

DIRECT MARKETING BASICS

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Key Concepts Marketers Need To Know About the Laws Governing Direct Marketing

Direct marketing presents unique legal challenges given the overlap jurisdiction between federal and state agencies.

SECTION 1. THE MESSAGE

An advertising message is deceptive if it contains a statement or omits information that is likely to mislead a reasonable consumer and is “material” or important to a consumer’s decision to buy or use the product or service. A statement may also be deceptive if the advertiser does not have a reasonable basis to support its claim.

1. What claims are being made about the advertised product or service?

The first step in determining whether the advertiser has a reasonable basis for its claim is to determine what claims the advertisement makes about the product. Advertising copy should be reviewed not just for whether the statements are literally correct, but reviewed with an eye towards the overall impression it conveys to the typical consumer. Advertising should be scrutinized to determine whether any claims are implied by a particular statement, such as guarantees or product names. Also, testimonials may create the impression that users will typically obtain the same results. Generally, “puffery” is not considered a claim, as long as a reasonable consumer would not materially rely on the statement or if the claim is vague enough to preclude reliance. Examples of puffery include: “Great”, “Amazing”, “Wonderful”, and etc.

The second step is to determine if any performance limitations are disclosed in the advertisement and whether such disclosure is clear and conspicuous.

2. What is adequate substantiation for a claim?

Once the claims are determined, the marketer must ensure that it has sufficient proof demonstrating that the claim is true and not misleading. The supporting evidence should be objective, such as in the form of tests or studies, and should be able to be duplicated by others. Testimonials should not form the sole basis of claim substantiation unless the marketer can prove that the testimonials represent the experience of a typical user. The FTC’s standards for a reasonable basis are set forth at *FTC v. Pfizer*, 81 F.T.C. 23 (1972).

The degree of substantiation required varies depending on what experts in the area consider adequate support. Generally, the more said about the product, the higher the level of substantiation required. For example, a product that affects health will require a significantly higher level of substantiation than a non-health related product. In addition, marketers must consider whether the type of product or advertisement triggers any particular law or regulatory guideline, such as the FTC Jewelry Guidelines. 16 C.F.R. § 23 *et seq.*

3. Am I free to use the word “free”?

Perhaps no word is more important in advertising lexicon than the word “free.” Advertisers who claim something is “free” must ensure that they can support the claim with evidence that product cost is not otherwise being covered in charges assessed to consumers.

In light of the importance consumers place on the word, there are significant restrictions on the word both on the federal and state level. The Federal Trade Commission has a specific guide on the use of the word free. 16 C.F.R. § 251.1. Under the FTC regulations, a product advertised as free must actually be free, meaning the cost of the product cannot be hidden in or covered by shipping and handling costs or the cost of the first product in a “buy one, get one free” or “two for one” promotion. The term “free” may not be used to describe an accessory or an item indispensable from the purchased product or its use. In addition, a free product advertisement must conspicuously state all terms, conditions, obligations and limitations associated with obtaining the product.

Some states and local governments have similar or more restrictive rules governing the use of the word “free”. For example, New York City requires that advertisements stating the terms and conditions associated with a free product must appear in a type size at least one-half as large as the word “free” or any other similar words (e.g., “Free trial,” “buy one get one free,” etc. 6 New York City § 2-131). California makes it illegal to derive more than half of one’s business from offers that include free offers. Other states have unique nuances that need to be observed.

4. The failure to have adequate substantiation can be costly.

A marketer that advertises a product or service without adequate substantiation supporting the claims may face a host of challenges ranging from regulatory enforcement, competitor suits, and class action lawsuits. *See FTC v. Pfizer*, 81 F.T.C. 23. In addition to the negative publicity a lawsuit can bring, regulators can seek full return of all monies paid by consumers, regardless of the advertiser’s expenses. Competitors who sue under the federal unfair competition law can obtain up to three times the profits made from the advertising and can block the distribution of a product. Class action lawsuits are very expensive to defend.

5. Privacy Is Important.

There is a growing body of privacy laws that may be triggered depending on the type of products being marketed, where they are marketed, to whom are the marketed, and how they are marketed. California recently enacted a law aimed strictly at companies that disclose consumers’ personal information for use in direct marketing campaigns. California Civil Code § 1798.83 which went into effect on January 1, 2005, requires businesses to disclose the types of personal information they share with third parties. Upon a customer’s request, a business must provide details about the type of personal information it shares with other businesses, along with the names and addresses of companies with whom the information is being shared. Alternatively, a business may provide a privacy statement that offers a cost-free means to opt out of a businesses’ information sharing activities. For health-related information, the stringent privacy and security rules under the Health Insurance Portability and Accountability Act (HIPAA) of 1996 (<http://www.hhs.gov/ocr/hipaa/>)

may apply, and a broad range of financial services companies may have to comply with the Gramm-Leach-Bliley Act's privacy rules.

<http://www.ftc.gov/privacy/privacyinitiatives/glbact.html>.

SECTION 2. THE CHANNELS

A marketer must consider what channels will be used to transmit its message to the consumer. Which governing laws apply and which enforcement bodies control may depend upon the channels used to market the message. The following points will address important issues to consider relating to each channel.

