

MOBILE MARKETING AND CONSUMER PROMOTIONS*

Melissa Landau Steinman
Partner, Venable LLP
575 7th Street, NW, Washington, DC 20004
mlsteinman@venable.com
<http://www.venable.com>

I. CONTEXT: THE EXPLODING GROWTH OF MOBILE DEVICE USAGE

- A.** Mobile devices have become a primary means of communication for voice, email, social networking, navigation, photos, video and other digital information.
- B.** There are over 4.1 billion mobile users worldwide. (International Telecommunication Union, ICT Development Index 2009; Portio Research, Worldwide Mobile industry Handbook 2009-20014).
 - 1. There are more mobile phone subscribers in the world than there are landline phone subscribers.
 - 2. There are over 271 million mobile phone users in the U.S.
- C.** In July 2008, DMA reported the highlights of its first and most recent survey on mobile marketing.
 - 1. About one-quarter (24 percent) of those surveyed had responded to a mobile marketing offer.
 - 2. One-third of the group that had not responded to any mobile marketing offer reported that they had never received an offer.
 - 3. Seventy-one percent of people who respond to mobile offers cite their data plans – the cost of airtime and lack of interest are cited as the leading reasons for not responding by those who haven't responded to mobile offers.
 - 4. Twenty-one percent of mobile marketing responders indicated that they responded to three or more offers per month.

* ©2010, VENABLE LLP. *This summary was prepared by Venable only as a reference, and nothing in it should be construed as legal advice, guidance or interpretation establishing an attorney-client relationship. Please consult an attorney before marketing to mobile devices.*

5. Teens between 15-17 years old (19 percent) and young adults between 21-30 years old (19 percent) are twice as likely to respond to offers on their mobile devices as individuals between 18-20 years old (7 percent).
6. Single (never married) respondents are the most likely of all groups to respond to mobile marketing appeals.

II. LEGAL AND INDUSTRY STANDARDS FOR MOBILE MARKETING

A. What Rules Apply? General Standards for Mobile Marketing

1. There is ONE OVERRIDING PRINCIPLE: The customer must be in control of the relationship “The customer is king (or queen)”
2. Two federal laws provide the primary legal framework for regulating messages sent to mobile devices:
 - a. *The Telephone Consumer Protection Act (“TCPA”)* (47 U.S.C. § 227 et seq.) and corresponding Federal Communications Commission (FCC) rules (47 C.F.R. § 64.1200 et seq.) Which law applies depends, in part, on what technology is used to send the messages, but most text message campaigns are subject to the TCPA.
 - b. *The Controlling the Assault of Non-Solicited Pornography and Marketing Act (“CAN-SPAM Act”)* (15 U.S.C. § 770 et seq.) and corresponding FCC rules. (47 C.F.R. § 64.3100 et seq.)
3. States also have similar laws regulating telemarketing and email marketing.
4. Industry standards are also extremely important in regulating mobile marketing – basic principles and best practices (as well as, in some case, more specific carrier policies) are outlined in guidelines from the Direct Marketing Association (DMA), Mobile Marketing Association (MMA) and CTIA – the Wireless Association, an international association for the wireless telecommunications industry.
 - a. The industry standards generally address issues such as:
 - i. Notice: As part of the mobile marketing communication, the marketer must provide the identity of the marketer or products or services, and key terms and conditions of the offer, to the consumer.
 - (1) Choice & Consent: The mobile marketer must obtain opt-in consent via text message, IVR, web site, or other method (with functionally-equivalent opt-out).
 - (2) Consumers who opt-in must have an easy way to opt-out of all mobile marketing.

- (3) Consent is program-specific.
- ii. Security: Mobile marketers must design programs and take steps to protect user information.
 - (1) Privacy policies must be aligned between the carrier and the brand.
 - (2) Marketers must seek to avoid privacy/data breaches and respond appropriately if they occur.
- b. MMA US Consumer Best Practice Guidelines for Cross-Carrier Mobile Content Programs (the “MMA Guidelines”) is the most specific industry standard. *See* <http://tinyurl.com/lhwsde>.
 - i. The MMA Guidelines, discussed in more detail below, is a compilation of legal requirements, best practices, and wireless carrier policies that can be highly specific. It specifically addresses, for example, how to properly structure and market sweepstakes using mobile marketing.
 - ii. The MMA Guidelines do not have the force of law, but most agreements related to mobile marketing campaigns require the parties to comply with them.
- 5. Other laws that could potentially be implicated by mobile marketing: Lanham Act, FTC Act, state Unfair and Deceptive Trade Practices Acts, IP laws (trademark, copyright), fraud, etc. – similar to any other advertising campaign.

