

# California - Emarketing

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## 1. GOVERNING TEXTS

### 1.1. Legislation

#### California

- [§17529 et seq. of the California Business and Professions Code](#) (Cal. Bus. & Prof. Code) ('the Anti-Spam Law'). However, please note that California's restriction on sending

emails where the person has not provided consent or has an established business relationship has been preempted by federal legislation.

- [§17538.45 of the Cal. Bus. & Prof. Code](#) ('the Email Advertising Law')
- [California Consumer Privacy Act of 2018 \(last amended in 2019\)](#) ('CCPA')

## Federal

- [Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003](#) ('the CAN-SPAM Act')
- [CAN-SPAM Rule \(16 eCFR Part 316\)](#) ('the CAN-SPAM Rule')

## 1.2. Regulatory Authority Guidance

The [Federal Trade Commission](#) ('FTC') has issued the following guidance:

- [Candid Answers to CAN-SPAM Questions](#) ('the CAN-SPAM Questions').

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## 2. DEFINITIONS

### California

#### [The Anti-Spam Law](#)

**California electronic mail address/California email address:** includes any of the following:

- an email address furnished by an electronic mail service provider that sends bills for furnishing and maintaining that email address to a mailing address in the State of California;
- an email address ordinarily accessed from a computer located in the State of California; or
- an email address furnished to a resident of the State of California.

**Commercial email advertisement:** any electronic mail message initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

**Electronic mail or email:** an electronic message that is sent to an email address and transmitted between two or more telecommunications devices, computers, or electronic devices capable of receiving electronic messages, whether or not the message is converted to hard copy format after receipt, viewed upon transmission, or stored for later retrieval. 'Electronic mail' or 'email' includes electronic messages that are transmitted through a local, regional, or global computer network.

**Unsolicited commercial email advertisement:** a commercial email advertisement sent to a recipient who meets both of the following criteria:

- the recipient has not provided direct consent to receive advertisements from the advertiser; and
- the recipient does not have a pre-existing or current business relationship with the advertiser promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

**Spam:** unsolicited commercial email advertisements.

**Direct consent:** the recipient's express consent to receiving email advertisements from the advertiser, either in response to a clear and conspicuous request for the consent or at the recipient's own initiative.

### The Email Advertising Law

**Electronic mail advertisement:** any electronic mail message, the principal purpose of which is to promote, directly or indirectly, the sale or other distribution of goods or services to the recipient.

**Unsolicited electronic mail advertisement:** any electronic mail advertisement that meets both of the following requirements:

- it is addressed to a recipient with whom the initiator does not have an existing business or personal relationship; and
- it is not sent at the request of or with the express consent of the recipient.

### **Federal**

#### The CAN-SPAM Act

**Affirmative consent:** when used with respect to a commercial electronic mail message, means that:

- the recipient expressly consented to receive the message, either in response to a clear and conspicuous request for such consent or at the recipient's own initiative; and
- if the message is from a party other than the party to which the recipient communicated such consent, the recipient was given clear and conspicuous notice at the time the consent was communicated that the recipient's electronic mail address could be transferred to such other party for the purpose of initiating commercial electronic mail messages.

**Commercial electronic mail message:** any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an internet website operated for a commercial purpose). The term 'commercial electronic mail message' does not include a transactional or relationship message.

**Electronic mail address:** a destination, commonly expressed as a string of characters, consisting of a unique user name or mailbox (commonly referred to as the 'local part') and a reference to an internet domain (commonly referred to as the 'domain part'), whether or not displayed, to which an electronic mail message can be sent or delivered.

**Electronic mail message:** a message sent to a unique electronic mail address.

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## 3. CONSENT REQUIREMENTS

In general, §17529.2 of the Anti-Spam Law provides that advertisers may not initiate or advertise, in an unsolicited commercial email, advertisement (where the recipient has not given direct consent to receive the advertisement and the recipient does not have a pre-existing business relationship with the advertiser) either sent from California or to a California electronic mail address.

However, these California restrictions have been pre-empted by the CAN-SPAM Act, which 'supercedes any statute, regulation, or rule [...] that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.' (§8(b)(1) of the CAN-SPAM Act).

### 3.1. B2C

With respect to business to consumer ('B2C') marketing, the CAN-SPAM Act does not require initiators of email solicitations to obtain consent prior to emailing the solicitations (see the CAN-SPAM Questions).

### 3.2. B2B

With respect to business to business ('B2B') marketing, and according to the CAN-SPAM Questions, the CAN-SPAM Act does not require initiators of email solicitations to obtain consent prior to emailing the solicitations.

### 3.3. Social Media Marketing

Not applicable.

### 3.4. Viral Marketing

Not applicable.

### 3.5. Exceptions

Per the CAN-SPAM Act, if an email recipient makes an opt-out request, the request must be promptly honoured, and no more commercial emails should be sent more than ten business days after receipt of the opt-out request (§5(a)(4)(A) of the CAN-SPAM Act).