6. What laws relate specifically to direct mail?

In addition to general principles of advertising laws and any laws that may govern a particular type of product or service, marketers who use direct mail to distribute their message must ensure compliance with the United States Postal Code.

As it relates to advertising goods or services, the primary postal code sections are the nonmailable section and the fraudulent or deceptive section, also known as the postal lottery law. The remedies available to the Postal Service depend on the section it alleges to have been violated. In addition, all direct marketers must observe the 30-day rule.

A. Nonmailable Materials (39 U.S.C. § 3001 *et seq.*)

This law originated to prohibit certain types of mailings or packages depending on their violation of postal codes, like size and weight. In addition, the government has also required certain disclosures on some mailings to prevent fraud, like statements of "non-negotiability" on facsimile checks or affirmative disclosures on invoices that actually seek a product order. More recently, the nonmailable law has been expanded to cover specific disclosures and prohibitions relating to sweepstakes and games of skill promotions.

The penalty for violating the nonmailable section is the immediate stoppage and detention of the mail. The Postal Service can also dispose of the mail after providing an administrative hearing process.

B. False or Deceptive Representations (39 U.S.C. § 3005)

The Postal "Lottery" law prohibits false or deceptive representations made in an attempt to obtain money or property through the mail. This section also prohibits using the mail to send lottery information and lottery tickets. After an administrative hearing process, a violation can result in a return of mail to the sender, marked "returned for violation of the false representation statute."

This section was amended a few years ago to authorize the Postal Service to impose significant monetary penalties. The law now permits an administrative penalty for deceptive mailings of up to \$1,000,000 for the first offense depending on the volume of mail. This penalty is unrelated to any claims of violations of prior orders. Rather, the amount is based on the number of pieces mailed, with the \$1,000,000 figure being based

on a mere 100,000 pieces mailed. The penalty can double if a violation of an existing mail-stop order is proven.

In addition to the Postal Code, marketers must consider the states in which a promotion is being mailed. Some states have very specific laws relating to marketing programs. For example, California virtually prohibits utilizing a facsimile check in a mail promotion.

C. Facsimile Checks (39 U.S.C. § 3001(k))

Under federal law, a facsimile check must contain a clear and conspicuous disclosure that it is “not a negotiable instrument” and “*does not have any cash value.*”

Certain states restrict or prohibit the use of facsimile checks, including California and Utah, which essentially ban their use, and New York, which requires certain language and type.

D. Government Look-a-like/Government Services Promotions

Postal Service prohibits the use of any seal, symbol, insignia, term, federal statute, or reference to any federal agency, commission, or the Postmaster General that could be reasonably interpreted to imply a connection or endorsement by the federal government, or otherwise misrepresents the identity of the mailer or the status of the mailing.

Any solicitation for payment for a product or service that is provided by the federal government at no cost must contain a clear and conspicuous disclosure of these facts.

E. Facsimile Invoices (39 U.S.C. § 3001(c))

If a solicitation suggests that the recipient has incurred a charge for which payment is due, it must include the following notice: **“THIS IS NOT A BILL. THIS IS A SOLICITATION. YOU ARE UNDER NO OBLIGATION TO PAY THE AMOUNT STATED UNLESS YOU ACCEPT THIS ORDER.”**

F. Mail-Order Sales Rule or “30-Day Rule” (16 C.F.R. § 435)

The Mail-Order Sales Rule is not technically limited to merchandise ordered through the mail. Rather, the rule governs the shipment of items ordered either through the mail or telephone, and on-line. <http://www.ftc.gov/bcp/online/pubs/buspubs/mailorder.htm>

Under the Rule, a seller must send an ordered product within the time represented in the offer or if no time is stated, within 30 days. The time period begins when the seller receives a completed order. An order is considered completed when the seller receives full or partial payment based on that seller’s requirements and all the information necessary to fill the order. When making a representation about delivery time, the seller must have a reasonable belief that the represented delivery date will be met. It does not matter when the seller deposits the payments or posts the customer’s account.

If the seller is unable to ship the product within the specified time frame or the default time of 30 days, the seller must send the customer a notice indicating: that there is a delay, provide a new scheduled ship date, and that if the customer does not affirmatively cancel,

such non-response will be considered consent to the revised ship date. If the product cannot be shipped by the new ship date, the seller must send the customer a second notice which must advise that the new ship date will not be met, provide a new scheduled ship date, and require the consumer to affirmatively agree to the new revised ship date or the order will be cancelled. If the customer does not respond to the second notice, then the order must be canceled.

The 30-Day Rule is a significant trap for the unwary as the FTC has repeatedly brought enforcement actions against marketers who violate the rule, even those with a good faith intent to fulfill on time.

7. What laws relate specifically to fax marketing?

A. Federal

In April 2006, the Federal Communications Commission (FCC) implemented changes to the facsimile (fax) advertising rules of the Telephone Consumer Protection Act (47 C.F.R. § 64.1200). The new rules: (1) codify an established business relationship (EBR) exemption to the prohibition on sending unsolicited fax advertisements; (2) define EBR as used in the context of unsolicited fax advertisements; (3) require the sender of fax advertisements to provide specified notice and contact information on the fax that allows recipients to “opt-out” of any future transmissions from the sender; and (4) specify the circumstances under which a request to “opt-out” complies with the Act. The new rules went into effect on August 1, 2006.