B. The TCPA

- 1. The TCPA prohibits marketers from using automatic telephone dialing systems (“auto-dialers” or “ATDS”) or an artificial or prerecorded voice to make “calls” to wireless devices (including cell phones, pagers, and any other device for which the called party pays), regardless of whether a marketer has an existing business relationship (EBR) with the called party.
 - a. The FCC and the courts interpret the word “call” to include text messages (including phone-to-phone and SMS message sent to a two-way pager).
 - i. The FCC has stated that the TCPA encompasses both “voice calls and text calls to wireless numbers, including, for example, short message service (SMS) calls, provided the call is made to a telephone number assigned to such service.” FCC Order 03-153 ¶ 165.
 - (1) In June 2009, the Ninth Circuit Court of Appeals held that a text message can constitute a “call” and, thus, be subject to the TCPA. *See Satterfield v. Simon & Schuster*, 569 F.3d 946, 951 (9th Cir. 2009).

(A) *Satterfield* was a class action where publisher Simon & Schuster (“S&S”) was sued for allegedly violating the TCPA by sending text messages to promote the Stephen King novel *The Cell*.

(i) Plaintiff received a text message from S&S after she became a registered user of Nextones.com at the request of her minor son in order to receive a free ringtone. The sign-up included a checkbox that was followed by “Yes! I would like to receive promotions from Nextones affiliates and brands. Please note that by declining you may not be eligible for our FREE content.” After receiving a text advertisement from S&S, plaintiff filed suit alleging violation of the TCPA.

(ii) The district court dismissed the suit, finding that the computer used to transmit the text message was not an autodialer because the number was not dialed randomly and the plaintiff had given consent to receive the message. The Ninth Circuit reversed, however, finding that:

- It was possible that the computer had the capacity to dial randomly
- The TCPA encompasses text calls made to SMS numbers,
- Consent must be construed narrowly, and S&S could not rely on the consent that the plaintiff had given to Nextones because it is not an affiliate or brand of Nextones.

(2) The Arizona Court of Appeals held that the TCPA applies to SMS and text messages sent internet-to-phone in *Jaffe v. Acacia Mortgage Corp.*, 121 P.3d 831 (Ariz. 2005), *cert. denied*, January 8, 2007. The Appellate Court found that the TCPA did not violate the defendant’s First Amendment rights, but was instead a content-neutral regulation narrowly tailored by Congress to further a significant governmental interest, *i.e.*, protecting telephone subscribers from the use of technological advances to disrupt their privacy.

ii. TCPA also applies to MSCMs (Mobile Service Commercial Messages) – essentially email messages sent to an email address on an Internet domain of a wireless carrier. Most wireless carriers maintain an Internet domain name that can be used to send MSCMs to the wireless devices of users on their networks. MSCMs that are ultimately delivered to wireless devices may be considered “calls” under the TCPA and subject to rules restricting calls to wireless devices when the calls are sent using an automated system.

- b. The TCPA defines an “automatic telephone dialing system” as “equipment which has the capacity (A) to store or produce telephone numbers to be called, using random or sequential telephone number generators, and (B) to dial such numbers.”
 - i. The Ninth Circuit held in the *Satterfield* case that equipment may constitute an autodialer if it has the *capacity* to store or produce telephone numbers to be called, using a random or sequential telephone number generators, and to dial such numbers,” regardless of whether the equipment *actually* stored, produced or called numbers using such a generator. 569 F.3d at 951.
 - ii. The TCPA applies to consumer and business numbers – profit and non-profit – and applies regardless of whether or not a solicitation is involved, including sales, transactional, polling and survey calls.
2. Exceptions to the TCPA’s coverage of text messages are extremely limited (although not expressly defined in the TCPA itself).
 - a. Prior express consent.
 - i. The burden to show consent is on the marketer.
 - ii. The marketer should be able to show that the consumer or business specifically consented to receive calls from the particular marketer at a certain number.
 - iii. It is helpful to look to the requirements of the industry guidelines (*e.g.*, MMA Code of Conduct), CAN-SPAM Act, etc. for guidance on how to properly obtain adequate consent.
 - b. Emergency situations.
3. The Do Not Call Rules and the national National Do Not Call Registry (16 C.F.R. §§ 310.4(b) (1) (iii) (B), 310.8)
 - a. Consumers can register their cell phone numbers on the National Do Not Call (“DNC”) Registry. Access to the list can be purchased from the FTC.
 - b. A marketer may not send a text message to any number registered on the national Do-Not-Call list unless the marketer (a) has an established business relationship with the consumer who owns the number or (b) obtained a prior express invitation or permission from the consumer recipient.
 - i. Marketers that do not use an auto-dialer and have neither an existing business relationship nor express consent must regularly scrub their lists against the

DNC list to prevent sending messages to consumers who have specifically requested not to be called.

