

Resource

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Overview

Launching a marketing or advertising campaign brings up a variety of legal issues to consider. Depending on the nature of the campaign, there are various regulations and considerations to keep in mind. Below you will find some of the key considerations to keep in mind for the more popular types of campaigns. Your Gunderson team can provide more in-depth and customized guidance on these topics as well.

Contents

- [Direct Mailers](#)
- [Email Marketing](#)
- [Mobile and SMS Marketing](#)
- [Influencer Agreements](#)
- [Referral Agreements](#)
- [Media Ad Buys](#)
- [Promotional Events](#)
- [Contest and Sweepstakes](#)
- [Conclusion](#)

Direct Mailers

While direct mailers have comparatively fewer regulations than other digital forms of advertising, if you plan to engage in direct mail advertising, there are a few items to keep in mind:

- There are certain types of mailings that are prohibited under the Deceptive Mail Prevention and Enforcement Act (DMPEA) (39 U.S.C. § 3001).
- Direct mailings involving sweepstakes and contests are also subject to specific requirements under DMPEA.
- In addition, all advertising, including direct advertising and marketing, must be in compliance with the Federal Trade Commission Act (FTC Act) (15 U.S.C. §§ 41 to 58) which ensures, among other things, that advertising is not deceptive, unfair, or misleading.
- You should also verify that recipients are not on the Direct Marketing Association's Do Not Mail List (found at DMAchoice.org).

If you plan to conduct any direct mail advertising, speak with your Gunderson attorney for more information.

Email Marketing

The federal law Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM) establishes rules for sending commercial messages. CAN-SPAM regulates the sending of all commercial electronic mail, which is defined as any electronic message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service. Commercial email messages do not include what are referred to as transactional or relationship messages. Generally, CAN-SPAM prohibits certain fraudulent activities in connection with the sending of emails, including using false or misleading headers or subject headings, accessing unauthorized computers to send multiple email messages, and registering multiple email addresses to intentionally send spam. The act also prohibits certain address “harvesting” and automated creation of multiple emails.

As described by the Federal Trade Commission (FTC) in their [CAN-SPAM Compliance Guide](#), consider at least the following when sending marketing emails:

1. **Don't use false or misleading header information.** Your "From," "To," "Reply-To," and routing information – including the originating domain name and email address – must be accurate and identify the person or business who initiated the message. Basically, it should be clear this is from "[Your Company]".
2. **Don't use deceptive subject lines.** The subject line must accurately reflect the content of the message.
3. **Identify the message as an ad.** The law gives you a lot of leeway in how to do this, but you must disclose clearly and conspicuously that your message is an advertisement.
4. **Tell recipients where you're located.** Your message must include your valid physical postal address. This can be your current street address, a post office box you've registered with the U.S. Postal Service, or a private mailbox you've registered with a commercial mail receiving agency established under Postal Service regulations.
5. **Tell recipients how to opt out of receiving future email from you.** Your message must include a clear and conspicuous explanation of how the recipient can opt out of getting email from you in the future. Craft the notice in a way that's easy for an ordinary person to recognize, read, and understand. Give a return email address or another easy Internet-based way to allow people to communicate their choice to you.
6. **Honor opt-out requests promptly.** Any opt-out mechanism you offer must be able to process opt-out requests for at least 30 days after you send your message. You must honor a recipient's opt-out request within 10 business days of their request. You can't charge a fee, require the recipient to give you any personally identifying information beyond an email address, or make the recipient take any step other than sending a reply email or visiting a single page on an Internet website as a condition for honoring an opt-out request. Once people have told you they don't want to receive more messages from you, you can't sell or transfer their email addresses, even in the form of a mailing list. The only exception is that you may transfer the addresses to a company you've hired to help you comply with the CAN-SPAM Act.
7. **Monitor what others are doing on your behalf.** The law makes clear that even if you hire another company to handle your email marketing, you can't contract away your legal responsibility to comply with the law. Both the company whose product is promoted in the message and the company that actually sends the message may be held legally responsible.

