

MOBILE MARKETING

WHAT COMPANIES NEED TO KNOW

The advancements in mobile marketing technology are far outpacing the development of the regulations that govern it. Savvy marketers must understand not only the opportunities associated with mobile marketing, but also how best to comply with an ever-evolving patchwork of regulations in an increasingly connected marketplace.

Mobile is the new frontier for commerce, communication, entertainment, information, education and socializing. With rapid technological advances in the development of mobile devices, such as cell phones, touch-screen tablets and e-book readers and the growing number of downloadable software applications (known as apps), hand-held machines allow users to more easily communicate, organize, search, conduct business, make purchases and access media at any time in almost every corner of the world.

Mobile devices and the ever-expanding number of apps that run on them have met a receptive audience, as tens of millions of units have been sold and more than a billion apps have been downloaded. Market research company eMarketer estimates that in 2008, 88.9% of the US population used a mobile device and that by 2013 that number will reach 96.7%, or over 300 million people.



JAMES D. TAYLOR
PARTNER
LOEB & LOEB LLP

James is Co-Chair of the firm's Advanced Media and Technology Department and Chair of the Advertising and Promotions Law Practice Group. His principal practice areas include advertising, promotions and privacy for advertisers, agencies and entertainment, media, internet and mobile clients.



NATHAN J. HOLE
ASSOCIATE
LOEB & LOEB LLP

Nate is an Associate in the Advanced Media and Technology Department, and regularly counsels clients on their advertising and promotional activities, including mobile initiatives, social media, and other digital and online issues.

More importantly, consumers are increasingly demonstrating a willingness to use their mobile devices in nearly every aspect of their daily lives. For marketers and advertisers, this new paradigm has opened up opportunities to reach millions of consumers (see *Box, What is Mobile Marketing?*). eMarketer estimates that advertisers spent \$320 million on mobile marketing in the US in 2008 and that they will spend \$1.56 billion in 2013.

A key advantage of mobile marketing is that advertisements and promotions can be tailored to a particular consumer based on:

- The specific device being used.
- An individual's personal location, preferences and behavior.
- Certain information transmitted from the device by an individual.

With these opportunities, however, come escalating scrutiny and potential risk. Companies engaging in mobile marketing must understand the myriad legal issues. This article is designed to help counsel advise companies on the:

- Framework of the law in this area.
- Specific regulatory requirements and best practices they need to address when designing campaigns via the various types of mobile platforms.
- More general legal considerations that apply to all types of marketing activities, namely:
 - false advertising issues;
 - privacy requirements; and
 - restrictions on marketing to children.

REGULATORY FRAMEWORK

Many of the laws regulating mobile marketing were enacted before the widespread use of smartphones and the emergence of mobile apps. Lawmakers often tried to address mobile marketing

by amending existing laws governing tele-marketing and commercial e-mail, resulting in some laws that provide significant challenges for mobile marketers. Consequences of non-compliance include class action litigation, government investigation, enforcement actions and public relations disasters.

Mobile marketing touches on a variety of federal and state laws and regulations, including, among others, the:

- Federal Trade Commission Act (FTC Act).
- Telephone Consumer Protection Act (TCPA).
- Telemarketing Consumer Fraud and Abuse Prevention Act (Telemarketing Act).
- Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM).
- Children's Online Privacy Protection Act (COPPA).

Both the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC) have issued rules that apply to marketing to consumers through mobile devices. The FCC's rules supplement the TCPA and CAN-SPAM. The FTC's Telemarketing Sales Rule supplements the Telemarketing Act and addresses the use of auto-dialers and caller ID information and establishes the national Do-Not-Call Registry.

>> For an overview of US advertising laws and regulations, search [Advertising: Overview](#) on our website.

Self-regulation also plays a key role in mobile marketing campaigns. Influential guidelines and codes of practice have been developed by federal agencies such as the FTC and well-respected industry groups such as the:

- Mobile Marketing Association (MMA).
- Cellular Telecommunications Industry Association (CTIA or Wireless Association).

