

California - Telemarketing

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1. GOVERNING TEXTS

1.1. Legislation

California

- §2871 et seq. of Article 1 of Chapter 10, Part 2, Division 1 of the California Public Utilities Code (Cal. Pub. Util. Code) ('the Automatic Dialling Law')
- §17590 et seq. of Article 8 of Chapter 1, Part 3, Division 7 of the California Business and Professions Code (Cal. Bus. & Prof. Code) ('the Unwanted Calls Law')
- §17511 of Article 1.4 of Chapter 1, Part 3, Division 7 of the Cal. Bus. & Prof. Code ('the Telephonic Sales Law')
- California Invasion of Privacy Act, §630 et seq. of the California Penal Code ('CIPA')
- California Consumer Privacy Act of 2018 (last amended in 2019) ('CCPA')

Federal

- Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 ('TCFAPA')
- Telephone Consumer Protection Act of 1991 ('TCPA')
- Telephone Consumer Protection Act Regulations 1992 ('the TCPA Regulations')
- Telemarketing Sales Rule 1995 (16 eCFR Part 310) ('the Telemarketing Sales Rule')
- §227 of Title 47 of the U.S.C., Restrictions on Use of Telephone Equipment ('the Telecom Rules')

1.2. Regulatory Authority Guidance

Not applicable.

2. DEFINITIONS

Marketing calls: There is no definition of 'marketing calls' in the law. However, 'telemarketing' means a plan, program, or campaign which is conducted to induce purchases of goods or services, or a charitable contribution, donation, or gift of money or any other thing of value, by use of one or more telephones, and which involves more than one interstate telephone call (§6106(4) of the TCFAPA).

Consent: Prior express written consent' means an agreement, in writing, bearing the signature of the person called that clearly authorises the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialling system or an artificial or pre-recorded voice, and the telephone number to which the signatory authorises such advertisements or telemarketing messages to be delivered (§64.1200(f)(8) of the TCPA Regulations).

The term 'prior express consent' is undefined in the TCPA and the TCPA Regulations.

3. CONSENT REQUIREMENTS

California

Under the Automatic Dialling Law, a person must not operate an automatic dialling-announcing device in California to a California phone number during certain hours (§2872(c) of the Automatic Dialling Law). In this respect, an 'automatic dialling-announcing device' means any automatic equipment which incorporates a storage capability of telephone numbers to be called, or a random or sequential number generator capable of producing numbers to be called and the capability, working alone or in conjunction with other equipment, to disseminate a pre-recorded message to the telephone number called (§2871 of the Automatic Dialling Law). Automatic dialling-announcing devices may be used to place calls over telephone lines only pursuant to a prior agreement between the persons involved, whereby the person called has agreed that he or she consents to receive such calls from the person calling (§2873 of the Automatic Dialling Law).

As to registration requirements, §17511.3 of the Telephonic Sales Law provides that, no more than ten days prior to doing business in California, a telephonic seller must register with the U.S. Department of Justice ('DoJ') by the required information and paying the \$50 filing fee. A seller must be deemed to do business in California if the seller solicits prospective purchasers from locations in California or solicits prospective purchasers who are located in California.

Federal

The Telemarketing Sales Rule does not apply to 'telephone calls between a telemarketer and any business to induce the purchase of goods or services or a charitable contribution by the business, except calls to induce the retail sale of nondurable office or cleaning supplies' (§310.6(b)(7) of the Telemarketing Sales Rule).

Furthermore, the TCPA prohibits telemarketing carried out to wireless lines on the Federal Trade Commission's ('FTC') National Do Not Call Registry, or to numbers that have requested that the specific company refrain from such telemarketing activity. Companies must maintain their own online Do Not Call list, and must add new numbers to the list promptly and no more than 30 days after such request is received. The following actions are also prohibited:

- telemarketing calls and texts using artificial or pre-recorded voice recordings without receiving prior express written consent;
- telemarketing calls and texts using automatic telephone dialling systems ('ATDS') without receiving prior express written consent;
- informational calls and texts using artificial or pre-recorded voice recordings without receiving prior express consent (does not need to be written); and
- informational calls and texts using ATDS without receiving prior express consent (does not need to be written).

3.1. B2C

The TCPA's prohibitions, described above under section 3 apply to business to consumer ('B2C') calls.

3.2. B2B

The TCPA appears to limit business to business ('B2B') calls, only to the extent that a business may not use an automatic telephone dialling system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously (§64.1200(a)(5) of the TCPA Regulations). However, B2B calls generate many lawsuits, particularly in circumstances where calls are forwarded or ported to consumers' phones, or if it is unclear whether a particular number is a business line or a personal line.