B. California Fax Law – Preempted

California Business and Professional Code § 17538.43 took effect on January 1, 2006 and made it unlawful for a person, if located in California or if the recipient is located in California, to send an unsolicited advertisement to a fax machine without that person’s prior express invitation or permission. In February 2006, a California District Court held that the California law is preempted as it applies to interstate faxes. *Chamber of Commerce v. Lockyer*, 2006 WL 462482 (E.D. Cal. 2006).

8. What laws relate specifically to telemarketing?

See FTC Handbook: <http://www.ftc.gov/bcp/online/pubs/buspubs/tsrcomp.htm>

A. Internal Do Not Call List (16 C.F.R. § 310.4; 47 C.F.R. § 64.1200)

Companies must institute the following standards when implementing their own internal do not call list:

- Once a consumer makes a request to be added to the company specific list, under FCC rules it must be done so within 30 days and under FTC rules it must be done “promptly”;
- All requests must be honored for 5 years; and
- Companies must have a written internal call policy which is available to consumers on demand, and must train their own telemarketers about the internal do not call list.

- B. Federal Do Not Call Registry (16 C.F.R. § 310.4)
Joint Jurisdiction (16 C.F.R. § 310.4; 47 C.F.R. § 64.1200)
The Federal DNC Registry is created and enforced by the FTC and the FCC.

Overview

- The responsibility on the telemarketers and sellers to scrub their lists started on October 17, 2003. The list can be obtained from www.donotcall.gov.
- The law requires telemarketers and sellers to obtain updated do not call lists from the FTC every 31 days (previously the rule required updating every 3 months).
- Data for up to five area codes will be available for free. Beyond that, there is an annual fee of \$56 per area code of data, with a maximum annual fee of \$15,400 for the entire U.S. database.

Exemptions

The Do-Not-Call registry does not prevent all unwanted calls. It does not cover the following:

- Calls from organizations with which you have established a business relationship;
- Calls for which you have given prior written consent;
- Calls which are not commercial or do not include unsolicited advertisements; and
- Calls by or on behalf of tax-exempt non-profit organizations.

Safe Harbor

The TSR has a “safe harbor” for inadvertent mistakes. If a seller or telemarketer can show that, it meets all the following requirements, it will not be subject to civil penalties or sanctions for mistakenly calling a consumer who has asked for no more calls, or for calling a person on the registry:

- It has written procedures to comply with the requirements;
- It trains its personnel in those procedures;
- It monitors and enforces compliance with these procedures;
- It maintains an internal list of telephone numbers that it may not call;
- It accesses the national registry no more than one month before calling any consumer; and
- Any call made in violation of the do not call rules was the result of an error.

The safe harbor was developed after commenters to the Telemarketing Sales Rule persuaded the FTC that telemarketers who have made a good faith effort to comply should not be liable for violations that result from an inadvertent error. If all above listed elements are present, a company will, in theory, escape punishment for calling someone on the Do Not Call List. Or at least that is how the safe harbor provision is supposed to work. To date, while the FTC has announced several settlements for Do Not Call violations, the FTC has never given credit to the safe harbor provision of the DNC. Moreover, as investigations are percolating across the country, businesses are reporting that the FTC is giving short shrift to the safe harbor provision. Indeed, it appears the FTC has taken the position that if a telemarketer has more than one DNC violation than the ‘safe harbor’ will

not apply even if the call was made because of an unintentional error. Of course, many telemarketing errors can be the product of a simply computer glitch or human error, resulting in hundreds or thousands of improper calls.

C. Penalties

- Under the TSR anyone who violates the Rule is subject to civil penalties of up to \$11,000 per violation. In addition, violators may be subject to nationwide injunctions that prohibit certain conduct, and may be required to pay redress to injured consumers.
- Under the TCPA, individuals may bring a private right of action. The TCPA allows for consumer damages of \$500 for each violation (\$1,500 for each violation if willful.)

D. Assisting and Facilitating

Suppliers who assist and facilitate telemarketers are liable under the TSR if they know or should have known about violations of the TSR. For example, a company that provides customer service may be liable for the telemarketer's misconduct once they learn from complaints that problems exist. Similarly, printers and list brokers may be liable for facilitating the deception.

E. FTC and Regulation of Prerecorded Voice Messages

In an order published on October 4, 2006 (RIN: 3084-0089), the FTC announced its intention to begin aggressive enforcement action against telemarketers that deliver prerecorded voice messages, even where the called party has an established business relationship ("EBR") with the telemarketer. The FTC's order, directly contradicts the telemarketing rules of the FCC as set forth in the Telephone Consumer Protection Act which permits such call where the is an EBR.

The FTC (16 C.F.R. § 310.4) and FCC (47 C.F.R. § 64.1200) rules are different when considering the use of prerecorded messages. The FCC's rules (Telephone Consumer Protect Act) are more extensive than the FTC's and cover the use of autodialers and artificial voices as well as prerecorded messages. The FCC rules prohibit the making of an artificial or prerecorded voice telephone call to any residential telephone line without the prior express consent of the called party. Some exceptions to this rule apply, including most significantly, calls to persons with whom the caller has an EBR.