- Direct Marketing Association (DMA).
- Children's Advertising Review Unit (CARU) of the Council of Better Business Bureaus.

The regulation of mobile marketing depends on several factors, including the type of message that is sent, how the message is distributed, what personal information is collected, which third parties are involved and the age of the recipient.

RUNNING CAMPAIGNS

Against this broad background, it is helpful to focus on the specific issues to consider when mounting campaigns through:

- Text messages.
- E-mail messages.
- Location-based services.
- App-based "push" services.
- Interactive promotions.

TEXT MESSAGES

Text messaging to consumers' cell phones (also called short message service or SMS) was the earliest type of mobile marketing. Text message marketing involves sending a short message to a consumer's mobile device for many different commercial purposes, including promoting a sale, publicizing an event and providing a news update. It is one of the most widely-used forms of mobile marketing.

Text message marketing is subject to numerous laws, rules and guidelines. Most prominently, the FCC regulates this form of marketing under the TCPA and its corresponding regulations, having defined promotional text messages as telemarketing "calls." Several marketers have challenged the application of the TCPA to text message marketing activities over the past few years, but courts have consistently upheld the FCC's approach. To minimize its legal risk under the TCPA, a marketer should:

WHAT IS MOBILE MARKETING?

Mobile marketing (or advertising) refers to several kinds of campaigns that utilize a mobile device. These can be divided into three primary groups:

- Marketing and promotions that use the interactivity or portability of mobile devices such as:
 - using global positioning system (GPS) technology to send promotional messages to a mobile device that are relevant to the user's location;
 - having users enter a contest or sweepstakes or cast a vote via text messaging;
 - delivering coupons to a mobile device that can be read by a scanner and redeemed at a store; and
 - sending a promotional message, alert or account update to a user via text message.
- Buying ad space on websites that are configured for access by mobile devices (sometimes called WAP-enabled sites).
- Advertising tied to content and mobile apps. Examples include:
 - creating a mobile app that promotes a product or event;
 - sponsoring a mobile app that appeals to a marketer's demographics (for example, an outdoor apparel company sponsors an app that provides maps of nearby hiking trails);
 - product placement in games played on a mobile device;
 - buying ad space in third-party mobile apps that appear before, during or after use of the mobile app;
 - advertising tied to streaming of live broadcasts; and
 - providing songs or other recordings for use as ringtones (which may be tied to a product or event, such as a recently released movie).

consumers a private right of action. Penalties under the TCPA begin at \$500 per violation (each message constituting a separate violation), which can be trebled for willful violations, creating a potential liability of \$1,500 per violation.

Some states have also taken steps to regulate text message marketing. For example, Washington has enacted text message/instant message spam laws known as "anti-spim" that restrict the manner and circumstances in which marketers may deploy unsolicited text messages. Marketers should

- Avoid sending promotional text messages to any wireless number listed on the national Do-Not-Call Registry maintained by the FTC unless it has an established business relationship with the consumer (whose name has not been placed on the company specific do-not-call list) or has otherwise obtained the consumer's prior consent. To minimize the risk of relying on dated information, marketers are required to verify the accuracy of their list every 31 days.
- Avoid sending promotional text messages using an automated dialing system or bulk deployment software to any wireless telephone number without first obtaining the consumer's express consent, regardless of whether there is an established business relationship with the consumer.
- Disclose to the consumer the name of the entity that will be sending the text messages and, if different,

the name of the entity advertising the applicable products or services when obtaining the consumer's consent. While there are no specific requirements on what form of consent must be provided (whether oral, written or electronic), the marketer maintains the burden of proving that the consumer provided it.

- Include an opt-out mechanism to allow consumers to stop receiving future messages.

Under federal law, an established business relationship can be demonstrated where a consumer has entered into a transaction with a seller during the past 18 months or has made an inquiry of that seller within the past three months. However, several states have laws that define an established business relationship differently and marketers must work with the more restrictive definition.

