

Playing by the rules

Consumer Protection Act Series #2

*Requirements for the direct
and indirect marketing of
consumer products and
services*

January 2011

In this issue:

- We provide an overview of the sections of the CPA dealing with marketing
- We look at the general CPA principle of marketing
- We provide you with an overview of the marketing practices, channels and methods regulated by the CPA
- We discuss promotional competitions , trade coupons and 'work-from-home' schemes
- We introduce a risk management assessment model

Introduction

The Consumer Protection Act (CPA), No.68 of 2008 impacts on direct and indirect marketing practices used by business to promote the supply of goods or services to consumers.

Organisations should take note of the specific requirements and review current marketing practices and methods before the CPA becomes fully effective on 31 March 2011.

Draft regulations to the CPA were released during the latter part of 2010 and are expected to become operative on promulgation.

Sections in the CPA that govern marketing

Chapter 2	Part A	Section 8	Protection against discriminatory marketing
Chapter 2	Part B	Section 11-12	Consumers' right to privacy
Chapter 2	Part E	Sections 29-39	Right to fair and responsible marketing

Please note that although they do not have a specific marketing theme, numerous other sections of the Act also have implications for marketing that should be considered.

It is imperative that businesses consider the above sections in conjunction with the other CPA provisions and the imminent regulations when conducting an impact assessment.

Always remember the general rule of marketing laid out in the CPA:

Marketing may not be misleading, fraudulent or deceptive.

The general rule applies to producers, importers, distributors, retailers and service providers. Business may also not market in a manner that is even likely to contravene the general rule. The CPA prohibition extends to the marketing of properties, the nature and price of goods or services, the manner and conditions of supply and the sponsoring of events.

What is ‘misleading, fraudulent or deceptive’ in CPA marketing terms?

A misleading fraudulent or deceptive representation about a material fact to a consumer is prohibited. This includes the use of exaggeration, innuendo or ambiguity about a material fact or failure to disclose a material fact.

According to the CPA you may not misrepresent that:

- You act on behalf of a supplier;
- Goods or services have characteristics that they do not have;
- Goods or services are of a particular standard, quality, grade, style or model;
- Goods are new or unused, if they are not; or
- Goods or services are available or can be delivered or performed within a specified time.

The Consumer has a right to restrict unwanted direct marketing

The consumer has a right to privacy. This right includes the consumer's right to pre-emptively block any impersonal approach or communication from direct marketers. Under these circumstances, a consumer may demand a business to desist from initiating any further communication. The National Consumer Commission may establish or recognise as authoritative a registry in which any person may register a pre-emptive block, either generally or for specific purposes, against any communication that is primarily for the purpose of direct marketing.

The current draft regulations propose, amongst other requirements, that:

- A direct marketer must assume that a pre-emptive block has been registered unless the registry confirms the contrary in writing. Business must implement appropriate procedures to facilitate the receipt of consumer demands to desist from direct marketing approaches. The consumer may also not be charged a fee for making the demand as contemplated in this section of the CPA.
- Direct marketers must register with the Administrator of the registry and must provide annual confirmation of specified details. Only registered direct marketers may request information regarding the register.
- If a consumer indicates in writing that he or she does not wish to receive direct marketing materials, including by placing a 'no junk mail' or other sign on his post box, then no direct marketing materials may be placed in or near the consumer's post box or his premises.
- Unless the consumer has requested direct marketing or agreed to it, no direct marketing may take place to consumers at home during the week between the hours of 19h00 and 08h00 the following day, nor on Saturdays before 09h00 and after 12h00; and no direct marketing may take place at all on Sundays and on official public holidays.

What is meant by the consumer's right to a 'cooling-off' period?

The consumer may cancel a transaction originating from direct marketing without incurring any penalty within five days after delivery of goods or the conclusion of an agreement. This is referred to as the 'cooling-off period' or the 'cooling-off' right of the consumer. Suppliers are required to include a 'cooling-off period' in direct marketing transactions. Suppliers are required to return payments received from consumers within 15 business days of receiving the cancellation notice. These conditions do not apply to a transaction if section 44 of the Electronic Communications and Transactions Act applies.

Definition: 'Direct marketing'

Direct marketing means to approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of promoting or offering to supply, in the ordinary course of business, any goods or services to the person; or requesting the person to make a donation of any kind for any reason.

