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Hands-on Counsel, Gloves-off Litigation

## **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.



## 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

## 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



got consent?

### How Is It Obtained?

May Be Obtained Via:

- Website Form;
- Email;
- Text Message ;
- Telephone Key-Press; or
- Voice Recording

### REMEMBER!

- Companies Should Scrub DNC List
- Consumer Can Revoke Consent

### Who Bears The Burden Of Proof?

Seller Bears Burden of Compliance

**BUT – The Risk Of Litigation Starts With The Third-Party Affiliate**



### CAN-SPAM ACT



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.

### 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.



# Know Your Medium – Advertorials/Landing Pages

When It Comes To Online Ads, The Basic Principles of Advertising Law Apply:

1. Advertising Must Be Truthful And Not Misleading;
1. Do Not Make A Claim That Requires Proof You Do Not Have; And
1. 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.

## AFFILIATES/PUBLISHERS



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 Micromanage.



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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