### 3.6 Additional Requirements

Under the CAN-SPAM Act, emails which have marketing as a primary purpose, must:

- use header and sender information that accurately identifies who initiated the email message and the content of the message;
- reasonably convey that the email is an advertisement or solicitation;
- include a valid physical postal address, which can be a street address or post office box;
- include an easy-to-use online opt-out mechanism for marketing messages (no more than two clicks) that is live for at least 30 days after the email is sent; and
- honour opt-out requests within ten business days and ensure that future email campaigns are scrubbed against the opt-out list.

The company should also have a mechanism for ensuring that consumer opt-out requests (not on-line) are included in the email opt-out list.

Moreover, all outgoing emails must contain a functioning return email address or other internet-based mechanism, clearly and conspicuously displayed, that allows the recipient to opt out of future email solicitations (§5(a)(3)(A)(i) of the CAN-SPAM Act).

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## 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 a 'sale' under the CCPA when such information is shared with third parties in exchange for anything of value.

In accordance with §17529 of the Anti-Spam Law, it is unlawful for any person or entity to collect email addresses posted on the internet if the purpose of the collection is to use the email addresses to do either of the following:

- initiate or advertise in an unsolicited commercial email advertisement from California, or advertise in an unsolicited commercial email advertisement sent from California; or
- initiate or advertise in an unsolicited commercial email advertisement to a California electronic mail address, or advertise in an unsolicited commercial email advertisement sent to a California electronic mail address.

It is unlawful for any person or entity to use an electronic mail address obtained by using automated means based on a combination of names, letters, or numbers to do either of the following:

- initiate or advertise in an unsolicited commercial email advertisement from California, or advertise in an unsolicited commercial email advertisement sent from California; or
- initiate or advertise in an unsolicited commercial email advertisement to a California electronic mail address, or advertise in an unsolicited commercial email advertisement sent to a California electronic mail address.

It is unlawful for any person to use scripts or other automated means to register for multiple electronic mail accounts from which to do, or to enable another person to do, either of the following:

- initiate or advertise in an unsolicited commercial email advertisement from California, or advertise in an unsolicited commercial email advertisement sent from California; or
- initiate or advertise in an unsolicited commercial email advertisement to a California electronic mail address, or advertise in an unsolicited commercial email advertisement sent to a California electronic mail address.

## 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 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 request 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, as well as investigative costs and fees.

## 5. NATIONAL OPT-OUT LIST

The Data and Marketing Association offers a voluntary Email Preference Service identifying consumers who do not wish to receive email solicitations.

In addition, §5(a)(3) of the CAN-SPAM Act provides that all electronic mail messages sent to a protected computer must clearly and conspicuously display a reply email or other internet-based communication allowing the recipient to request not to receive future commercial email messages from that sender. This option is most commonly offered as an 'unsubscribe' link.

Moreover, §316.5 of the CAN-SPAM Rule provides that a sender or any person acting on behalf of a sender may not require that a recipient pay any fee, provide any information other than the recipient's email address and opt-out preferences, or take any other steps except sending a reply email address or visit a single internet webpage in order to submit a request to not receive future commercial email addresses from the sender.

Finally, §1798.115 of the CCPA provides that the definition of a 'sale' of personal information under California law is very broad and will likely be interpreted to encompass circumstances where a business shares personal information with third parties for direct marketing purposes. The CCPA requires businesses who 'sell' personal information of California residents to provide a conspicuous 'Do Not Sell My Personal Information' button on their websites in locations where personal information is collected. Residents of California can also separately request a business to not 'sell' their information. Businesses must comply with all such requests from California residents.

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## 6. PENALTIES

Notwithstanding the fact that California's restriction on sending emails where the person has not provided consent or has an established business relationship has been preempted by federal legislation §§17529.5 and 17529.8 of the Anti-Spam Act provide that the AG, an email service provider, and a recipient of an unsolicited commercial email advertisement may bring an action to recover damages. Both actual damages and liquidated damages are available. Liquidated damages are calculated at \$1,000 for each unsolicited commercial email advertisement transmitted in violation of this statute, up to \$1,000,000 per incident. The recipient, an electronic mail service provider, or the AG may also recover reasonable attorney's fees and costs.

In addition, §1798.115 of the CCPA provides for penalties of up to \$2,500 for each violation and up to \$7,500 for each wilful violation.

Federally, §7 of the CAN-SPAM Act provides that violations of the CAN-SPAM Act are enforced by the FTC as if such violations were an unfair or deceptive act or practice under the Federal Trade Commission Act of 1914. States may bring civil actions on behalf of the residents of the State in a district court to enjoin further violations by the defendant, to obtain damages on behalf of residents of the State in an amount equal to the greater of the actual monetary loss suffered by residents or statutory damages. Statutory damages are calculated as follows: up to \$250 per violation with each separately addressed unlawful message received by or addressed to state residents treated as a separate violation. The total statutory damages amount must not exceed \$2 million. However, the court may increase the damage award treble damages in the event that the court determines the defendant committed the violation wilfully and knowingly or an aggravating violation is present. Attorney fees may also be awarded.

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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 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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