- ii. An established business relationship can be demonstrated by a transaction within the last 18 months or an inquiry within the last 3 months.
 - iii. Permission to call the consumer must be evidenced by a signed, written agreement between the consumer and the marketer that states that the consumer agrees to be contacted and includes the telephone number to which the calls may be placed.
 - iv. *Express* consent is required if an auto-dialer is used.
- c. There are also requirements to maintain a company DNC list.
4. Wireless device numbers and “porting” landlines.
- a. Consumers can port their landline numbers to their wireless devices.
 - b. How do you know? Through the Interactive Marketing Services (IMS), which is a DMA subsidiary that offers two lists:
 - (1) Wireless Block Identifier (updated monthly): identifies current and to be assigned cell phone numbers.
 - (2) Wireless-Ported Numbers File (updated daily): identifies ported numbers.
 - c. The FCC’s has a 15-day safe harbor for ported numbers, which provides that the marketer avoids liability if:
 - (1) The marketer is placing voice calls;
 - (2) The marketer does not knowingly make calls to wireless numbers; and
 - (3) The marketer makes the calls within 15 days of the port.

C. The CAN-SPAM Act

1. The federal CAN-SPAM Act, 15 U.S.C. §§ 7701-7713, applies to commercial email messages, including text messages/SMS and MSCMs, sent to an address that includes a domain name posted on the FCC’s wireless domain list for at least 30 days before the message is sent. This list is available at the FCC website, at <http://www.fcc.gov>.
2. The CAN-SPAM Act prohibits sending *commercial* electronic email messages to wireless devices unless the recipient has provided prior express authorization (*consent*) to receive such messages from the sender.

- a. A message is *commercial* if its primary purpose is to advertise or promote a commercial product or service (including content on a commercial website).
 - i. Messages that are “transactional” in nature, such as those that complete or confirm a transaction, are not subject to CAN-SPAM’s requirements.
 - ii. *E.g.*, an SMS text message confirming sign-up for a monthly gaming service is transactional, not commercial.
- b. If CAN-SPAM applies, *consent* must be obtained from the consumer in the form of express prior authorization.
 - i. This authorization may be obtained orally or in writing.
 - (1) Written authorization must contain subscriber’s signature (digital or electronic, as defined by the E-Sign Act) and an email address to which messages may be sent. For online authorization, the site must allow the consumer to input the address.
 - (2) Senders obtaining authorization orally must take reasonable steps to ensure authorization can be verified, such as by recording authorization. However, some courts have taken the position that TCPA applies to email messages directed to phones (*see Jaffe v. Acacia, supra*, 121 P.3d at 831) – which means that written consent would be required. Marketers should therefore obtain written consent to avoid potential issues.
 - ii. Requests for prior authorization must contain the following disclosures and consents:
 - (1) That the wireless subscriber consents to receive mobile messages sent to his/her wireless device by a particular sender;
 - (2) That the subscriber may be charged by his/her wireless service provider for receiving such messages; and
 - (3) That the subscriber may revoke his authorization at any time.
 - iii. Limited Scope/Transferability of Authorization.
 - (1) Any prior express authorization given by consumer will be interpreted narrowly.
 - (2) A consumer who provides prior express authorization for one type of email/text message has not necessarily given consent for other types – *e.g.*, consenting to weather updates is not the same as consenting to e-coupons.