The FTC's TSR does not expressly prohibit any use of autodialers and artificial or prerecorded voices. However, a reading of the TSR's "call abandonment" provisions states that calls that deliver prerecorded messages effectively are classified as unlawful "abandoned calls" under the TSR, even when those calls are made to persons with whom the caller has an EBR. The FTC rules appear to define a call that does not connect to a live representative within two seconds, even where that call delivers a prerecorded sales message within two seconds of the connection with whom the caller has an EBR, as an abandoned call.

The FTC appears to be disinterested harmonizing its rules with those of the FCC. In the order the FTC concluded that permitting EBR based prerecorded calls would have "potential hazards that prerecorded messages may pose for their health and safety when

home telephone lines cannot be released in emergencies.” RIN: 3084-0089 P. 29. The FTC also stated that encouraging wider use of inexpensive prerecorded telemarketing would “alter[] the delicate balance the Commission has struck between legitimate, but competing, privacy and communication interests.” *Id.* at 35. Even though the FTC is accepting comments until December 18, 2006, companies that are subject to FTC jurisdiction should prepare to comply with the rule which the FTC claims it will start enforcing on January 2, 2007.

F. State Regulations

Almost every state regulates telemarketing calls. These laws are in addition to the federal laws.

- State Do Not Call List: Many states require telemarketers to subscribe to and scrub against a state maintained do not call list.
- Registration/ Bonding: Many states require telemarketers to register and to be bonded with state authorities.
- Oral Disclosure Requirements (“Permission to Continue” “No rebuttal”): Some states require callers to ask at the beginning of the call whether he/she “May Continue”, and if the response is negative, immediately terminate the call. “No-rebuttal” states prohibit a telemarketer from continuing with a sales call if a called party at any time expresses a preference for the call to end.
- Calling Time Restrictions: Some states have restrictions that are more limiting than the federal requirement (8:00 a.m. to 9:00 p.m. local time at the called person’s location) that limits when a telemarketing call can take place.

G. Discontinuance of DMA Telephone Preference Service

On November 1, 2006, the DMA discontinued all mail and *most* web-based consumer registrations for Telephone Preference Service TPS. Consumers will be redirected to the Federal Trade Commission’s Do Not Call Registry instead.

The DMA’s plan to phase out consumer registrations is as follows:

- The DMA will continue to take web-based registrations for consumers located in the states of Maine, Pennsylvania, and Wyoming because the TPS list remains the official DNC list for those three states.
- The DMA will continue to update the TPS file as follows:
 - Removing disconnected numbers and updating area code splits and changes on the TPS file;
 - Eliminating the names of consumers who have been on TPS for 5 years; and
 - Adding new names of deceased individuals whose family/friends have registered them on DMA’s Deceased Do-Not-Contact (DDNC) list.

This process will have the following effect on DMA members:

- Since consumer names are kept on the TPS file for only 5 years, the DMA list will continue to shrink in size and after 5 years only contain residents of Maine, Pennsylvania and Wyoming, as well as names registered on DMA’s DDNC list.
- Because consumer names remain on TPS for 5 years, DMA members will be required to honor these consumers’ requests not to be called by scrubbing their prospecting lists against the TPS file through December 2011.

- The January 2007 quarterly update will be the last update DMA members will be *required* to purchase. Members must continue to scrub their prospecting list against this list for 5 years, at which point all registered consumer names will have dropped off.
- Alternatively, members may elect to purchase quarterly updates for the next 5 years (until November 2011). Each quarterly update will shrink in size as names drop off, thereby providing members with a smaller suppress list.
- Marketers who use DMA's Deceased-Do-Not-Contact (DDNC) list and/or who are required to use the state DNC lists for Maine, Pennsylvania, and/or Wyoming may either:
 - Purchase an annual subscription to the state lists from the DMA and DDNC list; or
 - Purchase the entire TPS file, which contains the state lists for Maine, Pennsylvania, and Wyoming, as well as the Deceased Do Not Contact information.

H. Identification of Wireless Numbers

Marketers must be know if the number they are calling is a wireless device. Consumers can now “port” their landline numbers to their wireless devices. Thus, a number that is safe to call today may not be permissible to call tomorrow. The Direct Marketing Association's (DMA) subsidiary Interactive Marketing Service offers several options to assist marketers determining wireless numbers.

1. Wireless Block Identifier: The Wireless Block Identifier file identifies those Area codes and Exchanges or blocks of numbers assigned to wireless carriers active within the North American Numbering Plan. Information regarding the Wireless Block Identifier can be found at <http://preference.the-dma.org/products/wireless.shtml>.
2. Wireless Ported-Numbers: These files provide marketers with the information to identify: a) Numbers that appear to belong to wired land lines but are now assigned to wireless telephones; and b) Numbers that appear to belong to wireless telephones but are now assigned to wired land lines. Information regarding the Wireless Porter-Numbers file can be found at <http://preference.the-dma.org/products/WirelessPortedNumbers.shtml>.
3. Wireless Lookup Services: To assist the smaller marketers that do not make frequent marketing calls or do not have the technical capacity to handle the wireless files, the DMA has developed this service. The Wireless Lookup Service permits marketers to enter telephone numbers into the DMA's web-based service where they will be matched to the DMA's Wireless database to determine if it has been assigned to a wireless device. The fees for this service are much less than the other services. Information regarding the Wireless Lookup Services can be found at <http://preference.the-dma.org/products/WirelessLookUp.shtml>.

