



Infringement Notice

Spam Act 2003

I, Jeremy Fenton, an authorised person for the purposes of clause 9 of Schedule 3 to the *Spam Act 2003* (**Spam Act**), having reasonable grounds to believe that Phoenix Securities Pty Ltd ACN 626 463 616 (**Phoenix Securities**), has committed one or more contraventions of a particular civil penalty provision,

HEREBY give an Infringement Notice (**the Notice**) under subclause 3(1) of Schedule 3 to the Spam Act to:

Phoenix Securities (ACN 626 463 616)

at

25B Herbert Road
West Croydon SA 5008

Details of Alleged Civil Contraventions

It is alleged that Phoenix Securities contravened subsection 16(1) of the Spam Act by sending commercial electronic messages that had an Australian link, and which were not designated commercial electronic messages, without the consent of the relevant electronic account holder. Schedule 1 to this Infringement Notice sets out brief details of the alleged civil contraventions.

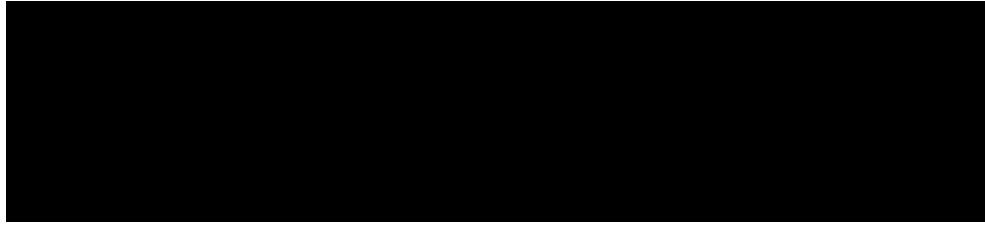
Amount of Penalty

The total pecuniary penalty (**the penalty**) for the alleged civil contraventions is \$26,640. The penalty is calculated in accordance with item 2 of the table under subclause 5(1) of Schedule 3 to the Spam Act, as set out in paragraph 4.1 of Schedule 1 to this Notice.

Payment of Penalty

The penalty should be paid to the Australian Communications and Media Authority (**the ACMA**), on behalf of the Commonwealth, by deposit into the following account by 17 December 2021 (56 days after the Notice is given).

Please include the narration “Phoenix Securities - UCES” with your payment:



If the penalty is paid

If the penalty is paid to the ACMA, on behalf of the Commonwealth, **within 56 days after the Notice is given**, this matter will not be dealt with by the Federal Court of Australia and any liability for the alleged contraventions that are the subject of this Notice is discharged.

If the penalty is not paid

If you do not pay the penalty **within 56 days after the Notice is given**, the ACMA may take action for the alleged contravention(s).

That action may include the institution of civil penalty proceedings in the Federal Court of Australia. The penalties that the Court can impose are potentially significantly higher than that in an Infringement Notice (see section 25 of the Spam Act).

Withdrawal of the Infringement Notice

The ACMA may withdraw this Infringement Notice. To be effective, the withdrawal must occur within 28 days after the Notice was given.

If you believe that the Notice should be withdrawn, you should write to me by 5 November 2021 (14 days from date of notice) setting out the basis/reasons for this position. The ACMA may take this into consideration when deciding whether or not to withdraw this Notice.

If the Notice is withdrawn after the penalty is paid, the penalty will be refunded.

Please note that if this Notice is withdrawn, the ACMA may consider taking action, including under Part 4 of the Spam Act, for the alleged contravention(s), the subject of this Notice.

DATE: Friday 22 October 2021



Jeremy Fenton
Executive Manager
Consumer, Consent and Numbers Branch
Australian Communications and Media Authority

SCHEDULE 1

In accordance with clause 4 of Schedule 3 to the Spam Act, brief details of each of the alleged civil penalty contraventions are set out below.

1. Background

- 1.1. Phoenix Securities is a registered company under the *Corporations Act 2001*, with a registered office at 25B Herbert Road, West Croydon, South Australia 5008.
- 1.2. On 11 March 2021, in response to consumer complaints alleging to have received commercial electronic messages from Phoenix Securities without having provided consent, the ACMA commenced an investigation into whether Phoenix Securities had contravened the Spam Act.

2. Relevant civil penalty provisions of the Spam Act

- 2.1. Subsection 16(1) of the Spam Act provides that a person must not send, or cause to be sent, a commercial electronic message that has an Australian link and is not a designated commercial electronic message.
- 2.2. Subsection 16(2) of the Spam Act provides that subsection (1) does not apply if the relevant electronic account-holder consented to the sending of the message.
- 2.3. For the purposes of the Spam Act, consent is defined in Schedule 2 of that Act.
- 2.4. Subclause 4(1) of Schedule 2 provides that, for the purposes of the Spam Act, the consent of the relevant electronic account-holder may not be inferred from the mere fact that a relevant electronic address has been published.
- 2.5. Subclause 4(2) of Schedule 2 to the Spam Act sets out an exception to the rule in subclause 4(1) where the electronic address to which the commercial electronic message was sent was conspicuously published. The requirements to be satisfied, in order to demonstrate this exception, are set out in that subclause.

3. Matters giving rise to the Infringement Notice

- 3.1. On 22 February 2021, Phoenix Securities sent at least 6 commercial electronic messages to electronic addresses that it obtained from the Yellow Pages, or a similarly available public directory. This information was obtained from Phoenix Securities under a notice to produce information and documents under section 522 of the *Telecommunications Act 1997*.
- 3.2. The purpose of the messages was to offer to supply, or to advertise or promote, the services of Phoenix Securities. Therefore, the messages described at paragraph 3.1 were commercial electronic messages, as defined in section 6 of the Spam Act.
- 3.3. The commercial electronic messages were not 'designated' commercial electronic messages as defined in Schedule 1 to the Spam Act.
- 3.4. The commercial electronic messages had an Australian link as defined in section 7 of the Spam Act. They were sent by Phoenix Securities, an organisation whose central management and control is in Australia.
- 3.5. Phoenix Securities did not provide evidence that the electronic addresses, to which the commercial electronic messages at paragraph 3.1. were sent, were conspicuously published. Therefore, it did not demonstrate that it had consent to send the commercial electronic messages at paragraph 3.1.
- 3.6. There are, therefore, reasonable grounds to believe that Phoenix Securities contravened subsection 16(1) of the Spam Act on at least 6 occasions on 22 February 2021, as set out in this Notice.
- 3.7. Subsection 16(1) of the Spam Act is a civil penalty provision (subsection 16(11) of the Spam Act).

4. The amount of the penalty

4.1. The total penalty specified in this Notice is \$26,640, calculated in accordance with subclause 5(1) of Schedule 3 to the Spam Act, as set out in the table below.

Penalties for contraventions of subsection 16(1) of the Spam Act

| Date of contravention | Civil penalty provision allegedly contravened | Number of contraventions | Total penalty units ¹ | Penalty imposed |
|-----------------------|---|--------------------------|----------------------------------|-----------------|
| 22 February 2021 | Subsection 16(1) | 6 | 120 | \$26,640 |
| Total penalty | | 6 | 120 | \$26,640 |

¹At the time of the alleged contraventions, the amount of a penalty unit was \$222, as set by section 4AA of the *Crimes Act 1914*.