3.3. Exceptions

Calls to residential landlines using an artificial or pre-recorded voice to deliver a message without the prior express written consent of the called party are not permitted unless (§64.1200(a)(3) of the TCPA Regulations):

- made for emergency purposes;
- not made for commercial purposes;
- made for commercial purposes but do not include or introduce an advertisement or constitute telemarketing;
- made by or on behalf of a tax-exempt non-profit organisation; or
- to deliver a healthcare message made by, or on behalf of, a 'covered entity' or its 'business associate,' as those terms are defined in the Health Insurance Portability and Accountability Act of 1996 Privacy and Security Rules.

3.4. Additional Requirements

With respect to calling time restrictions, under the Automatic Dialling Law, a person must not operate an automatic dialling-announcing device in California to a California phone number during the hours between 9 p.m. and 9 a.m. California time (§2872(c) of the Automatic Dialling Law). The Telemarketing Sales Rule also provides that it is an abusive telemarketing act or practice and a violation of the Telemarketing Sales Rule for a telemarketer to engage in, without the prior consent of a person, outbound telephone calls to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location (§310.4(c) of the Telemarketing Sales Rule).

Under §64.1200(b) of the TCPA Regulations, all artificial or pre-recorded voice telephone messages must:

- at the beginning of the message, identify the individual or entity responsible for the call;
- state clearly the telephone number of the individual or entity;
- permit any individual to make a do-not-call request during regular business hours; and
- provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request, including brief explanatory instructions on how to use such a mechanism.

When the called person elects to opt out, the mechanism must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call. When the artificial or pre-recorded voice telephone message is left on an answering machine or a voice mail service, such message must also provide a toll free number that enables the called person to call back and automatically record the called person's number to the seller's Do Not Call list.

Under §64.1200(c) of the TCPA Regulations, no person or entity shall initiate any telephone solicitation to:

- a residential telephone subscriber before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location); or
- a residential telephone subscriber who has registered his or her telephone number on the national Do Not Call registry (unless the caller has obtained the subscriber's prior express invitation or permission, or the telemarketer has a personal relationship with the recipient of the call).

Under §64.1200(d) of the TCPA Regulations, telemarketers must institute procedures for maintaining a list of persons who request not to receive telemarketing calls made by, or on behalf of, that person or entity. A written policy must be maintained and personnel engaged in telemarketing must be appropriately trained. Tax-exempt non-profit organisations are not required to comply with this provision.

Recording of telephone calls

Federal law permits telephone calls to be recorded so long as there is consent from at least one of the parties to the call (see §2511(2)(d) of Title 18 of the United States Code ('U.S.C'), as part of the Electronic Communications Privacy Act of 1986). This is called a 'one-party' consent law. However, California is one of 11 states that are 'all-party' consent jurisdictions, which means that all parties to the call must consent to the recording or else recording the call is illegal.

If a call takes place between people in different States, it may be difficult to determine whether Federal or State law applies and, if State law applies, then which State's law controls. In *Kearney v. Salomon Smith Barney*, 39 Cal.4th 95, 45 Cal.Rptr.3d 730, 137 P.3d 914 (2006), the Supreme Court of California decided that California's all-party statute could be applied to a calls that came from a one-party state (Georgia): "The present legal proceedings are based upon defendant business entity's alleged policy and practice of recording telephone calls of California clients, while the clients are in California, without the clients' knowledge or consent. California clearly has an interest in protecting the privacy of telephone conversations of California residents while they are in California sufficient to permit this state, as a constitutional matter, to exercise legislative jurisdiction over such activity."

To avoid this dilemma, a business intending to record phone calls from every State, should obtain the consent of the other party to the call. California has an active plaintiffs' bar that files many class-action lawsuits. In March 2019, Twilio Inc. agreed to pay \$10 million to settle class action claims that they had violated California call recording laws. In 2017, the airline Volaris paid \$3.2 million to settle an illegal recording class action.

CIPA makes the recording of certain communications unlawful. Violations can result in fines of thousands of dollars per call. There are two related provisions that have become popular with class action plaintiffs.

The first CIPA provision is §632, which makes it illegal to record any telephone call involving a 'confidential communication' without the consent of all parties to the call. The second CIPA section is §632.7, which prohibits the recording of any call involving a cell phone unless all parties to the call

consent. In *Osgood v. Main Street Marketing, LLC*, 2017 WL 131829 (S.D. Cal. Jan. 17, 2017), the court held that: "[§632.7 of the CIPA] prohibits the intentional recording of any communication without the consent of all parties where one of the parties is using a cellular or cordless telephone [...] Any person who has been injured as a result of this invasion of privacy may bring an action [...] for the greater of the following amounts: (1) Five thousand dollars (\$5,000), or (2) Three times the amount of actual damages, if any, sustained by the plaintiff. [...] Defendants have a policy to record confidential telephone communications with California individuals without advising them at the outset of each telephone call that the call is being recorded. District courts as well as this Court have held that allegations of violations of plaintiffs' statutory rights under CIPA, without more, constitute injury."