9. What are the issues relating to e-mail marketing?

E-mail marketing provides companies with an efficient low-cost channel to reach consumers, an unfortunate side-result is the abuse of the channel. Very often the most offensive marketers are those that transmit bulk e-mail messages to recipients with whom they do not have a prior relationship, and whose messages are often of a prurient nature. While consumers and consumer groups have attempted to stop these marketers from engaging in these practices, the most vocal group has been the ISPs, those entities that bear the cost of carrying these messages. E-mail sent in bulk quantities and without the permission of the intended recipient's occupy valuable storage space of these third-party facilities, which have been suing bulk e-mailers on a variety of legal theories.

A. Federal Regulation

The most important U.S. law regarding unsolicited commercial e-mail is the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003 (15 U.S.C. 7701), which went into effect on January 1, 2004. CAN-SPAM prohibits practices which deceive recipients as to the sender of the message (including false headers or subject lines), requires senders to include an opt-out request (and process received requests within 10 business days), and mandates the inclusion of a postal address for the sender in the message. CAN-SPAM has an exemption if the emailer has the prior affirmative consent from the party receiving the email. It also requires that the message be identified as an advertisement. Violations of CAN-SPAM can lead to fines of up to \$11,000, plus additional fines for more egregious activities (including "dictionary attacks" for sending e-mail to all subscribers of an ISP). Further, there are criminal penalties for commercial emailers who use others' computers without authorization or falsify the sender information multiple times.

B. State Regulation

Several states have enacted anti-spam legislation, although the CAN-SPAM law may preempt the state laws in certain circumstances. State requirements vary, but generally require marketers to include "ADV:" or, in the case of adult related material, "ADV: ADLT", in the subject line. In addition, the laws prohibit falsification of the sender's contact information, and require certain disclosures and opt-out notices. Other states prohibit using a third party's Internet address or domain name without permission, or using false or missing routing information or a third party's name for the return address without permission. Some states permit ISPs to block unsolicited commercial e-mail, or otherwise prohibit a marketer from violating an ISP's posted policy. Virginia's anti-spam laws define unsolicited bulk commercial e-mailing as a felony, and one violator was reportedly sentenced to 9 years in prison for sending 10 million messages per day. More recently, Utah and Michigan launched similar opt-out registries which require e-mail marketers to regularly scrub lists to ensure they are not sending messages to children, a costly process (see <https://www.registrycompliance.com/> for more information).

C. Foreign Regulation

Many other countries and regions have passed anti-spam legislation, and to the extent a marketer or its partners have exposure in other jurisdictions, these laws may be an issue.

As one example, the European Union's Directive 2002/58/EC (found online at http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_201/l_20120020731en00370047.pdf) requires each EU members state to pass laws prohibiting unsolicited commercial e-mail,

D. Block Lists

Even those marketers who comply with applicable law and regulations may face problems from so-called "spammer block lists". A number of Web sites (such as Spamhaus.org) and software products (like Symantec's Brightmail) provide lists of alleged spammers. Some of these lists are then used by ISPs to block not only e-mail but even Web traffic from reaching subscribers' computers. Unfortunately, these lists are not always accurate, and a marketer that finds itself improperly added to a blocklist (either through its own activities, or even unauthorized spamming by a marketing partner) may have difficulty getting the list owners to remove it. Worse still, with some anti-spam software tools, the lists are not accessible to the public, and a marketer may not even know it has been included and blocked until it notices its e-mails are not getting through.

It is crucial that any company using e-mail for marketing familiarize itself with the laws and tools through which unsolicited e-mail is being addressed. Not only must the company adjust its practices to deal with these issues, but it must require all marketing partners to comply as well.

E. Privacy

Beyond the laws and policies relating to spam, there are a number of other legal issues affecting online marketing, both via e-mail and through the Web. One major area of concern is privacy – the collection and use of personally-identifiable information. The U.S. Children's Online Privacy Protection Act (COPPA) requires a company collecting personal information online from children under 13 to obtain verifiable parental consent first, and violations can be costly: Mrs. Fields' Cookies paid \$100,000 in 2003 to the FTC after it put birthday clubs on its Web sites and collected information from 84,000 children without prior parental consent.

F. California Spyware Act

California enacted Senate Bill 1435 which went into effect on January 1, 2005 (Cal. Bu. & Prof. Code § 22947). The law prevents the installation of spyware, a program that can modify computer settings, collect personal information or take control over a computer, on unsuspecting computer user's computer.

G. International Privacy

The European Union's Data Protection Directive 95/46/EC, which prohibits the exporting of information from EU citizens to countries with insufficient privacy protection (including the U.S.), drove the U.S. Department of Commerce to negotiate a safe harbor for U.S. companies (information at <http://www.export.gov/safeharbor/>). Other countries may also have privacy laws and rules that can apply to marketers and their online activities.