In addition to the enforcement powers of the FCC and states, the TCPA gives

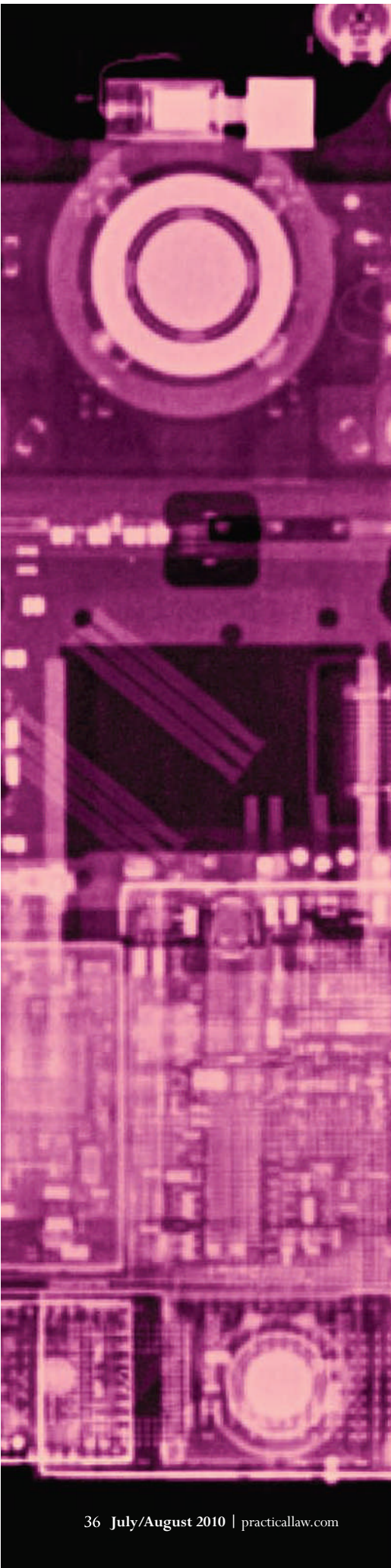
also be aware of state do-not-call regulations that may apply to this method of marketing.

>> For more information on the rules governing commercial communication by telephone, including the national and state do-not-call registries, search [Direct Marketing](#) on our website.

E-MAIL MESSAGES

Mobile commercial messages are e-mail messages sent for the purpose of advertising or promoting a commercial product or service to a consumer's mobile device through an e-mail address that contains the consumer's wireless telephone number and the wireless carrier's domain name (such as 5552659000@wirelesscarrier.com). Although not as common as promotional text messages, mobile commercial messages offer an alternate method for marketers to reach consumers through their mobile devices.

Mobile commercial messages, like conventional e-mails, are governed by CAN-SPAM



and regulated by the FCC. Following the enactment of CAN-SPAM, the FCC issued rules restricting how marketers can deploy mobile commercial messages to consumers. Under these rules:

- Marketers cannot send mobile commercial messages to any e-mail address that contains a wireless carrier's domain name listed on the FCC's wireless domain registry (available at fcc.gov/cgb/policy/DomainNameDownload.html), unless the applicable consumer has provided express prior consent.
- Wireless carriers are required to provide all domain names they use to transmit electronic messages to mobile devices on their networks, so the list may change from time to time. As a result, marketers should verify that their list matches the FCC's registry every 30 days.
- All requests for express prior consent must:
 - explain that the consumer is agreeing to receive mobile commercial messages sent to that person's wireless device from a particular sender;
 - identify the business, individual or other entity that will be sending the mobile commercial messages;
 - describe any fees or charges that the consumer may incur from that person's wireless service provider in connection with receiving these messages; and
 - disclose that the consumer may opt out of receiving mobile commercial messages at any time.
- Express prior consent can be oral or written and can be obtained electronically. Written consent must include the consumer's signature. If the signature is electronic, it must comply with the federal Electronic Signatures in Global and National Commerce (ESIGN) Act. All authorizations must include the e-mail address where the message will be sent.