Compliance with CIPA: One way to comply with all-party recording laws is simply not recording telephone calls. However, there is a value to recording consumer calls, so many companies begin all incoming phone calls with a recording that states: 'This call may be monitored or recorded for quality control purposes.' However, consent from any particular caller is a fact-specific inquiry that can vary from call to call and case to case. While there are no magic words to ensure a consumer is providing his or her consent, it is recommendable to go one step further than the language quoted above, and instead using the following disclosure: 'This call may be monitored or recorded for quality control purposes. By remaining on the line, you are consenting to the recording of this call.'

If a caller hears this disclosure and elects to continue with the call, the caller's consent will more likely be presumed, absent extenuating circumstances. To be fully effective, steps must also be taken to ensure that the recording disclosure is installed in the telephone operating system in such a manner that assures it is actually played at the very beginning of every telephone call that is recorded. This can be achieved and configured on almost any interactive voice response ('IVR') system. When a consumer calls in, he or she should hear a message such as 'Your call may be monitored or recorded' automatically played by an IVR system before the call is routed to an agent.

The disclosure must be installed in a manner that cannot be bypassed by the caller (i.e. that callers cannot miss hearing the disclosure by immediately pressing 0, by dialling a particular extension, etc.). It is important that the disclosure be heard by all callers that will be recorded, without giving them even an inadvertent opportunity to bypass the disclosure.

Please note that California's CIPA applies to outbound calls as well (see *Hataishi v. First Am. Home Buyers Protection Corp.*, 223 Cal. App. 4th 1454 (2014)).

4. MARKETING LISTS

Federal

The Do Not Call registry cannot be used for any purpose other than preventing telemarketing calls to the telephone numbers on the registry.

California

Under §1798.115 of the CCPA, a 'third party shall not sell personal information about a consumer that has been sold to the third party by a business unless the consumer has received explicit notice and is provided an opportunity to exercise the right to opt-out' of the sale. A 'sale' is defined broadly so that even if a business is not receiving monetary compensation in exchange for a consumer's data, it could still be considered to be 'selling' under the CCPA when such information is shared with third parties.

In accordance with §17592(d) of the Anti-Spam Law, people or entities that sell, lease, exchange, or rent telephone solicitation lists must not include on those lists telephone numbers that appear on the current 'do not call' list.

Per §1798.99.80 et seq. of Part 4 of Division 3 of the California Civil Code, a 'data broker' is defined as 'a business that knowingly collects and sells to third parties the personal information of a consumer with whom the business does not have a direct relationship.' 'Data broker' does not include a consumer reporting agency covered by the federal Fair Credit Reporting Act of 1970 ('FCRA'), a financial institution covered by the Gramm-Leach-Bliley Act of 1999 ('GLBA'), or any other entity to the extent that it is covered by the National Association of Insurance Commissioners' Insurance Information and Privacy Protection Model Act.

Pursuant to California law, data brokers are required to register with the California Attorney General ('AG') on or before 31 January following each year in which such entity acts as a data broker. Registration requires data brokers to pay a registration fee (currently \$360), and submit the following information through the AG data broker portal:

- data broker name;
- email address;
- URL;
- country;
- address;
- a description of how a consumer may opt out of sale or submit requests under the CCPA;

- a description of how a protected individual can demand deletion of information posted online; and
- additional information about the data broker's data collecting practices.

A failure to properly register may result in injunctive relief, civil penalties, fees, and costs in an action brought by the AG. The statute provides for civil penalties in the amount of \$100 for each day the data broker fails to properly register, an amount equal to the fees that were due during the period it failed to register, and investigative costs and fees.

5. NATIONAL OPT-OUT LIST

5.1. Numbers that can be registered

Both landline and cell phone numbers can be registered for free on the FTC's National Do Not Call Registry. Users are able to verify whether they have already registered their phone number.

5.2. Details on how to check numbers against it

Sellers and telemarketers are able to access the Do Not Call Registry, after paying the required access fee, through the FTC's [telemarketers' portal](#) (§310.8 of the Telemarketing Sales Rule).

California

Outlined under §17590(c) of the Unwanted Calls Law, is that the [California State Legislature](#) expresses an intent to adopt the California telephone numbers on the national 'do not call' registry as the California 'do not call' registry.

