

The Lead-up to 2020: Hot Legal Topics for Lead Generators, Lead Buyers, and Lead Brokers

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Agenda

- Applicable Laws, Rules and Regulations
- Tips for Lead Generators and Lead Buyers
- Lead Generation Agreements
- Enforcement Actions and Litigation

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Lead Generation

- Lead generation is the process of identifying and cultivating individual consumers who are potentially interested in purchasing a product or service.
- The goal of lead generation is to connect companies with those consumers so that they can convert “leads” into sales.
 - A lead can be any consumer who has indicated interest – directly or indirectly – in buying a product or service by taking some action.
 - Lead generation has become more sophisticated, rapid, and data-intensive

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Applicable Laws, Rules, and Regulations

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Applicable Law, Rules, and Regulations

- Federal Law
 - Section 5 of the FTC Act (all channels) (prohibits unfair and deceptive marketing practices)
 - Telemarketing laws, rules, and regulations (Telemarketing Sales Rule, Telephone Consumer Protection Act)
 - Email marketing laws (CAN-SPAM)
- State Law
 - Data privacy laws
 - Data broker registration laws
 - State anti-spam laws
 - “Mini FTC Acts”



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Federal Trade Commission Act

- The FTC Act prohibits unfair or deceptive acts or practices in or affecting commerce.
- The FTC has alleged that a lead generators’ activities are unfair if they:
 - Share or sell consumers’ sensitive personal information without consumers’ knowledge or consent, or share information without regard for whether the recipients had a legitimate need for the information.
- The FTC has alleged that a lead generators’ activities are deceptive if they:
 - Make false claims to induce consumers to provide their personal information, including false claims about the type of the offer, who is making the offer, how consumers’ data will be used, or the security of consumers’ data.

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What Is Lead Generation: The FTC's Perspective

- FTC's perspective on lead generation:

https://www.ftc.gov/system/files/documents/reports/staff-perspective-follow-lead/staff_perspective_follow_the_lead_workshop.pdf

“Follow the Lead” Workshop

STAFF PERSPECTIVE | SEPTEMBER 2016

<https://www.ftc.gov/news-events/blogs/business-blog/2017/07/lead-generation-when-product-personal-data>



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Federal Trade Commission's Expectations

- Disclose clearly to consumers who you are and how you will share their information.
- Monitor lead sources for deceptive claims and other warning signs like complaints.
- Vet lead buyers and avoid selling remnant leads to buyers with no legitimate need for sensitive data.
- Keep sensitive data secure.

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Who Is Potentially Liable?

- ✓ Lead Generators
- ✓ Lead Buyers (Offer Owners)
- ✓ Lead Brokers

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California Consumer Privacy Act (CCPA)

- The CCPA gives California consumers new rights, including
 - Access rights / rights to know
 - Deletion rights
 - Right to opt-out of personal information sale
 - Non-discrimination
- Enforced by attorney generals and provides a limited private right of action.

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CCPA Scope

- Any company that does business in California and meets one or more of these standards:
 - Annual gross revenue of more than \$25 million
 - Collects or shares personal information annually from 50,000 consumers, households or devices
 - Derives at least 50% of annual revenue from sale of personal information
- Obligations and limitations extend to all personal information maintained about consumers:
 - A “consumer” is any natural person who is a California resident.
 - “Personal information” is information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked with consumer or household.
- Certain exceptions

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CCPA Issues in Lead Generation

- Responding to access requests and knowing where the lead was passed
 - Providing consumers the categories and specific pieces of personal information that a business has collected, sold to a third party, or disclosed to another person for a business process within the past year.
- Honoring opt-out requests
 - Determine how individual rights request will be honored and test this process
- Data retention issues – complying with deletion requests while protecting against legal challenges
- Document data processing activities for the data collected, used, disclosed and or sold
- Including contractual provisions for data sharing and data security compliance
- Data security issues
- Review if you need to make any process or technological changes to comply with the law
- Analyze the risks of noncompliance

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Other State Laws Affecting Lead Generators' Data Collection

- **Nevada:** Gives consumers the right to prevent online service providers and website owners from selling specific types of personal information about them to third parties.
- **Pennsylvania, New Jersey, Massachusetts bills:** Would impose requirements similar to CCPA
- Beginning of new trend?

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Data Broker Laws

- California, Vermont laws applying to “data brokers”
- Requirements
 - Registration requirements
 - Minimum data security standards
 - Prohibits fraudulently acquiring certain types of data, or using such data to commit bad acts.

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Telemarketing



- Telemarketing Sales Rule (TSR), Telephone Consumer Protection Act (TCPA), State Telemarketing Laws and Regulations
- Applies to telemarketing and sales made on the telephone.
 - Includes text messages, prerecorded calls (including artificial intelligence/soundboard calls), voicemail messages
- Consent requirements
- Opt-out requirements
- Do Not Call requirements (company-specific, national and state registries)

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Telemarketing



- Call abandonment prohibitions
- Registration requirements
- Required disclosures
- Recordkeeping requirements
- TCPA lawsuits can be business ending!

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Telemarketing Updates



- 11th Circuit decision in *Salcedo v. Hanna* – one text message did not constitute a sufficient injury to provide standing for a TCPA claim in federal court.
- Definition of “automated telephone dialing system” (ATDS)
- “One call safe harbor”?
- Questions about the classification of soundboard technology

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Email Marketing CAN-SPAM Act



- CAN-SPAM Act is the federal law that regulates commercial email messages.
- CAN-SPAM’s main provisions for commercial electronic messages:
 - No false or misleading header information.
 - No deceptive subject lines – must indicate commercial nature of message.
 - Provide opt-out method – honor in 10 business days.
 - Include sender’s valid physical postal address.
- Advertisers may be liable for actions of affiliates and third-party email vendors.