Even if a marketer has received a consumer's express prior consent to send a mobile commercial message, the usual CAN-SPAM requirements apply. Generally, CAN-SPAM requires that an unsolicited message must:

- Clearly identify the message as an advertisement or solicitation for products or services.
- Provide an easily accessible method for a consumer to opt out of receiving future messages from that sender.
- Include the sender's valid return e-mail address and postal address.
- Not contain a deceptive subject line or false header information.
- Include the warning "SEXUALLY-EXPLICIT" in the subject line if the message contains sexually-oriented material.

CAN-SPAM contains both criminal and civil penalties, which include jail time and seizure of offending equipment for criminal violations, and civil penalties ranging from \$25 to \$300 per violation, depending on the type and nature of the violation. The civil penalties can be enforced by the FTC, state attorneys general, internet service providers, and other specified federal and state agencies, but not by individual consumers, as there is no private right of action.

State laws that require labels on unsolicited commercial e-mail or that prohibit these messages entirely are pre-empted by CAN-SPAM. However, CAN-SPAM does not pre-empt state laws that address related issues, including laws prohibiting deceptive trade practices and computer crimes. Unlike the federal statute, several states' anti-spam statutes authorize direct action by consumers, increasing an advertiser's potential exposure to liability for non-compliant activities.

Mobile commercial messages may also be governed by the TCPA. For example, an Arizona state court held that a text message sent to an e-mail address incorporating the

consumer's wireless number and the wireless provider's domain name that was read on the consumer's cell phone was a "call" under the TCPA (see *Joffe v. Acacia Mortgage Corp.*, 211 Ariz. 325 (Ariz. Ct. App. 2005)).

LOCATION-BASED SERVICES

Marketers have increasingly turned to location-based services to make consumers aware of certain products and services that are available near a consumer's physical location or in specific geographic areas where a consumer searches. Consumers typically use location-based services by accessing mobile apps on their mobile devices that rely on data from satellite-based GPS technology or other similar systems that are built into these devices. Apps that feature location-based services can help consumers:

- Search for a product and find a local retailer that sells it.
- Find restaurants, gas stations, pharmacies, grocery stores and other nearby businesses.
- Locate and network with friends and business colleagues.
- Find emergency services such as the nearest hospital or police station.
- Track package deliveries.
- Access electronic coupons or advertising tailored to the consumer's specific location.
- Obtain real-time information such as weather conditions, news or traffic information.

Location-based services facilitate behavioral advertising. Behavioral advertising refers to the practice of collecting, analyzing and using consumer data to deliver advertisements customized to an individual's interests. Using location-based services can be a very effective method for reaching a large number of new and existing consumers to promote

PRACTICE NOTES

DOCUMENTS

CLAUSES

CHECKLISTS

ARTICLES

The following related Practice Notes are available on practicallaw.com

>> **Simply search the title OR resource number**

[Advertising: Overview or 2-501-2799](#)

[Direct Marketing or 5-500-4203](#)

[Online Advertising and Marketing or 4-500-4232](#)

[Sales Promotions, Contests and Sweepstakes or 1-500-4243](#)

[Social Media Risks and Rewards or 8-501-1933](#)

[US Privacy and Data Security Law: Overview or 6-501-4555](#)

products or services tailored to each individual's physical location. However, location-based services raise significant privacy concerns because they use information that is personal to an individual. As a result, these marketing activities may be subject to federal and state privacy and data protection laws (see below *Privacy and Behavioral Advertising*).

To help promote and protect user privacy when marketers and other service providers use location-based services, the Wireless Association has issued best practices guidelines for using location-based services. The voluntary guidelines address best practices for providing notices to consumers, obtaining consents and safeguarding location-based data, regardless of the type of technology involved, mobile device used or business model employed. The full text of the guidelines can be found at ctia.org/business_resources/wic/index.cfm/AID/11300.

