

COLUMNS

Legal and regulatory risks associated with the growth of mobile marketing

April 13, 2011



By [Richard B. Newman](#)

The use of consumers' mobile devices to deliver targeted advertisements is increasing at an exponential rate.

Given the current legal and regulatory landscape, companies using mobile must proceed with extreme caution to side-step potential state and federal landmines, including class action litigation.

Text messaging, mobile applications, email messages and social media platforms are all racing to secure the attention of consumers.

However, there are specific state, federal and regulatory standards that apply to mobile marketing.

For example, the federal CAN-SPAM Act and the Telephone Consumer Protection Act ("TCPA") may indeed serve to restrict the ability of companies to forward marketing materials to a consumer's mobile device.

The overriding consideration in this space is informed consent.

Ask task

Best practice, not to mention the avoidance of consumer complaints, dictates that companies in this space obtain consumer consent prior to sending marketing messages to consumers' mobile devices, particularly if those consumers are on the federal Do Not Call registry.

Other considerations involve state Do-Not-Call and commercial email statutes, as well as state and federal consumer and child protection laws, such as the Children's Online Privacy Protection Act.

In some circumstances, state lottery laws could apply to mobile marketing campaigns.

For example, a recent lawsuit filed by the Federal Trade Commission illustrates some of the risks inherent in mobile marketing.

Take *FTC v. Flora*, No. 11299 (C.D. Cal. complaint filed 2/22/11).

In that case, the FTC alleges that a mobile marketer violated both CAN-SPAM and Section 5 of the FTC Act by sending allegedly deceptive text messages and then selling the cellular phone numbers of consumers who responded to the advertisements.

This lawsuit serves a reminder that companies should, at a bare minimum, require advertising affiliates to comply with applicable notice and consent standards.

Clearly, both CAN-SPAM and the TCPA can potentially apply to marketing-related text messages because text messages can be transmitted either to a wireless domain name, or to a mobile telephone number.

The TCPA prohibits using "any automatic dialing system" to make "any call" to "any telephone number assigned to a cellular telephone service."

The TCPA law also restricts calls to parties listed on the federal Do Not Call registry.

CAN-SPAM contains requirements that businesses must follow when transmitting unsolicited commercial e-mail.

Thus, if an SMS message goes to the wireless domain, CAN-SPAM applies (no private right of action), otherwise, the TCPA applies (provides for a private right of action).

As a result, a mobile marketer that sends unsolicited text messages could potentially face investigations from regulators at both the FTC and the Federal Communications Commission.

Various state rules must also be kept in mind.

Scrub rub

Numerous states have laws that restrict the transmission of certain types of electronic commercial messages, particularly to children, and others are considering them.

For example, both Michigan and Utah have child protection laws on the books that require marketers to scrub their marketing lists against state registries.

The laws prohibit the sending of ads for items such as tobacco, firearms, alcohol, knives, gambling, and pornography to children, and carry stiff civil and criminal penalties.

Legislation was also recently introduced in Iowa that would create a similar registry.

In California, legislators are currently considering a pair of bills that could have an effect on mobile marketing.

The proposed legislation would potentially require sellers of mobile devices with geo-tagging capabilities to disclose those capabilities to a consumer.

The proposal would prohibit the sale of those devices without prior written consent to that capability.

Additionally, the proposal would expand California's existing prohibition of unauthorized electronic surveillance to include tracking via any electronic tracking device, not merely those attached to vehicles or other moveable things.

Given the foregoing, those companies in the mobile marketing space are well advised to get all ad service providers to agree to comply with applicable state and federal laws and regulations, obtain express prior consent before sending marketing messages to mobile devices, integrate privacy by design, obtain insurance to cover potential liability, use contractual indemnity provisions, and scrub against federal and state databases.

Richard B. Newman is managing partner at [Hinch Newman LLP](#), San Diego. Reach him at mewman@hinchnewman.com.