

**Discussion of U.K. Companies Act Amendments of 2006¹
as Applied to Email Marketing and Transactional Email Messages**

Issue Presented:

Do recent amendments to the Companies Act 1985 and Companies (Northern Ireland) Order 1986 provisions on “trade disclosures,” embodied in Companies Act 2006 and The Companies (Registrar, Languages and Trading Disclosures) Regulations 2006, require that all emails sent by a company incorporated or doing business in Great Britain include specific references to that company’s name, place of registration, registration number and address of its registered office?

Statutory Considerations:

The Companies Act 1985 established various requirements that companies disclose their names and other identifying information in certain types of communications.² Specifically, Sections 349 required that all “business letters, notices and publications” sent by the company must contain legible references to *the company’s name*, and in the case of “business letters” also include place of registration, the number under which it is registered in Great Britain, and the address of its registered office. Overseas companies that operate in Great Britain have been subject to similar requirements.³

In response to a European Directive,⁴ 2006 Amendments to the Companies Act as supplemented by implementing regulations⁵ extended the application of such disclosure requirements to include “a document of that type in hard copy, electronic or any other form.”⁶ In light of this structure, email disclosure requirements under the new Companies Act and its implementing regulations depend on the pre-existing disclosures requirements for business letters, notices and publications. Two factors suggest that general advertising emails would not be governed by the “business letters” rule, whereas transactional-type emails could. Treating advertising as a “notice” or “publication” under the rule is also problematic.

First, the requirements for fuller disclosures of registration information in business letters are coexistent with those governing “order forms,” which speaks to the idea of a commercial transaction underway.⁷ Nearby “business name only” disclosure provisions speak to other transactional-type communications such as bills of parcels, invoices, receipts, letters of credit, bills of exchange, cheques, and orders for money or goods, which similarly contemplate a pre-existing business relationship with the recipient of such communications. On this basis, a reasonable construction of at least the business name disclosure requirement suggests that

¹In force as of 1 January 2007.

² See Companies Act 1985 §349 *et seq.*

³ See Companies Act 1985 §693.

⁴ See Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003 amending Council Directive 68/151/EEC (stating at (10) that similar requirements are appropriate “for all company letters and order forms, whether they are in paper form or use any other medium.”)

⁵ See The Companies (Registrar, Languages and Trading Disclosures) Regulations 2006.

⁶ See *id.* at §1(4) of Schedule 2, Regulation 6: “Trading Disclosures Amendment of 1986 Order.”

⁷ See companies Act 1985 §351.

transactional emails of the type used to enable a commercial transaction should require at a minimum the disclosure of the company's business name in the email. If these appear as an order form or direct business communication (letter) related to an ongoing business relationship, the additional requirements relating to disclosure of registration information (place of registration, registration number and address of registered company) would be appropriate. General advertisements, however, do not necessarily share this trait of being used in communications of a transactional nature. Instead, they may be viewed depending on their level of specificity as mere invitations to engage in a transaction.

Another factor suggesting that advertisements were not historically considered under the umbrella of "business letters" is reflected by the fact that advertising in Great Britain has principally been subject to self-regulation under the Codes of the Advertising Standards Authority (ASA),⁸ which do not require an advertiser to reveal itself. Under a similar rationale, the absence of the name disclosure requirement in the ASA Code may suggest that advertisements have also not been deemed "notices and publications" for purposes of the Companies Act disclosure requirements. This rationale and resulting ambiguity was explicitly acknowledged in 2001 by the Company Law Review Steering Group launched by the Secretary of State for Trade and Industry.⁹

Nevertheless, regulations for the E-Commerce Directive applicable in the U.K. do specifically address commercial email communications, and confirms that commercial email communications should "clearly identify the person on whose behalf the commercial communication is made."¹⁰ Such a commercial communication generally exists if it is "designed to promote, directly or indirectly, the goods, services or image of any person pursuing a commercial, industrial or craft activity or exercising a regulated profession."¹¹ This Directive therefore generates a motivation independent of the Companies Act itself for focusing on the inclusion of properly identifying "name" information in a pure advertising email.

⁸ See <http://www.asa.org.uk/asa/codes/>

⁹ Specifically, that group acknowledged:

It is not immediately apparent whether the Act's requirements for the company's name to appear in all notices and official publications apply to any advertisements. Advertising is subject to self-regulation through the Advertising Standards Authority which requires all advertisements to be decent, legal and honest. There is no requirement for the advertiser to reveal itself. We tend to the view that the Act's requirement for the company to disclose its name should not apply to advertisements which seek to raise awareness, e.g. those on hoardings and stickers, but that they should apply to any advertisement that is a direct attempt to persuade someone to enter into a contract. However this distinction may not be easy to define.

¹⁰ See The Electronic Commerce (EC Directive) Regulations 2002 No. 2013, §7(b).

¹¹ This does not include a communication

(a) consisting only of information allowing direct access to the activity of that person including a geographic address, a domain name or an electronic mail address; or

(b) relating to the goods, services or image of that person provided that the communication has been prepared independently of the person making it (and for this purpose, a communication prepared without financial consideration is to be taken to have been prepared independently unless the contrary is shown).

Conclusion:

Despite the Company Act's ambiguity with respect to "business records," "notices" and "publications" terminology implicitly recognized by the Secretary of State's Company Law steering group, the relative ease in complying with the requirement to include a registered business name in an email, paired with its potential utility in helping to comply with the E-Commerce Directive where applicable, councils in favor of such inclusion for all email-based marketing and transactional material.

Under the Companies Act, the case for inclusion of more detailed disclosures such as place of registration, registration number and address of registered business is strongest in the transactional email context, where marketing/commercial communications evidencing a pre-existing business relationship are in use.

In this respect, to comply with U.K. disclosure law companies *should not analogize* to the U.S. CAN-SPAM Act, which would yield a contrary result. Unlike the Companies Act, under the CAN-SPAM Act properly-defined transactional messages (newsletters, business communications, etc.) are subjected to the *lower standard* than that applied to commercial advertisements.