- (3) Authorization given to a sender does not entitle the sender to act/send text messages on behalf of third parties, even affiliates and/or marketing partners.
- iv. Duration of Consent.
 - (1) Express prior authorization lasts until it is revoked – and once it is revoked, the marketer has ten (business) days to cease sending business emails.
 - (2) Authorization cannot be via “negative option” – consumer must affirmatively state that he authorizes the messages, and marketer cannot presume consent.
 - v. Costs.
 - (1) Consumers cannot be required to incur any costs for authorization; as such, a marketer should not send a text message request for authorization or require a consumer to give authorization via text message.
 - (2) Marketers may give consumers an option to respond via a mechanism that involves cost *if* a free method is also available.
 - c. The CAN-SPAM Act only applies if the technology used to send a message references a domain on the list. So, while messages addressed to 2125551212@verizonwireless.com might be covered, phone-to-phone SMS messages that do not include a reference to a domain name are not covered.
 - d. General CAN-SPAM Requirements for Content – the CAN-SPAM Act requires the following for *all* commercial emails, including commercial mobile messages:
 - i. The email must disclose that it is an advertisement or solicitation, and the “from” and “subject” lines of the message must not be misleading.
 - ii. The email must disclose the name and address of the sender/initiator of the message, and identify the sender in such a way that the consumer can determine that the sender is the authorized entity.
 - iii. The message must disclose that the recipient can opt-out of future commercial messages, and provide a functioning email address or other Internet-based opt-out mechanism. Marketers must provide the same mechanisms to revoke authorization that they provided to grant authorization, without charge. These mechanisms must be operable for at least 30 days after the message to the consumer is sent.

- iv. Marketers must not send commercial messages to consumers who have opted-out.

C. State Laws

1. States have various laws applicable to mobile marketing, including laws governing telemarketing, email marketing and advertising generally.
2. States can bring enforcement actions against mobile marketing companies for alleged violations of applicable laws. The Florida Attorney General's Office in particular has been active in the mobile marketing area.
 - a. The most recent case in Florida is *In re Mobile Messenger Americas, Inc.*, Case No. L09-3-1015 (Fla. Att'y Gen. Jan. 21, 2009), which involved a \$1 million settlement with a major mobile content marketer over allegations concerning improper billing for mobile content.
 - b. In May 2008, The Florida Attorney General's ("AG's") Office announced that Florida was developing a "zone system" that would dictate where material terms on a mobile should be disclosed. The AG's Office indicated that price and terms of offer would need to be within 125 pixels of submit field, and other information would be required to be presented in a minimum font size and a color that contrasted with the background.
 - c. In February 2008, the Florida AG's Office announced a settlement with AT&T Mobility over ads involving "free" offers in which AT&T agreed to pay \$2.5 million plus \$10 million in rebates to consumers. *In re Cingular Wireless, Inc.*, Case No. L08-3-1219 (Fla. Att'y Gen. Feb. 28, 2008). The settlement was particularly unusual because AT&T is a wireless carrier, not an advertiser. The settlement requires AT&T to include specific provisions in its agreements with third party providers that regulate how those third parties market using mobile text messaging and similar mechanisms and how they disclose the terms and conditions of their promotional offers. The Florida AG entered into a similar, but even more specific, agreement with Verizon Communications in 2009. *In the Matter of Verizon Wireless, Inc. and Alltel Communications, Inc.*, Case Nos. L08-3-1034 and L08-3-1035 (Fla. Att'y Gen. June 16, 2008),
 - d. In November 2007, the Florida AG entered into a settlement with Azoogole over the company's Internet ads for "free" ringtones that offer that in fact required that consumers purchase a subscription to \$9.99/month service to obtain. Azoogole agreed to pay \$1 million and prominently disclose the costs of any offer. *In the Azoogoleads US, Inc.*, Case No. L07-3-1044 (Fla. Att'y Gen. 2007),

D. Industry Guidelines

1. Several industry groups have adopted guidelines for mobile marketing that require compliance with the applicable federal laws and recommend standards for mobile marketing activity in specific areas:
 - a. Mobile Marketing Association (MMA)
 - i. Consumer Best Practices Guidelines for Cross Carrier Mobile Content Programs – extensive and detailed, addressed both general guidelines and best practices and carrier-specific requirements for, *inter alia*, notice/disclosure of terms and conditions, obtaining consent, use of term “free,” sweepstakes and contests, coupons, etc.
 - (1) MMA Consumer Best Practices Guidelines comprehensively address mobile-specific marketing issues such as:
 1. Disclosure of offer terms and conditions
 2. Deactivated and recycled numbers
 3. Subscription programs
 4. Mobile “chat”
 - (2) MMA also provides comprehensive, technically-oriented “Mobile Advertising Guidelines” for creating ads, which include
 1. Aspect ratios
 2. Dimensions
 3. Formats
 4. Downloadable applications
 - (3) Finally, MMA also published program/topic-specific publications, such as:
 1. Mobile Marketing Sweepstakes and Promotions Guide.
 2. Introduction to Mobile Coupons.