Specific marketing practices, methods and channels

Marketing practice/ method/channel	Brief summary of marketing practice/method/ channel	Dos and don'ts
Direct marketing	Approaching a consumer either in person, by mail or electronic communication for the purpose of promoting or offering goods or services, or to request a donation of any kind for any reason.	A consumer who has been directly approached, for example via SMS or email, may demand that the direct communication be desisted from. Such a demand from the consumer must be facilitated by the direct marketer and no further communication may be directed to the consumer.
Negative option marketing	The consumer is deemed to have concluded an agreement or transaction initiated unilaterally by the supplier, if the consumer fails to perform a certain action.	This practice is for example popular with suppliers who send books or other goods via the post to consumers. The onus is then on the consumer to return the goods, failing which he or she is automatically obliged to pay for the goods received. This practice is now prohibited in terms of the CPA. The CPA prohibits a supplier from marketing on the basis that goods or services are supplied, or that an agreement will automatically come into existence, unless declined by the consumer. An agreement or modification induced within the meaning of negative option marketing is void.
Bait marketing	Enticing a consumer to contact or visit a supplier.	<p>Subject to certain defences available to the supplier, it is prohibited to entice consumers to contact or visit a supplier under misleading circumstances in advertisements. A supplier may not advertise goods or services at a specified price in a way that may mislead consumers as to the actual availability of the goods or services at that advertised price.</p> <p>If a supplier advertises the goods or services as available at a specified price, and the advertisement expressly states a limitation in respect of the availability of the goods or services from that supplier at that price, the supplier must make the goods or services available at that price, to the extent of the expressed limits.</p> <p>The provisions relating to bait marketing apply to advertisements.</p>

Marketing practice/ method/channel	Brief summary of marketing practice/method/ channel	Dos and don'ts
Discriminatory marketing	Marketing aimed at a specific person or group of persons.	<p>A supplier may not treat any person or categories of persons differently from another, on the basis of unfair discrimination*. Included in the list of prohibitions are:</p> <ul style="list-style-type: none"> • Exclusion from accessing goods or services or granting exclusive access; • Assigning priority for the supply of goods or services; • Supplying a different quality of goods or services; • Charging different prices for any goods or services; and • Targeting particular market segments for exclusive priority. <p><small>*Unfair discrimination is prohibited by the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000.</small></p>
Catalogue marketing	The agreement for the supply of goods or services is not entered into in person, but telephonically, if the contact is initiated by the consumer; or by postal order or fax. The consumer does not have the opportunity to inspect the goods before concluding the agreement.	<p>Before concluding an agreement or transaction, a supplier must disclose the prescribed information to a consumer in an appropriate manner such as:</p> <ul style="list-style-type: none"> • The supplier's name and licence or registration number; • The address of the supplier's physical business premises and related contact details; • The sales record information required by section 26; • The currency in which amounts are payable; and • The supplier's delivery arrangements. <p>The above requirements do not apply where Chapter 7 of the Electronic Communications and Transactions Act applies.</p>

Other methods of marketing

Promotional competitions

Promotional competitions are currently also governed by section 54 of the Lotteries Act of 1997. The CPA makes significant changes to the legal requirements for promotional competitions. If a lottery satisfies the requirements of the CPA's definition of a promotional competition, the CPA will apply. Section 1 of the Lotteries Act will also be amended to include the CPA definition of a promotional competition.

What is a promotional competition?

The main elements contained in the CPA definition of a promotional competition are:

- The competition is conducted in the ordinary course of business;
- The purpose is to promote a supplier or the sale of goods or services;
- Prizes are distributed by lot or chance;
- It is irrelevant for the purpose of the definition whether a participant is required to demonstrate any skill or ability before being awarded a prize; and
- Any prize offered exceeds the threshold prescribed by the regulations.

What are the dos and the don'ts of running a promotional competition?

Do:

- Prepare competition rules prior to the competition;
- Make the competition rules available to the National Consumer Commission and to any participant, on request and without any cost;
- Retain a copy of the competition rules for the prescribed period after the end of the competition;
- State in an offer the benefit or competition to which the offer relates;
- State the steps required by a person to accept the offer or to participate in the competition;
- State the basis on which the results of the competition will be determined;
- State the closing date for the competition and the medium through which the results of the competition will be made known; and
- State how, when and where a person may obtain a copy of the competition rules and the prize.

Don't:

- Require the participant to pay more than the reasonable costs of entering the promotion;
- Award a prize to a winner if it is unlawful;
- Inform a person that he or she has won a competition, if:
 - No competition has in fact been conducted;
 - The person has not in fact won the competition;
 - The prize for that competition is subject to a previously undisclosed condition; or
 - The person is required to offer further consideration for the prize, after the results of the competition have been announced.
- Inform a person that he or she has a right to a prize:
 - To which the person does not in fact have a right;
 - If the prize was generally available or offered to all similarly situated persons or class of persons; or
 - If, before becoming eligible to receive the prize, the person is required to offer further consideration for the prize or to purchase any particular goods or services.

The draft regulations currently propose that for promotional competitions where consumers are required to enter the competition via SMS or MMS or other similar application, a fee exceeding the minimum fee normally payable on the network or via the consumer's service provider for an ordinary SMS or MMS may no longer be charged.

Trade coupons and other promotional offers

Consumer sales promotions may sometimes consist of a 'voucher', 'coupon' or 'stamp', entitling the consumer to a price reduction, benefit or prize. In some instances the 'coupons' have to be collected in sets. The CPA provisions relating to trade coupons and similar promotions do not apply to franchise agreements, loyalty programmes, loyalty credit or awards or promotional competitions. In the context of trade coupons, a 'promotional offer' is regarded as an offer of a prize or reward, gift, free good or service,

price reduction or concession, enhancement of quantity or quality of goods or services, irrespective of whether or not acceptance of the offer is conditional on the offeree entering into any other transaction.

