate the sending of an unsolicited marketing fax to any number listed on the Register.
4. You can send unsolicited marketing faxes to a number on the Register where the subscriber has notified you that, for the time being, they do not object to receiving such calls.
5. You must provide your identity (i.e. the name of the business being promoted) and a valid business address or freephone number at which you can be contacted on each fax you send.
6. Marketers are entitled to get hold of a copy of the Register by contacting the Commissioner:

Opt-Out Register
Gibraltar Regulatory Authority
Suite 603
Europort
Gibraltar
privacy@gra.gi

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

No. You must suppress details upon receipt of 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 sub-contractors, you must make sure they screen against your suppression list as well as ensuring they don't fax numbers registered on the Register.

- We pay a sub-contractor 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 sub-contractor. You should check you have appropriate contracts in place to guard against such failures.

If your sub-contractor's failures cause you to break the rules, seek independent legal advice about an action for breach of contract and find another sub-contractor who will ensure you don't break the rules.

It would be possible for the Commissioner to take action against sub-contractors who allow their lines to be used in contravention of the Regulations but this is more likely to apply where the sub-contractor 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 sub-contractor 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. Even though some of the numbers are on the Register, can we fax them?

As outlined above, recording a number on the Register indicates a general objection to receiving unsolicited marketing faxes. The Register is a statutory register. Subscribers can give consent to receiving unsolicited marketing faxes which overrides opt-out registration but this is only valid where that over-riding 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 ensure that the list is screened against the Register and your own suppression list before sending any marketing faxes. Such lists have no statutory basis and do not over-ride registration on the Register.

Telephone Marketing

- Key Points and questions on Telephone Marketing
 1. If any subscriber has told you to stop making marketing calls to their number, you must comply with that request.
 2. You cannot make or instigate the making of unsolicited marketing calls to any number listed on the Register.
 3. You can make or instigate the making of unsolicited marketing calls to a number on the Register where that subscriber has notified you that, for the time being, they do not object to receiving such calls on that registered number.
 4. You must identify yourself when making a marketing call. If asked, you must provide a valid business address or freephone number at which you can be contacted. When using a subcontractor, the subcontractor's call centre staff must identify the instigator of the call (i.e. the organisation on whose behalf they are making the call).
 5. Marketers are entitled to get hold of a copy of the Register by contacting the Commissioner:

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Gibraltar Regulatory Authority
Suite 603
Europort
Gibraltar
privacy@gra.gi

- A subscriber is not registered with the Register 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.

- We pay a sub-contractor 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 sub-contractor's failures

cause you to break the rules, seek independent legal advice about an action for breach of contract and find another sub-contractor who will ensure you don't break the rules.

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

No. 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 telephone number at which that company can be contacted with an opt-out request.

- If the sub-contractor 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 i.e. the call would not be made unless you paid for it to be made. If asked, your sub-contractor or his call centre staff must provide a valid address or telephone 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 upon receipt of 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 sub-contractor 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 sub-contractors, you must make sure that they don't call numbers on your suppression list as well as ensuring that they don't call numbers registered on the Register.

- 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 (i.e. the person who pays the bill) has registered the number on the Register, 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.

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

As outlined above, the Register indicates a general objection to receiving unsolicited marketing calls. The Register is a statutory list. Subscribers can give consent to receiving unsolicited marketing calls which over-rides the Register but this is only valid where that over-riding 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 ensure that the list is screened against the Register and your own suppression list before making any marketing calls. Such lists have no statutory basis and do not over-ride registration on the Register.

- My company has mistakenly been faxing and or calling a number on the Register. The owner of the said number has begun proceedings against my company for breaching the Regulations and is requesting compensation. Can he do so?

Yes, Under Regulation 32 and provided that the individual can prove that he has suffered loss or damages as a result of the unsolicited faxes/telephone, then he can make a claim for damages by contacting the Commissioner.

However, under Regulation 30 (1) a person, may also bring proceedings in Court for compensation from an entity, for damaged suffered.

Please note that an individual can choose whether to make the complaint to the Commissioner or bring proceedings to Court.

Further Guidance on the Opt-Out Register is provided in the following documents, which are available on the GRA's website.

- The Opt-Out Register for Fax and Telephone – Guidance for Subscribers
- The Opt-Out Register for Fax and Telephone