PUSH NOTIFICATION SERVICES

Push notifications are "real-time" alert notices sent by a party to a consumer's mobile device. A consumer can choose to have a push notification delivered to their mobile device as an audible alert, as a text alert that pops up on the user's screen or as a "badge" that appears over an application's icon. Consumers often use push notification services to:

- Receive real-time news, sports and stock alerts.

- Be notified of new e-mails or voice messages.
- Send and receive instant messages.

These notices are typically sent to a consumer's mobile device on an open internet connection, either directly from the app's hosting server or through an intermediary's server (such as Apple's push notification server). Push notification technology is unique in that it automates the transmission of information from a party's central server to a mobile device. Traditionally, users obtain information on internet-connected devices by making a one-off request to "pull" that information from the host's server. Consumers often subscribe to push notification services in advance, either online or by adjusting a mobile app's settings. Once the consumer subscribes, the app's host server automatically "pushes" alerts to the consumer's mobile device whenever it is connected to the internet.

Marketers using push notification alerts should comply with the MMA's Consumer Best Practices Guidelines for Cross-Carrier Mobile Content Services and Mobile Advertising Guidelines (available at mmaglobal.com/policies/consumer-best-practices and mmaglobal.com/policies/global-mobile-advertising-guidelines, respectively). Push notifications may also be subject to the TCPA, CAN-SPAM and ESIGN Act (see above *Text Messages* and *E-mail Messages*).

INTERACTIVE PROMOTIONS

Mobile technology has opened up new opportunities for marketers to undertake interactive promotional campaigns, examples of which include:

- Contests, sweepstakes and lotteries.
- Promotional subscriptions and giveaways.
- Electronic coupons and gift certificates.

These activities (whether through mobile devices or otherwise) are governed by a variety of existing state and federal laws that limit how they may be undertaken, regulate how they are advertised, obligate the marketer to disclose key information and require registration with the appropriate regulatory agency.

>> For more information on the laws governing sales promotions, contests and sweepstakes, search [Sales Promotions, Contests and Sweepstakes](#) on our website.

Sweepstakes

Conducting interactive promotions in a mobile environment creates practical challenges that may make complying with applicable laws more difficult. For example, some mobile marketing campaigns allow individuals to enter a sweepstakes or contest by sending a text message to a designated number. For some consumers, sending a text message incurs charges. While state laws generally do not prohibit marketers from charging contestants a fee or requiring some other form of consideration to enter a sweepstakes, they must create a free alternate method of entry for contestants that is no more onerous than the paid method and provides an equal chance to win.

However, creating a free method for entering a sweepstakes that is no more onerous than sending a text message may be challenging. In fact, offering a free alternate method of entry from a web page could be considered to be more onerous if the contestant must submit more information through the web-based entry

portal to process the entry than by sending a text message.

The laws and regulations that apply to sweepstakes and contests require that the material terms and conditions be set forth in the advertising and prior to entry. Disclosing these rules within the confines of a mobile screen can be difficult for the contestant to access and it is questionable whether requiring contestants to access those terms through a link will be satisfactory.

Promotional Subscriptions

Promotional subscriptions are another form of interactive marketing that is scrutinized by regulators. These promotions involve a consumer subscribing to a service, or purchasing something using a mobile device that includes a subscription, to receive items of interest such as horoscopes, coupons or ringtones at regular intervals. To minimize the risk of liability when offering promotional subscriptions, marketers should, at a minimum:

- Clearly disclose the terms of the transaction and any fees that may be charged, including indirect fees such as text messaging charges levied by a wireless service provider.
- Avoid using promotional terms such as “free,” “complimentary” or “no charge” if consumers may be subject to fees from their wireless service providers or any other parties.
- Avoid using pre-checked boxes for accepting the terms or conditions of an offer. The consumer should be required to affirmatively opt in to the subscription.
- Include valid methods for the consumer to terminate a subscription or challenge a fee.