Moreover, under §17591 of the Unwanted Calls Law it is unlawful for any person to do any of the following:

- use the 'do not call' list for any purpose other than to comply with the State and Federal telemarketing laws;
- deny or interfere in any way, directly or indirectly, with a subscriber's right to place a California telephone number on the 'do not call' list;
- cause a subscriber to participate in and be included on the 'do not call' list without the subscriber's knowledge or consent;
- sell or lease the 'do not call' list to a person other than a telephone solicitor;
- sell or lease by a telephone solicitor of the 'do not call' list;

- charge a fee to place a California telephone number on the 'do not call' list; and
- if such person is a telephone solicitor, either directly or indirectly, persuade a subscriber with whom it has an established business relationship to place his or her telephone number on the 'do not call' list, if the solicitation has the effect of preventing competitors from contacting that solicitor's customers.

6. PENALTIES

California

Under §17593 of the Unwanted Calls Law, the AG, a district attorney, or a city attorney may bring a civil action and may obtain an injunction, a civil penalty, and/or any other relief that the court deems proper.

Federal

The Federal Communications Commission ('FCC') has various actions available to it, including:

- forfeiture penalties: this must be in addition to any other penalty. The amount of the forfeiture penalty must not exceed \$10,000 for each violation, or three times that amount for each day of a continuing violation. The amount assessed for any continuing violation must not exceed a total of \$1,000,000 for any single act or failure to act; and
- criminal penalty: Any person convicted of wilfully and knowingly violating the TCPA be fined not more than \$10,000 for each violation, or three times that amount for each day of a continuing violation.

In addition, US States may seek injunctive relief, damages, and treble damages. Damages are calculated in the amount of \$500 for each violation. Violations are calculated on a 'per call' basis, where there is one TCPA claim per call. Each call, whether to the same or different persons, is considered a separate violation. Treble damages are available if the court finds that the defendant acted wilfully or knowingly.

There is also a private right of action to enforce the TCPA that authorises statutory damages in the amount of \$500 for each illegal call or text message and up to \$1,500 for each 'willful' violation (§227(b)(3) and (f)(1) of the Telecom Rules). No actual injury is required. Many private lawsuits are

filed as class actions, which subjects defendants to potential liability for each and every call to members of the class, not just the lead plaintiff(s).

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Andrew Lustigman is the chair of Olshan's Advertising, Marketing & Promotions department. He represents marketers, advertisers, media, mobile and internet companies in connection with the legal aspects of their advertising and promotional marketing business, including clearance of advertising and social media marketing, sweepstakes, games of skill, and other contests, and advises on intellectual property issues, and privacy matters. An equally significant portion of his practice involves investigations and litigation brought by regulatory agencies regarding national advertising campaigns, as well as defending private consumer individuals and class action lawsuits.

With over 20 years experience in advertising law, Andrew regularly discusses important new cases and trends that advertisers and marketers need to know, and has been consistently recognised by Chambers USA, Legal 500 U.S. as a 'Leading Lawyer' in Advertising and Marketing. Andy graduated, magna cum laude, from American University, Washington College of Law in 1991 and is admitted to the New York and New Jersey State Bars.

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Mary Grieco works with her clients in all facets of brand development and protection. Mary has broad experience counseling clients in the use of the internet and social media to help build their brands, and advises clients on the pitfalls of internet-based advertising, website content, and other internet-related issues. She also helps clients navigate the complicated and often conflicting data privacy laws in the US as well as internationally. She manages domestic and international trademark portfolios, and counsels clients with regard to their copyright and design matters, which includes securing protection for trademarks, copyrights and designs throughout the world.

Mary has published articles and spoken on many topics, including brand development and intellectual property, privacy and data protection for brands, and the use of intellectual property in social media and other types of marketing. Mary graduated, from Loyola Law Schools and is admitted to the New York, California and District of Columbia Bars.

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Scott Shaffer focuses his litigation practice in the areas of advertising, direct marketing, class action defense, and sports and entertainment law.

Scott has an impressive record defending consumer class action lawsuits and other mass litigations, including successfully obtaining dismissals at the pleading stage, denial of class action status, negotiating favourable settlements, and setting legal precedent. He has defended consumer class action suits in Federal and State courts alleging a wide range of legal theories, including false advertising, Telephone Consumer Protection Act violations, and other consumer fraud violations.

Additionally, Scott is prominently involved in sports and entertainment law, particularly in the sport of boxing. In that arena, he represents promoters, managers, individual boxers, and other entertainment and media businesses on a worldwide basis.

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Morgan Spina is a part of Olshan's Brand Management and Protection practice and participates in all facets of the firm's brand management, including privacy, advertising, and intellectual property matters. She received her LL.M. from Brooklyn Law School and holds a B.A., with Distinction, in History and English Literature and a LL.B from University of Wollongong in Australia.

Morgan assists in advising clients in order to help them build, maintain, promote, and protect their brands. Morgan's work includes the structuring of sweepstakes and games of skill, clearance of advertising and marketing materials, privacy, trademark enforcement, all types of intellectual property and advertising agreements, and federal and state government regulatory investigations.

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