H. Privacy Policies

Beyond specific laws, marketers must take care to comply with their own published privacy policies or risk enforcement actions. Even where a marketer's use of information collected from customers is not illegal, the very fact that the use goes against the privacy policy can cause the marketer to be sued by government officials and customers alike. Companies from Amazon.com to B.J.'s Wholesale Club to Petco have faced FTC enforcement for breaching their own privacy policies (http://www.ftc.gov/privacy/privacyinitiatives/promises_enf.html).

California requires that an operator of a Web site or online service that collects personal information from California residents through the Internet must conspicuously post its privacy policy on its Web site (Calif Bus & Prof Code § 22575). Pennsylvania punishes any business that "knowingly makes a false or misleading statement in a privacy policy, published on the Internet or otherwise distributed or published, regarding the use of personal information submitted by members of the public," with fines of up to \$500 per violation (18 Pa Stat. § 4107). For other examples of state laws impacting on Internet privacy matters, see <http://www.ncsl.org/programs/lis/privacy/eprivacylaws.htm>.

I. General List Considerations

Third-party lists can be obtained directly from another company, a list broker, or a marketing partner. There are many types of lists to choose from, with varying degrees of specificity to a marketer's particular target audience, and lists created with an opt-in model are typically more expensive. Mailing a third-party list carries certain regulatory and reputational risks, as the intended messages may very well be considered by the recipients to be unsolicited.

Before renting or purchasing a third-party opt-in list, try to determine how and when the list was compiled and what type of notice, if any was provided to the consumers on the list at the time they provided their information. For example, what were consumers told when they provided their personal contact information, such as "may we share your information with our partners?" or the more specific "May we provide your contact information to a partner that may offer you special deals on exercise products?"

J. Privacy Breaches

In March 2006 New York Attorney General reached a settlement with Datran Media, a leading e-mail marketer over the selling of e-mail addresses in what authorities said may have been the biggest deliberate breach of internet privacy ever (http://www.oag.state.ny.us/press/2006/mar/mar13a_06.html). Datran was alleged to have improperly used information it had obtained from several companies that compile and sell information on consumers. Attorney General Eliot Spitzer accused Gratis Internet of selling personal information obtained from millions of consumers despite a promise of confidentiality.

The consumers thought they were simply registering to see a website offering free iPod music players, condoms or DVD movies and video games. On sign-up pages, Gratis promised it "does not ... sell/rent e-mails." Instead of confidentiality, Gratis through

Datran sold access to their e-mail information to three independent e-mail marketers, and hundreds of millions of e-mail solicitations followed.

Spitzer claims Gratis wrongfully shared as many as 7 million “user records,” creating the largest deliberate breach of a privacy policy discovered by U.S. law enforcement. He said the company’s promises to consumers included: “We will never give out, sell or lend your name or information to anyone,” and “We will never lend, sell or give out for any reason your e-mail address or personal information.”

Under an Assurance of Discontinuance with the Attorney General, Datran has agreed to pay \$1.1 million as penalties, disgorgement and costs. Also injunctive provisions which include the following:

- Destruction of data from Gratis
- Bar on acquiring personal consumer information without first independently confirming that such acquisition is permissible under relevant seller privacy policies
- Appoint a Chief Privacy Officer or other employee to oversee privacy compliance efforts
- Independently review privacy policies in effect at time of data collection
- Independently confirm that privacy policies represented sharing or if no representation, there is opt in to permit sharing
- Retain copies for 5 years of privacy policies
- Written representation from list owner insufficient

Currently the New York Attorney General has a separate suit pending against Gratis.

SECTION 3: SWEEPSTAKES AND PRIZE PROMOTIONS

Many direct marketers utilize sweepstakes and other forms of prize promotions to obtain responses and leads. In the wake of the negative publicity surrounding the American Family Publishers and Publishers Clearing House sweepstakes campaigns, federal and state laws have significantly restricted sweepstakes and prize promotions.

10. What laws relate to direct marketing sweepstakes/skill contests?

The first step is to determine whether the promotion is a valid sweepstakes or an illegal lottery. A lottery is illegal when offered by a private entity. A lottery has three elements: prize, chance and consideration (i.e., the payment of money or some other form of non-cash expenditure). Sweepstakes, on the other hand, remove one of the elements - consideration. Thus, legitimate sweepstakes must prominently disclose that no purchase is necessary to enter or win.

A. Federal Law

Deceptive Mail Prevention and Enforcement Act of 1999 39 U.S.C. § 3001, et seq. (Public Law 106-168). Federal law establishes federal standards for sweepstakes and general mailings. Does not preempt state laws.

1. Sweepstakes

- The statements “*No purchase is necessary*” and “*a purchase will not improve one’s chances of winning*” must be disclosed clearly and conspicuously *3 times*: in the official rules, on the entry or order form, and in the text of the mailing.
- The name of the sponsor (or mailer) and its principal place of business or a contact address must be disclosed.
- All terms and conditions of the sweepstakes promotion, including the rules and entry procedures must be clear.
- In addition, the Rules must contain:
 1. Odds of winning *each* prize.
 2. Quantity, estimated retail value and nature of *each* prize.
 3. Any schedule of payments of the prize, if to be made over time.