Other Interactive Methods

In addition to conventional sales promotions, companies have taken an active role in engaging in more nuanced forms of marketing, such as branded entertainment and product placements.

Engaging in these activities creates several legal and business risks for a company in addition to those covered in this article, including:

- Intellectual property issues.
- Software design, development and maintenance issues.
- Wireless service provider program conditions and restrictions.

>> For information on intellectual property matters generally, search [Intellectual Property: Overview](#) or [Intellectual Property Rights: The Key Issues](#) on our website.

One common marketing method is the development of mobile apps specifically tailored to market a business or its products or services. In developing these apps, businesses typically strive to provide consumers with:

- Information related to their products and services.
- The ability to make purchases directly from the business.
- Promotional discounts and other offerings that they would not otherwise have access to.

These types of apps enable a company to directly interact with its customers and obtain valuable information about their buying habits, personal preferences and other relevant metrics.

Another popular method is cross-platform marketing, where a business promotes its goods and services through an app unrelated to the business' offerings. Product placements are the clearest examples of cross-platform marketing and often involve entering into a co-marketing agreement with the app's owner.

ADVERTISING LAWS AND REGULATIONS

In addition to the specific requirements particular to each type of mobile platform, any marketing campaign must take into account:

- Traditional consumer protection laws and regulations, such as those governing false advertising.
- Privacy requirements and behavioral advertising issues.
- Restrictions and guidelines on marketing to children.

CONSUMER PROTECTION RULES

Federal and state advertising laws apply to any message that is considered an advertisement, whether it is broadcast on television, pushed through an app or sent as a text message to a wireless device. The consumer protection laws that apply to traditional types of advertising and marketing materials, such as those issued by the FTC, apply equally in the mobile marketing arena. Therefore, on mobile devices, as elsewhere:

- Advertisements must be truthful and not misleading.
- Claims made in an advertisement must be substantiated.
- Disclosures that prevent an advertisement from being misleading must be clear and conspicuous.
- Advertisers' claims about a competitor's products must be supported by the appropriate evidence and may not be unduly disparaging.
- Testimonials and endorsements contained in an advertisement should comply with the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising.

>> For more information on advertising regulation in the US, including the key legal issues to consider when planning an advertising campaign, search [Advertising: Overview](#) on our website.

The FTC's booklet, *Dot Com Disclosures*, offers special guidance for online advertisers to comply with general consumer protection laws. The booklet addresses internet-specific issues such as banner ads,

pop-up windows, scrolling and hyperlinks and emphasizes that FTC rules and guides that use specific terms such as "written," "writing," "printed" and "direct mail" are adaptable to new technologies.

In particular, the guidance is intended to help businesses evaluate whether disclosures are likely to be clear and conspicuous in online advertisements. This presents particular challenges in the context of wireless devices because of the small screens. Among other things, the FTC recommends that online advertisers:

- Prominently display disclosures so they are noticeable to consumers and place disclosures near, and when possible, on the same screen as the triggering claim.
- Use text or visual cues to encourage consumers to scroll down a web page when it is necessary to view a disclosure.
- When using hyperlinks to lead to disclosures:
 - make the hyperlink obvious and place it near the relevant information;

The consumer protection laws that apply to traditional types of advertising and marketing materials apply equally in the mobile marketing arena.

- label the hyperlink appropriately to convey the importance of the information it leads to;
- use hyperlink styles consistently so that consumers know when a link is available;
- take consumers directly to the disclosure on the click-through page; and
- assess the effectiveness of the hyperlink by monitoring click-through rates and make changes accordingly.
- Recognize and respond to any technological limitations or unique

characteristics of high-tech methods of making disclosures, such as frames or pop-ups.

- Repeat disclosures as needed.