The CPA prohibits promotional offers if the intention is not to fulfil it, or to fulfil it differently than offered.

A document reflecting a promotional offer must clearly state:

- The nature of the prize or reward;
- The goods or services to which the offer relates;
- The steps required by a consumer to accept or to receive the benefit ; and
- The particulars of any person from whom, any place where, and any date and time on or at which the consumer may receive the prize or reward.

Where a business makes or sponsors a promotional offer, it must:

- Ensure that the supply of the particular prize or capacity thereof is sufficient to accommodate all reasonably anticipated demands resulting from the offer;
- Not limit or restrict capacity to supply any such goods or services in response to the acceptance of the offer, on any basis other than that it applies to such a supply in exchange for any other form of consideration;
- Not require the consumer to accept an inferior quality of goods or services than those generally available to any other consumer on the same date who tenders a different form of consideration; and
- Not impose any monetary charge for the handling of a transaction in respect of which the consumer tenders a trade coupon.

The CPA provides for certain defences if, for instance, the supplier offers to supply and supplies through another supplier, comparable goods or services and the consumer accepted or declined the supplier's offer.

Alternative work or ‘work-from-home’ schemes

The provisions relating to alternative work schemes regulate marketing practices where persons are invited or solicited to conduct work from home.

An advertisement to promote ‘work-from-home’ practices must disclose:

- A cautionary statement regarding uncertainty of the extent of work;
- Income or other benefit to be derived;
- The full name, or registered business name, of the person promoting the matter and the address and contact numbers of that person’s primary place of conducting the business; and
- The nature of the work.

The CPA prohibits false representations regarding the availability, actual or potential profitability, risk or other material aspect of the work.

Definition: ‘Advertisement’

Advertisement means any direct or indirect visual or oral communication transmitted by any medium to bring the existence or identity of a supplier to the attention of the public; or the existence, nature, availability, properties, advantages or uses of any goods or services that are available for supply, or the conditions on, or prices at, which any goods or services are available for supply; promote the supply of any goods or services; or promote any cause.

Meeting the requirements of the CPA

Important considerations

We recognise the challenges posed to business by the CPA both before and after the effective date of 31 March 2011. The CPA may significantly impact the marketing practices of many companies doing business in South Africa. The risk of non-compliance could be costly; not only with regards to financial penalties, but also in relation to the potential damage that non-compliance poses to a company's brand and image in the market place. Those companies that have not initiated steps towards compliance, should without any delay assess the potential impact of the CPA on their business and ensure that adequate measures are introduced to minimise the risk of non-compliance in an effective and cost-efficient manner.

How we can help you

PwC has significant experience in assisting clients with regulatory compliance. Our specialists take a structured approach to enable clients to achieve and sustain compliance in a relatively short space of time. Our solution encompasses helping companies to assess the impact of the CPA on their business and designing and implementing the changes required to ensure ongoing compliance.

Our understanding of the specific requirements of the CPA, together with our blend of regulatory compliance, risk management, information technology, process consulting and industry-specific expertise allow us to provide a complete CPA compliance solution.

We follow a proven and structured regulatory compliance approach for CPA compliance at each of the following key stages:

- **Assess**
An assessment of impact of the CPA on the business.
- **Design**
Detailed design of the transformation requirements – for example, the development of a CPA compliance framework, changes to existing business processes and/or practices, training and awareness; and new IT systems.
- **Construct**
Build new ways of working and plan roll-out.
- **Implement**
Roll-out new ways of working and ensure benefits are realised.
- **Operate**
Operate new processes and systems and implement continuous improvement.

Our approach is top-down and risk based. It spans the domains of strategy, structure, process, people and technology. Typical outcomes include an increased awareness of the CPA and its implications and risks to the business, a CPA compliance framework, new and/or revised structures and processes relating to aspects such as customer complaints or care lines, internal consultation, upstream and downstream supply chain, marketing and promotion, packaging and labelling, product guarantees, supplier contracts and pre-payments.

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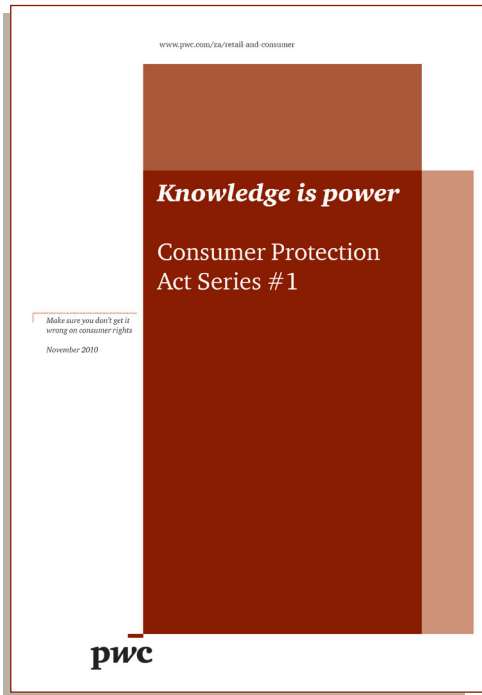
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