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INFORMATION TECHNOLOGY LAW UPDATE

New Israeli “Spam” Law Goes Into Effect December 1

By David Mirchin, Adv.

A broad new law regulating commercial solicitations, including by email, will soon go into effect on December 1, 2008. The law, Amendment 40 to the Communications Law, regulates the practice of sending commercial marketing materials to recipients without their consent by way of email, fax, automatic phone dialing systems or short messaging technologies (SMS, MMS). It includes both civil and criminal penalties for non-compliance, including personal liability for officers and those in charge of the marketing or advertising activities of a company. Furthermore, individuals may sue and collect up to 1,000 NIS in exemplary damages for every spam email they have received, even without proving any actual damages. To make this threat more real, the Israel Internet Association is calling on users to sue spammers and has uploaded a sample "cease and desist" letter and form lawsuit to its site.

Since the law will impact many companies, even those who do not perceive themselves as sending “spam”, we are writing to provide details of the main points of the law, as well as a checklist for compliance. Please be sure to consider the steps you should take before December 1, as you have more flexibility to obtain consent from recipients before that date.

General Rule

The new law establishes a general rule that an advertiser may not send commercial communications without obtaining the *explicit, written, advance* permission of the recipient. Even after a recipient has given his or her permission to receive messages, the recipient may revoke that permission at any time. This model, similar to that prevailing in the European Union, is an “opt in” model. (It differs from the “opt-out” model adopted by the U. S. Can-Spam Act, which permits unsolicited commercial email until a recipient “unsubscribes”.)

What type of information is covered?

The law’s scope is broad. It covers “any commercial message, the object of which is to encourage the purchase of a product or service, or to encourage spending money in any other way.” It does not specifically exempt informational communications or newsletters, and therefore it is not clear whether they are covered. Due to the harsh penalties, however, it is advisable that companies follow these rules even for messages which may be construed as indirectly related to the purchase of goods or services.

What means of communication are covered?

The law covers electronic commercial communications via:

- Email
- Fax
- SMS and MMS, including by text, audio or video
- Automated phone messages

Who is Covered?

The law broadly defines an “advertiser” as being anyone:

- Whose name or contact details appear in the message for the purpose of purchasing the good or service;
- Whose business is advertised or goals promoted in the message; or
- Who markets the message on behalf of a third party.

Note that while the law does not explicitly cover recipients who are outside Israel—and therefore give them rights to sue--the drafters of the law have stated publicly that they believe that such recipients are covered.

Are there Exceptions to Obtaining the Recipient’s Consent?

Yes. There are two circumstances in which explicit consent from a recipient is NOT required. A message may be sent:

- to a business on a single occasion as long as it requests a consent to send future messages; or
- if it satisfies all three of the following conditions:
 - **Previous business relationship:** In the course of purchasing a product or service, or during negotiations therefor, the recipient discloses his or her contact details and was notified that such details would be used to send marketing materials.
 - **Opportunity to Unsubscribe:** The recipient is given an opportunity to indicate that he or she does not want to continue receiving marketing materials.
 - **Similar product:** The advertisement being sent is for a product or service similar to that previously purchased or negotiated.

Is there specific information that must be included in messages?

Yes. For email, in addition to receiving the recipient’s consent, a message must “*prominently and clearly*” contain:

- the word “advertisement” in the subject heading;
- the name, address, telephone number, fax and email of the advertiser; and

- the right of the recipient to unsubscribe, including a valid email address for such purpose.

Remember that the name and address of both the entity whose goods or services are being advertised, as well as the third party direct mail company, if one is used, must be included.

For SMS or automated phone messages, the word “Advertisement” should appear at the beginning of the message.

For SMS or MMS, the advertiser's name and contact details in the body of the message satisfy the “unsubscribe” requirement.

What are the penalties for violating the Law?

The real stick is the severe criminal and civil penalties for violating this law. Perhaps most importantly, officers and marketing/advertising managers can be personally liable. The law specifically requires these officers to do everything possible to prevent violations of the law. Furthermore, class actions are possible. The fines for violating the law are stiff:

- An advertiser which sends a message without receiving the recipient’s express consent commits a criminal offense punishable by a fine of up to 202,000 NIS
- An advertiser which sends a message without complying with the form and content requirements commits a criminal offense punishable by a fine of up to 67,300 NIS.

May individuals sue?

Yes! Some spam laws, such as the U.S. Can-Spam Act, do not provide for private enforcement -- only government entities may bring an action. The Israeli Law, however, does permit individuals to sue. Importantly, these individuals may obtain damages of 1,000 NIS per advertisement even without proving actual damage. The courts in fact are directed to be sympathetic to plaintiffs in that they are NOT to consider the damage (or lack thereof) caused to the recipient. Rather, the court should consider the following factors in determining damages:

- the deterrent value of an award;
- the extent that an award would encourage recipients to enforce the law; and
- the extent of the violation.

Importantly, the Israel Internet Association is encouraging individuals to enforce the Law, and has both sample cease & desist letters, as well as court complaints which can be downloaded from its website.

Summary and Recommendations for Compliance

We suggest that you take the following steps to comply with this new law:

1. Before December 1, obtain permission from anyone who is on your email, fax, SMS or automated phone lists so that you can be confident in your continued ability to use these valuable business assets. This is particularly important if your recipients are individuals since the law does not clearly grant the right to request permission from them after the law becomes effective.
2. For emails, send a short email with a reply option indicating that if they want to continue receiving messages from you, they need to affirmatively indicate they are interested.
3. Since officers may be personally liable, they should establish clear, written procedures for their organizations to follow to avoid violations of the law. We would recommend following this up with a documented, face-to-face session with anyone who may send out emails for your company, in order to ensure they understand how to comply with the law.
4. Advertisers wishing to send commercial email must do all of the following:
 - A. Receive express permission from recipient;
 - B. Include the words “ad” or “advertisement” in the subject line;
 - C. Include the name of the advertiser, and its address, fax, telephone and email;
 - D. Send from a working email address to which the recipient can simply “reply” in order to be removed from the list (you may not hide behind “do-not-reply” addresses); and
 - E. Maintain a central list of those recipients who have agreed to receive emails, and those who have requested removal. This is particularly important if your organization has many different groups sending mass mailings.
5. Finally, you should check whether your insurance policies cover liability under this law.

If you have further questions, please feel free to contact your regular Meitar attorney or David Mirchin, +972-3-610-3199, dmirchin@meitar.com. This memorandum is provided by Meitar for educational and informational purposes only and is not intended and should not be construed as legal advice.