>> For an overview of online advertising regulation in the US, search [Online Advertising and Marketing](#) on our website.

PRIVACY AND BEHAVIORAL ADVERTISING

Privacy remains a hot button issue with consumer advocates and government regulators. One particularly sensitive area relates to behavioral advertising (also called behavioral targeting or interest-based advertising). This includes online behavioral advertising (tracking a consumer's activities online) and location-based marketing (delivering an advertisement to a mobile device based on a consumer's location) (see above *Location-based Services*). Although it can be very effective in reaching existing customers to promote a new product or service, or reaching new customers, behavioral advertising raises significant privacy concerns.

Privacy advocates argue that behavioral advertising takes place largely out of sight and that consumers may not know who is collecting the data, what the data is used for and who it is shared with. In addition, the information collected through behavioral advertising is usually anonymous, but it can be merged with personally identifiable data (often provided by a consumer when registering or making a purchase). Privacy advocates also argue that the data is being kept for longer than necessary and the amount of data collected per consumer is increasing and enabling a richer profile to be compiled.

In the US, there is no single comprehensive privacy law. Instead there is a patchwork system of privacy laws that overlap and dovetail and sometimes may contradict one another. Laws that may govern the collection of personal information through mobile marketing include:

- The FTC Act, which prohibits unfair and deceptive practices.
- The Gramm-Leach-Bliley Act, which applies to financial information.
- The Health Insurance Portability and Accountability Act (HIPAA), which applies to medical information.
- State privacy laws, such as California's Online Privacy Protection Act.

The FTC has used the FTC Act to target companies that fail to:

- Comply with their own privacy policies.
- Give consumers notice or the opportunity to opt out of a changed policy.
- Reasonably safeguard data.
- Adequately disclose what data is collected and for what purpose.

In addition, government agencies have developed guidelines and industry groups have undertaken self-regulatory efforts that do not have the force of law but are considered best practices. For example, in its Code of Conduct for Mobile Marketing (available at mmaglobal.com/policies/code-of-conduct), the MMA suggests that mobile marketers:

- Ask for and obtain an explicit opt in for all mobile messaging programs.
- Implement a simple opt-out process and reasonable technical, administrative and physical procedures to protect user information from unauthorized use, disclosure or access.

>> For a comprehensive overview of prominent US privacy and data security laws, search [US Privacy and Data Security Law](#) on our website.

>> For detailed information on the regulation of online behavioral advertising practices, including a summary of the FTC's self-regulatory principles, search [Online Advertising and Marketing](#) on our website.

MARKETING TO CHILDREN

Mobile marketing campaigns directed to children are subject to additional layers of regulation, including:

- COPPA, which restricts the online collection of information from children under age 13 (and is currently under review by the FTC).
- CARU, which provides extremely influential guidelines for marketing to children.
- Specific state laws that restrict messages sent to children through the use of child protection registries.

The FTC is particularly concerned about how many children are using mobile devices and whether existing laws such as COPPA are protecting these children from unfair or deceptive practices.

COPPA

COPPA restricts the online collection of personally identifiable information from children under age 13. The Act requires, among other things, that operators of websites and online services that are directed to children under age 13, or who knowingly collect information from children under age 13, obtain verifiable parental consent.

The FTC is particularly concerned about how many children are using mobile devices and whether existing laws such as COPPA are protecting these children from unfair or deceptive practices. Earlier this year, the FTC announced that it was initiating a review of COPPA ahead