Mobile and SMS Marketing

If your marketing campaign will involve text messaging users, you will need to think about the federal law, The Telephone Consumer Protection Act (TCPA). The TCPA restricts the manner by which businesses may contact consumers' telephones and fax machines, governs how a company can obtain permission to text marketing messages to consumers and when the company can send text messages, and allows consumers to opt out of receiving such calls, texts and faxes.

The TCPA distinguishes two types of messages: (1) transactional messages (i.e. messages that contain information that is necessary for your customers to use your product or service); and (2) marketing messages (i.e. messages that have the purpose of advertising or encouraging the purchase of services). Messages can also be a combination of transactional and marketing materials. Under the TCPA, such combination messages are considered marketing messages.

To send marketing messages through an automatic telephone dialing system, you will have to get express written consent from the consumer receiving the message via an "opt in." This means that, after being properly informed of what they are agreeing to, a consumer must affirmatively agree in writing to receive marketing messages. At a minimum, you must inform the consumer that: (1) by consenting, they will receive text messages sent by an automatic telephone dialing system; and (2) consent is not a condition of purchase. This disclosure should be in close proximity to the consent mechanism. The TCPA also requires that you provide consumers with a way to opt-out of future marketing text messages. Once a consumer opts out of receiving marketing text messages, you will not be able to text that consumer again, other than to confirm that you have processed the unsubscribe request, unless the consumer re-subscribes to receive your marketing text messages.

Unlike the more stringent requirements for marketing text messages, to send exclusively transactional text messages through an automatic telephone dialing system, the express consent required can be either written or verbal. The standard for voluntary, prior express consent for text message non-marketing communications is met where: (1) an individual gives his or her wireless phone number to the person initiating these communications, (2) there is some relation between the communications and the reason for which an individual provided this wireless number, and (3) there are no instructions from this individual not to use this wireless number to contact the individual in this way.

Keep in mind that, as noted above, if you send marketing messages in combination with a transactional message (for example, if you inform the consumer that the service order is being processed, and in the same text message you tell the

consumer about other products or services that you offer), then this will be treated as a marketing message for the purposes of the TCPA and you should get a written opt-in for this type of communication. Any type of marketing message, even if secondary to the initial purpose of the message, requires the consumer's express written consent via an opt-in.

Violation of the TCPA could result in some hefty fines – up to a \$500 penalty per text message received by a consumer. In addition, if a company willfully or knowingly violates the TCPA, a court can triple the amount of damages (up to \$1500 per text message). Noncompliance is also often a target for class-action suits.

There are a number of trade associations that provide best practices resources and examples for mobile messaging, including the Cellular Telecommunications Industry Association (CTIA) and the Marketing Management Association (MMA). Please also reach out to your Gunderson attorney to help you craft appropriate language for any opt-in or opt-out messages in relation to text messaging marketing campaigns.

Influencer Agreements

If you're engaging an influencer, you'll want to have an influencer agreement in place governing the relationship. The contract will spell out any guidelines that you have for the influencer in promoting your brand, as well as rules for the influencer in disclosing their relationship with your brand through their promotion.

Social media posts by influencers endorsing or promoting products are a form of native advertising, which is regulated by the FTC. The FTC requires that an influencer must disclose their relationship with a brand when there is a material connection between the brand and the influencer or a benefit to the influencer from the brand for promotion – this can be a material connection or consideration in the form of a monetary payment, but even free products count as a material connection that would need to be disclosed. Advertisers have some flexibility about the specific format and wording of the disclosures, so long as such disclosures are conspicuous and consumers are able to comprehend the disclosures. Your Gunderson attorney can provide you with influencer agreements as well as more specific guidelines around disclosures.

In addition to complying with state and federal laws, if you are running a promotion on a third party platform, you'll need to make sure you're complying with any platform-specific requirements as well. Many popular social media platforms (i.e. [Facebook](#), [Instagram](#), [Twitter](#), and [YouTube](#)) have rules and guidelines that apply to promotions. If a promotion violates platform guidelines, you may be prohibited from using the platform.