- b. Direct Marketing Association (DMA): Guidelines for Ethical Business Practice – comprehensive guidelines for ethical and legal conduct for multiple different types of direct marketing using different vehicles, including sweepstakes and other types of promotions.
 - c. CTIA – The Wireless Association – Primarily addresses duties of wireless carriers. Several potentially relevant documents:
 - i. Best Practices and Guidelines for Location Based Services (*e.g.*, *GPS*).
 - ii. Consumer Code of Conduct.
 - iii. Content Classification Criteria.
2. Opt-in Consent
- a. DMA suggests single opt-in.
 - b. MMA suggests single and double opt-in.
 - i. Single opt-in for promotions where the subscriber incurs no charges for receiving messages (FTEU or “free to end user”), and where the subscriber incurs standard text messaging charges imposed by the carrier (*e.g.*, \$0.15 per message).
 - ii. Double opt-in for promotions where the subscriber incurs a per message charge that is higher than the standard charge imposed by the carrier (*e.g.*, \$0.75 per message).
3. Mobile Specific Marketing – These organizations incorporate into their guidance best practices and legal compliance requirements in specific areas such as such as:
- a. Disclosure of offer terms and conditions
 - b. Use of the word “free”
 - c. Affiliate marketing
 - d. Word-of-mouth marketing.
 - e. Advertising to children.
 - g. Organizations each have more targeted guidelines that are applicable to the conduct of sweepstakes or other types of promotions (coupons, etc.)

III. MOBILE MARKETING IN CONNECTION WITH CONSUMER PROMOTIONS

A. Sweepstakes and Contests Overview

1. Lotteries (with the exception of state “lottos”) are prohibited under federal laws and the laws of all fifty states, usually as a form of gambling. A lottery is defined as having three elements: (1) prize, (2) chance, and (3) consideration. One of these elements must be eliminated before a prize promotion can lawfully proceed.
 - a. Prize: Something (anything) of value – even of nominal value – that is awarded to promotion winners. Non-tangible awards, such as bragging rights, generally are not considered prizes.
 - b. Chance: The outcome of the promotion depends on factors that are outside the entrants’ control. *E.g.*, a random drawing, pre-selected winning numbers, a guessing game.
 - c. Consideration: Something of value that must be given for the opportunity to participate in the promotion. Consideration may be monetary (*i.e.*, a payment or purchase) or non-monetary (*i.e.*, an expenditure of substantial time and/or effort).
 - i. It is essential to ensure that no consideration is required in a sweepstakes where prizes are (by definition) awarded on the basis of chance. If consideration is present in a sweepstakes where prizes are awarded on the basis of chance, it will be an illegal lottery.
 - ii. One way to eliminate or negate consideration is to offer a free alternative method of entry (AMOE) (*i.e.*, a method of entry that does not require consideration).
 - (1) *E.g.*, mail-in method of entry (“send in a 3x5 card with your name, home and email address and telephone number”; online entry form.
 - (2) AMOE must have “equal dignity” with the method of entry that requires consideration – everyone who enters must be treated the same, whether they pay/purchase or not.
 - iii. Another way to avoid the lottery issue is to eliminate chance (rather than consideration), which would make the game a skill contest. Examples of skill contests are trivia contests, essay contests, user generated content contests, etc. *Note that a number of states prohibit consideration even in skill contests.*

