

California - Postal Marketing

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1. GOVERNING TEXTS

1.1. Legislation

California

- [§17514 of the California Business and Professions Code](#) ('the Mail Solicitation Law')

Federal

- Deceptive Mail Prevention and Enforcement Act ('the Deceptive Mail Act')
- §3005 of Title 39 of the U.S. Code, False Representations; Lotteries
- §3008 of Title 39 of the U.S. Code, Prohibition of Pandering Advertisements ('the Advertisements Law')

1.2. Regulatory Authority Guidance

Not applicable.

2. DEFINITIONS

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

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

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

Non-mailable matter: under the Deceptive Mail Act, non-mailable matter includes, but is not limited to 'deceptive invoices' and 'notices which appear to come from a governmental entity.'

Deceptive invoices: material which is in the form of, and reasonably could be interpreted or construed as, a bill, invoice, or statement of account due, but is actually a solicitation for goods or services, or both unless such matter bears on its face, in conspicuous and legible type in contrast by typography, layout, or colour with other printing on its face, in accordance with regulations which the Postal Service shall prescribe, the following notice: 'This is a solicitation for the order of goods or services, or both, and not a bill, invoice, or statement of account due. You are under no obligation to make any payments on account of this offer unless you accept this offer' or in lieu thereof, a notice to the same effect in words which the Postal Service may prescribe.

Notices which appear to come from a governmental entity: this includes:

- matter otherwise legally acceptable in the mails but which constitutes a solicitation for the purchase of or payment for any product or service that is provided by the Federal Government, *and* may be obtained without cost from the Federal Government *but*

- does not contain a clear and conspicuous statement giving notice of the information set forth above; or
- matter otherwise legally acceptable in the mails which constitutes a solicitation by a nongovernmental entity for the purchase of or payment for a product or service or a request for information or the contribution of funds or membership fees: *and*
 - which reasonably could be interpreted or construed as implying any Federal Government connection, approval, or endorsement through the use of a seal, insignia, reference to the Postmaster General, citation to a Federal statute, name of a Federal agency, department, commission, or program, trade or brand name, or any other term or symbol; or contains any reference to the Postmaster General or a citation to a Federal statute that misrepresents either the identity of the mailer or the protection or status afforded such matter by the Federal Government; or
 - which bears the term 'census' on the envelope or outside cover or wrapper; or
 - on which the term 'census' is visible through the envelope or outside cover or wrapper is nonmailable matter and shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs, *unless*:
 - the connection, approval, or endorsement actually exists or the matter bears on its face, in conspicuous and legible type in contrast by typography, layout, or colour with other printing on its face, in accordance with regulations which the Postal Service shall prescribe, the following notice: 'THIS PRODUCT OR SERVICE HAS NOT BEEN APPROVED OR ENDORSED BY THE FEDERAL GOVERNMENT, AND THIS OFFER IS NOT BEING MADE BY AN AGENCY OF THE FEDERAL GOVERNMENT.', or a notice to the same effect in words which the Postal Service may prescribe;
 - the envelope or outside cover or wrapper in which such matter is mailed bears on its face in capital letters and in conspicuous and legible type, in accordance with regulations which the Postal Service shall prescribe, the following notice: 'THIS IS NOT A GOVERNMENT DOCUMENT' or a notice to the same effect in words which the Postal Service may prescribe, and such matter does not contain a false representation stating or implying that Federal Government benefits or services will be affected by any purchase or nonpurchase; or

- such matter is contained in a publication for which the addressee has paid or promised to pay a consideration or which he has otherwise indicated he desires to receive, except that this paragraph shall not apply if the solicitation is on behalf of the publisher of the publication.

The above is a non-exclusive definition.

3. CONSENT REQUIREMENTS

The Mail Solicitation Law provides that any unsolicited mail which is designed, adapted, or intended for preventing conception is non-mailable matter and must not be carried or delivered by mail. Any unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter. An advertisement must not be deemed to be unsolicited for the purposes of this paragraph if it is contained in a publication for which the addressee has paid or promised to pay a consideration or which he/she has otherwise indicated his/her desires to receive.

The Mail Solicitation Law additionally provides that, when a solicitation is sent by mail that solicits a recipient to consent to receive information via telephone, where that recipient's telephone number is not listed on a 'do not call' registry, it must include in the solicitation a clear and conspicuous disclosure of the name of the sender, the telephone number to which calls are to be placed, and notice that the recipient may be contacted by a telephone solicitor.

3.1. B2C

The Mail Solicitation Law applies to all mail recipients.

3.2. B2B

The Mail Solicitation Law applies to all mail recipients.

3.3 Exceptions

Not applicable.

3.4. Additional Requirements

Not applicable.

4. MARKETING LISTS

No person can sell, lease, lend, exchange, or license the use of, or, except for the purpose expressly authorised by statute, use, any mailing list compiled in whole or in part from the list maintained by the Postal Service pursuant to the Advertisements Law.

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

The Postal Service maintains a national 'pandering' list in which persons have opted out of receiving any pandering advertisement in which the address in their sole discretion believes to be erotically arousing or sexually provocative.

The Data and Marketing Association maintains a voluntary Mail Preference Service of persons that do not wish to receive unsolicited mail.

Persons offering sweepstakes or contests must offer an opt-out mechanism and cease such mailings to consumers who have so indicated.

6. PENALTIES

The Deceptive Mail act provides that any person who violates its provisions may be liable for civil penalties:

- in an amount not to exceed \$25,000 for each mailing of less than 50,000 pieces;
- \$50,000 for each mailing of 50,000 to 100,000 pieces; and
- with an additional \$5,000 for each additional 10,000 pieces above 100,000, not to exceed \$1,000,000.

Persons that violate prior postal enforcement orders are subject to civil penalties:

- in an amount not to exceed \$50,000 for each mailing of less than 50,000 pieces;
- \$100,000 for each mailing of 50,000 to 100,000 pieces; and
- with an additional \$10,000 for each additional 10,000 pieces above 100,000, not to exceed \$2,000,000.

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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