The Rules cannot contain:

1. A statement that a consumer who does not buy will be disqualified from receiving future sweepstakes mailings.
2. A purchase requirement.
3. “You have won” language unless it is true.
4. Contradictory information from other information in the mailing.

2. Skill Contests

- Clear and conspicuous disclosure of all rules and entry procedures (i.e., must be in language that is easy to read, find, and understand).
- The name of the sponsor (or mailer) and its principal place of business or a contact address must be disclosed.
- The Rules must clearly and conspicuously disclose:
 1. The number of rounds or levels, the cost to enter each one, and the increasing difficulty of advanced rounds if applicable.
 2. The maximum cost to enter.

3. An estimate of how many will successfully solve the game and how many entrants have solved the last 3 games run by the sponsor.
 4. The identity of the judges, a description of their qualifications, and their method of judging.
 5. The date that winners will be determined and prizes awarded.
 6. The quantity, estimated retail value, and nature of each prize.
 7. Any schedule of payments of the prize, if made over time.
3. Exemptions For Certain Sweepstakes and Skill Contests Advertising Materials
- There is a narrow exemption for sweepstakes and contests which are not directed to named individuals and which appear in magazines or newspapers where there is no opportunity to make a purchase or order products or services.
4. Mailing List Suppression
- Sweepstakes and skill contests must include clear and conspicuous disclosure that the promoter may be contacted at either a specified address or toll-free number to have the recipient's name removed from the sponsor's mailing list.
 - Mailers must honor "do not mail" requests received from a consumer, the consumer's representatives, or a request made to a government agency within 60 days of notification.
 - A record of requesters must be kept and names suppressed for five years.
 - Separate penalties and private right of action can be asserted against sweepstakes and skill contest promoters who continue to mail to persons who elect not to receive such mailings from that promoter.
 - Substantial penalties of up to \$2,000,000 per violation can also be imposed for marketing mailing lists derived from a "do not mail" list for any commercial use.
5. State Laws Are Not Preempted
- The law does not supercede any state laws. Mailers must observe the federal as well as the laws of all states to which the mail is sent.

6. Telemarketing Sales Rule (16 C.F.R. § 310.3)

The TSR requires following information to be disclosed in any prize promotion prior to the acceptance of any payment information:

- The odds of being able to receive the prize, and, if the odds are not calculatable in advance, the factors used in calculating the odds;
- That no purchase or payment is required to win a prize or to participate in a prize promotion and that any purchase or payment will not increase the person's chances of winning; and
- The no-purchase/no-payment method of participating in the prize promotion with either instructions on how to participate or an address or local or toll-free telephone number to which customers may write or call for information on how to participate.

7. Prize Promotions

- Many states have similar and/or additional certain disclosures to be made in telemarketing calls that involve a prize promotion.

B. State Laws

Most states have enacted and enforce "prize and gift notification statutes." These statutes generally require certain disclosures to be made in direct mail advertisements addressed to specific addressees when certain other representations are made. Some states, such as New York, Florida, and Rhode Island require registration and bonding.

Sweepstakes and prize promotion laws have become very technical, and significant enforcement activity remains. For example, Texas severely restricts sweepstakes promotions with a grand prize of \$50,000 or more (Tex Bus & Com Code § 40.001 *et seq.*). For example, the Texas law applies to sweepstakes conducted through the mail. The numerous prohibitions include one against using an order form that is connected to a sweepstakes entry, unless it can be detached. The law also prohibits any mailing that offers a premium (or non-sweepstakes prize) or another sweepstakes prize within 30 days after the last day of the most recent sweeps mailing. Colorado is another state that has significant restrictions on sweepstakes and prize promotions (Col Rev Stat § 6-1-801 *et seq.*). For example, Colorado law imposes numerous restrictions and disclosure requirements on sweepstakes and contests conducted by direct mail. The law tracks many of the federal law's provisions, but goes further in prohibiting consideration in a bona fide skill contest. It also requires disclosure be presented next to the first listing of the prize or in a separate section marked "Consumer Disclosure" in at least 12-point type.

C. State Attorney General Enforcement Actions Against Major Sweepstakes Marketers

The major sweepstakes marketers (Time, Publishers Clearinghouse, Reader's Digest) entered into multi-state settlements regarding their sweepstakes marketing practices.

While these settlements are not binding authority on companies not subject to the settlements, they provide keen insight as to the regulator's mindset as to what are permissible marketing practices.

Some Highlights:

“If you have and return the winning number”: i.e., conditional winner headline must be in the future tense in the same type size and appearance as the winner statement.

Sweepstakes Fact Disclosure: Agreements require sweepstakes mailings to include a separate document containing a prize grid of the odds of winning each prize and the number of prizes. Disclosure must also contain four messages “Buying Will Not Help You Win”, “Entry is Free”, “You Can Enter As Often As You Like”, and “You Have Not Won”.

D. Charity Sweepstakes Marketing Practices

In 2006, nineteen states settled with a leading advertising agency that non-profits utilized to create sweepstakes fundraising campaigns. The settlement related to the agency's use of allegedly misleading claims in pre-selected winner sweepstakes mailings that it produced for more than 30 nonprofit organizations. As part of the settlement, the agency agreed to pay \$400,000 and to make a number of changes to future sweepstakes mailings.