B. Special Issues for Mobile/Wireless Prize Promotions

1. Text Messages as Consideration

- a. Costs incurred as a result of using a mobile device to enter a promotion (e.g., texting fees) may constitute consideration – because consumers have to pay money to send text messages, a requirement to send a text message (standard or premium) to enter a promotion may be consideration.
 - i. *American Idol/Deal or No Deal Cases (Hardin v. NBC Universal, Inc. et al (Georgia)); Bentley v. NBC Universal, Inc., Herbert v. Endemol USA and Cunningham v. Endemol USA (California)*: In 2007, class action cases filed in California and Georgia challenging text message games conducted during the broadcast of popular TV shows *Deal or No Deal*, *American Idol*, *1 vs. 100*, *America’s Got Talent*, and other similar programs. Television audience members could enter via text message but would incur a \$0.99 premium text message fee; in the alternative, they could enter for free via the Internet. The plaintiffs alleged that the games violate the gambling/lottery laws in Georgia and New York/Massachusetts, respectively.
 - (1) *Hardin v. NBC Universal, Inc. et al (Georgia)*: The Georgia case against NBC concerning was dismissed in 2008 by the Georgia Supreme Court, which determined that a “gambling contract” did not exist between the game sponsors and participants who paid the text messaging fee because the fee “never hangs in the balance,” and thus the game did “not involve a bet or wager.” According to the Court, because the participant did not compete against the game sponsor – such that one of the two parties would win and the other would lose – the participants did not make a bet or a wager on the outcome of the event. Therefore, Georgia’s gambling law was not violated and plaintiffs were not entitled to receive any money.
 - (2) *Bentley v. NBC Universal, Inc., Herbert v. Endemol USA and Cunningham v. Endemol USA (California)*: The California class action suit is still pending; it is important both because it challenges the established proposition that an alternative method of entry eliminates the element of consideration from promotional games and also raises the question of whether the Internet can be relied on as a free alternative method of entry. Plaintiffs are arguing, in part, that the promotions violate the lottery laws because consumers don’t receive anything of value for the premium rate they pay for text messages.
 - ii. Text message promotions should include a free AMOE that will not require consumers to pay text messaging fees or otherwise incur any costs.
 - (1) The *Bentley* case in California raises questions as to whether even a free AMOE will be sufficient..

- (2) Until the California case is resolved, companies should *at minimum* (a) avoid any method of entry that has a premium cost associated with it unless there is some value associated with the charges (a ringtone, a t-shirt, etc.) and (b) ensure the availability of a free AMOE.

2. Disclosure of Prize Promotion Terms and Conditions/Registration

- a. As with all promotions, must disclose Official Rules prior to entry; disclosure is complicated by medium (smaller screen, etc.)
 - i. At minimum, need link to complete rules from ads on mobile screen.
 - ii. Ads in other media should make more complete disclosures.
 - iii. May wish to require registration online for more complicated promotions.

3. Industry Standards for Mobile Marketing in Connection with Sweepstakes and Contests

- a. DMA Guidelines – apply to all direct-to-consumer marketing in connection with consumer promotions, including mobile marketing. With respect to consumer promotions, the DMA’s Guidelines for Ethical Business Practice reflect general legal standards. For example, the guidelines require a free method of entry for games of chance, and clear and accurate disclosures regarding prizes, odds of winning, and other materials terms and conditions.
- b. MMA Consumer Best Practices Guidelines also require a free method of entry into a game of chance. Moreover, MMA’s Mobile Marketing Sweepstakes and Promotions Guide provides procedural guidance regarding the operation of a consumer promotion.

C. Mobile Coupons, Premiums, and Other Promotional Offers

1. Marketers are increasingly offering coupons, rebates, premiums, or other promotional offers through communications to mobile devices. For example, some marketers send coupons to mobile devices that can be redeemed online by entering a coupon code, or provide consumers with electronic copies of coupons that must be printed out in order to redeem them. Some companies offer location-based services that use satellite systems (such as GPS) to determine the location of the user and then provide mobile promotional offers for nearby retail outlets.
2. Legal Standards: Coupon and premium offers are subject to the same consumer protection standards that govern traditional coupons, rebates, premiums and other

promotional offers, such as the FTC Guides on deceptive pricing and “free” claims, state trading stamp laws, and the FTC’s Mail or Telephone Order Merchandise Rule.

3. Industry Standards

- a. *Prior consent:* MMA and DMA guidelines require that mobile coupons, premiums, and other promotional offers comply with all applicable federal and state laws and regulations, and with the guidelines’ prior consent and notice requirements applicable to all mobile marketing (discussed further below). As with all mobile marketing, MMA and DMA guidelines require that mobile marketers obtain consumers’ prior consent to receive mobile coupons and other promotional offers, and notify consumers of how the identity of the product/service and key terms and conditions of the offer.

- b. *Location-Based Services:* With respect to location-based services, the DMA’s Guidelines for Ethical Business Practice state that marketers sending location-based mobile marketing messages to recipients should inform consumers how location information will be used, disclosed, and protected, and that location-based information should not be shared with third-party marketers without the consumer’s prior express consent. CTIA has issued a Best Industry Practices and Guidelines for Location Based Services, which states that wireless companies providing location-based services should obtain the wireless user’s prior consent to initiate a location-based service or disclose location information to third parties, and allow users to revoke such consent. It also states that wireless carriers should disclose how location information will be used, disclosed, and protected.