Referral Agreements

Referral partnerships are common marketing relationships where third parties are granted rights to promote, refer, distribute or sell your product or service. With these arrangements, you'll want to ensure the scope of the relationship is clearly spelled out in a commercial agreement, including consideration of at least the following items:

- Exclusivity (with respect to field or industry, geography, product)
- Trademark usage rights
- Commissions, revenue shares, and royalty payments
- Intellectual property rights and licenses
- Marketing and sales obligations
- Forecasts and milestones

Your Gunderson attorney can help customize an agreement for you to govern these types of relationships.

Media Ad Buys

The Interactive Advertising Bureau (IAB) is an organization comprising more than 700 leading media companies, brands, agencies, and the technology firms responsible for selling, delivering, and optimizing digital ad marketing campaigns. For example, see the [IAB's "Standard Terms and Conditions for Media Buys One Year or Less."](#) For media ad buys it is quite common to sign insertion orders (IO's) or order forms that are governed by the IAB Terms. They enable efficient contracting for media buys on industry standard terms. These terms, though, can typically be negotiated and revised for your particular campaign. Your Gunderson attorney can provide insertion orders in connection with the IAB terms, and further advise and customize these documents to fit your needs.

Promotional Events

If you are hosting an event in connection with a marketing campaign, there will likely be a number of contracts you'll need to put in place. If you'll be hosting the event at a venue, you'll have an agreement with the venue, as well as other vendors involved. Depending on the event, you may also have event participants sign a release containing language giving you a license to use the participant's name and likeness in connection with footage or photographs from the event, as well as a release for the company from any liability arising from any injuries or damage at the event.

Gunderson has various form releases and vendor agreements that can be leveraged for promotional events, and your Gunderson attorney can help tailor the forms appropriately for your specific needs.

Contest and Sweepstakes

Sweepstakes, contests, and giveaways are often broadly referred to as “promotions.” Although these words are often (incorrectly) used interchangeably, they have specific meanings and legal implications which must be carefully considered. Where promotions are available nationally and internationally, it is important to make sure that such promotions are structured properly to ensure compliance with U.S. federal laws, state laws, and foreign laws (if the promotion is not limited to U.S. residents).

When structuring a promotion, it is crucial to ensure that it will not be characterized as a lottery. Lotteries are generally illegal under both federal and state law (with certain exceptions, such as those sponsored by governments). A lottery is any promotion that includes all three of the following elements: (i) a prize (anything of value), (ii) chance (winning depends on factors that are outside a person’s control), and (iii) consideration.

Promotions that include a prize and chance, but have no consideration component are categorized as sweepstakes (“games of chance”). Promotions that include a prize and consideration, but have no chance component are generally categorized as contests (“games of skill”). For a sweepstakes to avoid the risk that it will be found to include an element of consideration (and therefore be an illegal lottery), there must not be a payment requirement or the purchase of a product to enter the sweepstakes, and often an alternative method of entry (e.g., entry by mail) is presented to participants. This can be tricky to set up properly – while typically, “consideration” means that something of value is exchanged in return for something of value, not only is an interpretation of “value” quite vague, but the specific definition of “consideration” can actually vary from state to state. For example, consideration is clearly present when a sponsor gives a prize to a contestant but in exchange requires that the participants purchase a product or make a monetary payment to enter the contest. A less obvious example, though, is one in which the participant is required to expend substantial time or effort (i.e., provide a review of a product or provide some kind of detailed information about him or herself) in order to be entered.

Regardless of the ultimate structure, sweepstakes or contest promotions will require promotion rules to clearly outline requirements for entry and the prizes you intend to offer. The rules should be prominently displayed wherever the promotion is promoted or accessed.

Conclusion

Your Gunderson attorney can help you strategize the appropriate structure for your promotion, provide template rules to display to participants, advise on state registration or bonding requirements, and otherwise determine what releases and accompanying documents/record retention practices are required in connection with your promotion.

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