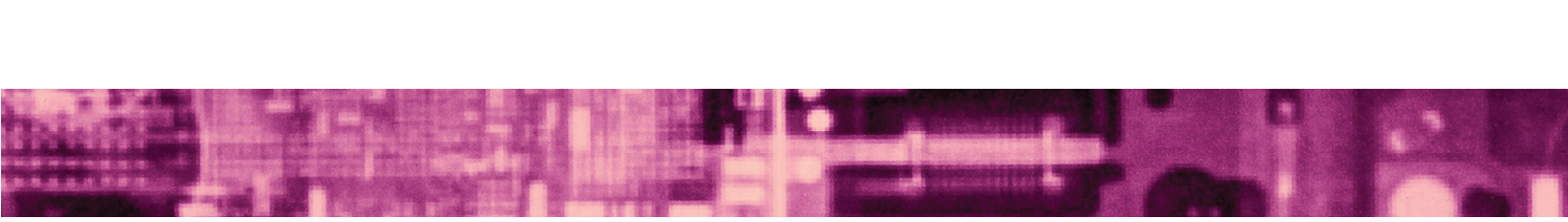
of schedule and invited public comments on the following topics:

- The implications for COPPA enforcement that are raised by mobile communications, interactive television, interactive gaming and other similar interactive media.
- The use of automated systems to review children's web submissions and filter out any personally identifiable information prior to posting.
- Whether operators have the ability to contact specific individuals using information collected from children online, such as persistent IP addresses, mobile geo-location data and information collected in connection with behavioral advertising, and whether the rule's definition of "personal information" should be expanded accordingly.

- Whether there are additional technological methods to obtain verifiable parental consent that should be added to the COPPA rule and whether any of the methods currently included should be removed.

CARU

CARU is the children's arm of the advertising industry's self-regulation program. Its basic activities are the review and evaluation of child-directed advertising in all media and online privacy practices as they affect children. CARU's Self-Regulatory Guidelines for Children's Advertising, although voluntary, are widely followed. The guidelines cover



the special responsibilities of advertising to children or collecting data from children online, emphasizing that companies should not advertise products that are inappropriate for children and should not create unreasonable expectations about a product's quality or performance.

The agency is paying especially close attention to mobile marketing to children. It is concerned about companies that advertise ringtones or other mobile content as "free" and do not adequately disclose the fees, as well as companies that collect a child's cell phone number online without complying with COPPA's requirement for obtaining parental consent.

CARU initiated proceedings against a company that advertised a free text message joke service during children's television programming. The service allowed children to sign up without parental consent and did not disclose fees. Children who responded were signed up to receive jokes by text message, which resulted in charges from wireless carriers. The company agreed to stop advertising on children's cable networks and to change its program.

The Self-Regulatory Guidelines for Children's Advertising also address sweepstakes and require that a sweepstakes sponsor clearly depict the prizes and the likelihood of winning in terms understandable to children and use adequate age-screening mechanisms. The full text of the guidelines can be found at caru.org/guidelines/guidelines.pdf.

Child Protection Registries

Utah and Michigan established child protection registries, similar to the national Do-Not-Call Registry. Individuals and schools can register land-line and wireless telephone numbers, fax numbers, e-mail addresses and instant message addresses that belong to or can be accessed by a child. Marketers are prohibited from sending messages or calls that contain or advertise certain content

such as pornography, alcohol, firearms and tobacco products to any number or address on the registry. If an advertiser is marketing this type of content, it needs to scrub against each registry.

IN THE PIPELINE

The fundamental challenge for marketers is that the regulation of mobile marketing is still evolving and recent developments suggest that increased regulation is on its way. The FTC was scheduled to review COPPA in 2015, but in light of rapidly changing technology used by children, found it necessary to review the law this year. This suggests that the rules will soon be updated to reflect how information is being collected from children using mobile devices.

Another important recent development was the introduction of a federal privacy bill by two House members in May 2010. If enacted, the bill would require companies that collect personal information to provide a lengthy, detailed disclosure about how they collect, use and share that information. Making these disclosures would be difficult on the small screens of most mobile devices. And the bill would, for the first time, impose federal regulation of behavioral advertising, which many mobile marketers use to target advertisements to mobile consumers.

In the meantime, counsel should ensure that their clients have in place mechanisms to keep up to date with current best practices in this constantly evolving arena.

The authors would like to thank Jill Westmoreland who contributed to this article.