Under the terms of the agreement, direct-mail solicitations cannot claim that the recipient has already won a prize or will be guaranteed a prize by responding to the charitable solicitation. Moreover, when using a pre-selected winning number promotion the agency must ensure that a prize is ultimately awarded by the charity. The agency must also include inserts along the lines of the PCH “Sweepstakes Fact” disclosures explicitly stating that the consumer has not already won a prize, and that donating to the charity does not improve their chances for winning.

With the settlement, it is clear that charities must follow the same rules that traditional sweepstakes companies such as PCH and Reader's Digest are required to follow.

SECTION 4: ENFORCEMENT

11. Who are the key regulatory agencies that enforce laws relating to Direct Marketing?

A. Federal Trade Commission

The FTC is responsible for enforcement of the Federal Trade Commission Act, 15 U.S.C. § 41, and focuses on consumer deception/fraud.

Violations of Section 5 of the FTC Act (15 U.S.C. § 41)

- An advertising message or business practice is unfair if it causes or is likely to cause substantial consumer injury which a consumer could not reasonably avoid; and it is not outweighed by the benefit to consumers. FTC Policy Statement on Unfairness: <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>
- An advertising message is considered deceptive if it contains a statement or omits information that is likely to mislead reasonable consumers under the circumstances and the information is “material” or important to a consumer’s decision to buy or use the product. *See* FTC Policy Statement on Deception, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. at 174.
- A statement also may be deceptive if the advertiser does not have a reasonable basis to support its claims. *See* FTC Policy Statement on Advertising Substantiation, appended to *Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *FTC v. Pfizer*, 81 F.T.C. 23 (1972)

Guidance: A Business Checklist for Direct Marketers
<http://www.ftc.gov/bcp/online/pubs/buspubs/checklist.htm>

Enforcement: The FTC routinely files actions against marketers and advertising agencies that is deceptive or otherwise lacks substantiation for objective performance claims.

B. U.S. Postal Service

United States Postal Inspection Service plays a key role in enforcement of advertising in the direct mail channel.

1. **Nonmailable Matter 39 U.S.C. § 3001, et seq.**
This law originated to prohibit certain types of mailings or packages depending on their violation of postal codes, like size and weight. Dramatically expanded under the Deceptive Mail Prevention and Enforcement Act (discussed below).
2. **39 U.S.C. § 3003.** Mail bearing a fictitious name or address (can withhold mail).
3. **39 U.S.C. § 3004.** Delivery of mail to persons not residents of the place of address.
4. **39 U.S.C. § 3005:** False Representations, Lotteries.

Entry of mail stop order against conducting a scheme or device for obtaining money or property through the mail by means of false representations or lotteries.

The penalty for violating the nonmailable section is the immediate stoppage and detention of the mail. The Postal Service can also dispose of the mail after providing an administrative hearing process.

5. **Fictitious Names:** 18 U.S.C. § 1462, with certain exceptions, prohibits the use of fictitious names or addresses.
6. **Lotteries**
 - a. 18 U.S.C. § 1302, with certain exceptions, prohibits using the mails to send lottery information.
 - b. 18 U.S.C. § 1301, with certain exceptions, prohibits transporting lottery tickets through interstate or foreign commerce.
7. **Enhanced U.S. Postal Service Enforcement Powers**

Deceptive Mail Prevention and Enforcement Act of 1999 39 U.S.C. § 3001, et seq. (Public Law 106-168)

- A. The law amends the civil penalties section of the postal code to permit a penalty assessment for deceptive mailings of up to \$1,000,000 for the *first offense* depending on the volume of mail. This is unrelated to claims of violations of prior orders. It also establishes penalties for violations of false advertising laws of up to \$25,000 based on quantities of up to 50,000 pieces; \$50,000 for each mailing from 50,000 to 100,000 pieces, with an additional \$5,000 for each additional 10,000 pieces above 100,000, not to exceed \$1,000,000. A penalty assessed on the basis of the volume of mail could easily reach the \$1,000,000 mark.
- B. The Postal Service is empowered with enhanced civil penalty and subpoena powers that it can use against all allegedly deceptive mailings.
- C. The Postal Service is empowered to seek penalties of up to \$2,000,000 against a mailer for violations of an existing mail stop order.
- D. **Enhanced Subpoena Power:** The law empowers the Postal Service with significant subpoena authority for all mailings. In any mail stop proceeding brought in the Postal Court, the Postal Service is

empowered to subpoena the production of any records which “the Postmaster General considers relevant or material” to the investigation.

E. Beginning to be enforced against mailers, including non-sweepstakes mailers.

C. State Attorneys General/District Attorneys

General Jurisdiction: Almost all states have enacted and enforce general consumer protection laws that, like the FTC Act, generally prohibit unfair and deceptive trade practices. Many states have also enacted laws that target specific marketing channels, such as telemarketing, or specific types of promotions such as sweepstakes, skill contests, etc.

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The laws relating to direct marketing continue to evolve, particularly as the channels utilized to market to consumers change with technological innovations.