

California - SMS/MMS Marketing

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1. GOVERNING TEXTS

1.1. Legislation

California

- [§17538.41 of the California Business and Professions Code](#) (Cal. Bus. & Prof. Code) ('the Telemarketing Law')
- [California Consumer Privacy Act of 2018 \(last amended in 2019\)](#) ('CCPA')

Federal

- [Telephone Consumer Protection Act of 1991](#) ('TCPA')
- [Telephone Consumer Protection Act Regulations 1992](#) ('the TCPA Regulations')
- [§227 of Title 47 of the U.S.C., Restrictions on Use of Telephone Equipment](#) ('the Telecom Rules')
- [CAN-SPAM Rule \(16 eCFR Part 316\)](#) ('the CAN-SPAM Rule')

1.2. Regulatory Authority Guidance

Not applicable.

2. DEFINITIONS

SMS/MMS: There is no general definition of 'SMS/MMS' in the law. However, see the definitions below for similar terms.

SMS/MMS marketing: There is no general definition of 'SMS/MMS marketing' in the law. However, see the definitions below for similar terms.

Consent: There is no express and general definition of 'consent' in the law.

California

The Telemarketing Law

Text message advertisement: a message, the principal purpose of which is to promote the sale of goods or services, or to promote a political purpose or objective, to the recipient, and consisting of advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit, or advertising material for political purposes.

Federal

The TCPA

Text message: a message consisting of text, images, sounds, or other information that is transmitted to or from a device that is identified as the receiving or transmitting device by means of a ten-digit telephone number or N11 service code. A text message includes a short message service (commonly referred to as 'SMS') message and a multimedia message service (commonly referred to as 'MMS') message. A text message does not include a real-time, two-way voice or video communication, or a message sent over an IP-enabled messaging service to another user of the same messaging service.

Unsolicited advertisement: any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

The TCPA Regulations

Prior express written consent: 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.

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

3. CONSENT REQUIREMENTS

California

In accordance with the Telemarketing Law, text message advertisements may not be sent unless one of the following requirements is met:

- text messages are transmitted at the direction of a person or entity offering mobile telephony service, pager service, or two-way messaging service if the subscriber is offered an option to not receive those text messages;
- text messages are transmitted by a business, candidate, or political committee that has an existing relationship with the subscriber, if the subscriber is offered an option not to receive text messages from that business, candidate, or political committee; or
- text messages are transmitted by an affiliate of a business that has an existing relationship with the subscriber, but only if the subscriber has provided consent to the

business with which he or she has that relationship to receive text messages from affiliates of that business ('affiliate' means any company that controls, is controlled by, or is under common control with, another company).

Federal

The TCPA prohibits marketing text messages unless the recipient has provided prior express written consent.

3.1. B2C

The general conditions outlined in section 3 above apply to business to consumer ('B2C') marketing.

3.2. B2B

The general conditions outlined in section 3 above apply to business to business ('B2B') marketing.

3.3 Exceptions

Text messages sent manually (i.e. not by an automatic telephone dialling device) and texts sent for emergency purposes, per §64.1200(a)(1) of the TCPA Regulations. In addition, there is a slightly lower level of consent, 'prior express consent', when the text message is made by, or on behalf of, a tax-exempt non-profit organisation, or delivers a health care 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](#) (see §64.1200 of the TCPA Regulations).

3.4. Additional Requirements

Not applicable.

4. MARKETING LISTS

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.

Data brokers

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 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 mobile phone numbers can be registered for free on the [Federal Trade Commission's](#) ('FTC') [National Do Not Call Registry](#). ('the 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 national Do Not Call Registry through the FTC's [portal for telemarketers](#), after paying the required access fee, as per §310.8 of the CAN-SPAM Rule.

6. PENALTIES

Federal

The TCPA

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

- forfeiture penalties: This is 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; or
- criminal penalties: Any person convicted of wilfully and knowingly violating the TCPA can 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 'wilful' 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).

ABOUT THE AUTHORS



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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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