Affiliate Compliance: It’s Not Just the Message, It’s the Messenger

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Managing Risk Means Controlling The Medium And The Messenger

The Key Is Finding The Right Balance
Understanding Risk – Controlling Your Mediums of Communication

Phone calls/Text Messages

Email Marketing

Social Media/Blogs

Mobile Advertising

Advertorials/Landing Pages
Know Your Medium – Phone Calls/Text Messages

Before Your Affiliates Pick Up The Phone, Make Sure The Recipient Of Your Message Wants To Hear From You.

Otherwise You May Be Subject To Enforcement Efforts From The FTC, FCC, Or Private Litigants.

For The FTC Content Matters, For The TCPA It’s The Medium That Counts.

The TCP Provides for $500 -$1500 In Damages Per Violation Based On The Medium Alone.
Know Your Medium – Phone Calls/Text Messages

Telephone Consumer Protection Act

Mobile Phones

NEW RULE: Marketers Must Receive Prior Express Written Consent From Consumers Before Placing Autodialed Calls/Texts Or Generating Pre-Recorded Messages To Cell Phones For Telemarketing Purposes.

EXCEPTIONS:

• Live (Non-Autodialer) Telemarketing Calls To Wireless Numbers Do Not Require Consent

• Live (Non-Autodialer) Informational Calls To Wireless Numbers Do Not Require Consent

Landline Phones

NEW RULE: Marketers Must Obtain Prior Express Written Consent Before Generating Pre-Recorded Telemarketing Messages to Consumers’ Landlines.

EXCEPTIONS:

• Live Telemarketing (With Or Without Autodialer) Calls To Residential Lines Generally Do Not Require Consent

• Live Informational Calls (With Or Without Autodialer) To Residential Lines Do Not Require Consent
Know Your Medium – Phone Calls/Text Messages

Telephone Consumer Protection Act

What Is Consent?
- Must Be Unambiguous – i.e. “Clear and Conspicuous Disclosure”
- May Not Be A Condition of Purchase
- Requires Consumer to Designate a Phone Number

How Is It Obtained?
May Be Obtained Via:
- Website Form;
- Email;
- Text Message;
- Telephone Key-Press; or
- Voice Recording

Who Bears The Burden Of Proof?
Seller Bears Burden of Compliance

REMEMBER!
- Companies Should Scrub DNC List
- Consumer Can Revoke Consent

BUT – The Risk Of Litigation Starts With The Third-Party Affiliate
The CAN-SPAM Act regulates unsolicited commercial e-mail and sets out specific requirements for the content of these messages.

Each Separate Email In Violation Of The CAN-SPAM Act Is Subject To Penalties Of Up To $16,000.

Initiators of Commercial E-Mail Messages Must Comply With The CAN-SPAM ACT.

What Matters Is The “Primary Purpose” Of The Message.

A Commercial E-mail Can Have More Than One Initiator Or Sender – i.e. Third-Party Affiliate.
Know Your Medium – Email

CAN-SPAM ACT

Don’t Use False Or Misleading Header Information.

Don’t Use Deceptive Subject Lines.

Identify The Message As An Ad.

Tell Recipients Where You Are Located.

Tell Recipients How To Opt Out From Future Emails.

Shooting Off A Non-Compliant Commercial E-mail May Mean That The FTC, FCC, State AGs, And Even ISPs May Shoot The Messenger.
Know Your Medium – Social Media/Blogs

March 2013, FTC Updated its Disclosure-of-Advertising Guidelines to Include Social Media and Blogs.

Guidelines Even Apply To Limited Character Count.

Bloggers Must Disclose Relationship/Material Connection With Advertiser.

You Can’t Talk About Your Experience With A Product If You Have Not Tried It.

Even Paid Tweets Must Include “Clear And Conspicuous” Disclosures.

Reasonable Monitoring Of Disclosures Is Required By Affiliates/Endorsers, But The Focus Will Ultimately Be On the Advertiser, Not Endorsers.
Know Your Medium – Mobile Advertising

What Constitutes A “Clear And Conspicuous Disclosure” On Mobile Advertising?

- Placement And Proximity
- Prominence
- Unavoidability
- Distracting Factors
- Repetition
- Audio Clarity Or Duration Of Disclosure
- Understandable Language
- Format And Language Of The Disclosure

**REMEMBER!** When Disclosures Cannot Be Made Clearly And Conspicuously On A Device Or Platform, Then The Device Or Platform Should Not Be Used.
When It Comes To Online Ads, The Basic Principles of Advertising Law Apply:

1. Advertising Must Be Truthful And Not Misleading;
2. Do Not Make A Claim That Requires Proof You Do Not Have; And
3. Advertisements Cannot Be Unfair.
Understanding Risk – Controlling Your Messenger

Where Is The Message Coming From?

Advertiser

Affiliate
Understanding Risk – Controlling The Messenger

ADVERTISER

Never Work With An Advertiser Without A Contract – IOs Don’t Count!

Determine Which Party Holds The Bargaining Power.

Institute Best Practices And Hold Your Advertiser Accountable.

Maintain Good Record-Keeping.

Limit Your Liability.
Never Work With An Affiliate Without A Contract – Sign-Up Terms Don’t Count!

Institute Best Practices And Hold Your Affiliates Accountable.

Conduct Periodic Audits, But Don’t Micromange.

Maintain Good Record-Keeping.

Limit Your Liability.
When You Lose Control

State Attorney Generals

“Surf” Days

Private Litigants

Your Competitors
Regaining Control

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