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Email Marketing *California Anti-Spam Act*



- Applies to person or entity from advertising in a commercial email sent from California or sent to a California email address.
- Enforced by private parties: A violation of Section 17529 can be penalized with actual damages, or statutory damages of up to \$1,000 per email, up to \$1 million.
 - Due Care Defense
- Presents risk to lead buyers and lead generators, depending upon their roles in email marketing.

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Email Marketing *California Anti-Spam Act*



- Prohibits sending email advertisement containing a third-party's domain name without the permission of the third party.
- Prohibits sending email advertisement containing falsified, misrepresented, or forged header information.
- Prohibits sending email advertisement with a misleading subject line.
- **NOTE:** Other states have similar anti-spam laws that are enforced by private plaintiffs.

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Online Lead Generation Considerations

- Advertising claim substantiation (for all channels)
- Privacy and Security
- Providing appropriate disclosures
 - Channel-specific disclosures
 - Vertical-specific disclosures

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Other Lead Generation: Social Media, Influencer Marketing

- Online marketers must disclose
 - Any “Material Connection”:
 - Payment
 - Free product
 - Sweepstakes entry
 - Other things of value
 - Business or family relationship to seller
 - Employee relationship
 - That would not be expected

Part IV

Federal Trade Commission

16 CFR 255
Guides Concerning the Use of Endorsements and Testimonials in Advertising Federal Acquisition Regulations Final Rule

§ 255.5 Disclosure of material connections.

When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience), such connection must be fully disclosed.

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Social Media Influencers

- If the existence of a financial interest will not be clear to an audience from TV or radio, in print ads, or in non-traditional broadcast advertisements, celebrity paid to endorse a product or service MUST disclose his/her interest.
- Disclosure must be made in the same format (orally, written, etc.) as the triggering claim.
- Disclosures must be made ***every time*** a celebrity appears in a broadcast or print advertisement for a product.
- FTC's Disclosures 101 for Social Media Influencers:
https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf

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Note: simply disclosing endorser's relationship with company in the "About" page on the endorser's website is not likely to be sufficient.

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Native Advertising

- Native advertising disclosure considerations:
 - Is it even an advertisement?
 - Questions about required disclosures for product placements.
 - Context is key.
 - Disclose that content is an “Advertisement” or “Sponsored” content, near the headline/top left of the article or near the ad’s focal point.



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Tips for Lead Generators and Lead Buyers

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Tips for Lead Generators

- Understand who you are selling the leads to and what they are doing with it.
- Can you impose controls on what lead buyers do with leads?
 - Should you?
- Do you have an obligation to monitor what lead buyers do with leads?

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Tips for Lead Buyers

- Do you understand what activities your lead buyers are doing to market to leads?
- Are you responsible for lead generators' activity?
 - When?
- Do you need to vet your lead generators?

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Lead Generation Agreements



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Lead Generation Agreements

- The contract should specify who is doing what.
 - What is the lead generator doing?
 - What is the lead buyer doing?
- What constitutes a lead?
 - Redirect
 - Warm transfers
- How much is being paid for a lead?
- Lead buyer's obligations
- Lead generator's obligations

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Disclaimers / Limitations on Liability / Indemnification

- Limitations of liability and disclaimers of warranties may limit the amount of money that can be recovered and instances in which money may be recovered.
- Indemnification provisions impose defense obligations.
- Considerations:
 - Lead buyer/offer owners' obligations differ from lead generators' obligations.
 - Vertical-specific considerations (advertising claims and disclosures, registration requirements)
 - Channel-specific considerations
 - If a violation of the law may occur, how and when could it occur?
 - Practical risks

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Additional Considerations in Lead Generation Agreements

- Who has control and approval of creative assets?
 - Ability to change creative assets?
- Investigating traffic
- Setoffs?
- Dispute resolution provisions

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Enforcement Actions and Litigation

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Enforcement Actions: FTC v. EduTrek

- Alleged that defendants obtained consumers' phone numbers from websites that claimed to help consumers apply for jobs, health insurance, unemployment benefits, Medicaid coverage, or other forms of assistance, but instead of offering these services, the defendants and their affiliates called consumers to market vocational or post-secondary education programs.

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Enforcement Actions: FTC v. Career Education Corporation

- Settlement requires defendants to implement a system to monitor and review lead sources, including procedures sufficient to:
 - Obtain the lead path associated with covered information, and information sufficient to permit defendants to review:
 - copies of all materials created or used by a lead generator displayed or contained within a lead source in the lead path, including text, graphic, video, audio, and photographs;
 - the location of any lead source in the lead path; and
 - the URL of any hyperlink contained in a lead source in the lead path
 - Review, directly or through a non-lead generator agent, all materials used to obtain such covered information, prior to defendants' use or purchase of that covered information; and
 - Preclude payment of any amounts to the lead aggregator or lead generator for such covered information if such material contains a prohibited misrepresentation.
 - Promptly investigate any complaints or other information that defendants receive about whether any lead generator is engaging in prohibited acts or practices.
 - If any lead generator is engaging in prohibited acts or practices, defendants shall inform the lead aggregator that approval is denied and shall not pay any amounts to the lead aggregator or lead generator for such information.

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Enforcement Actions: CFPB v. D&D Marketing

- Settled charges against a lead aggregator that purchased leads from lead generators that marketed payday and installment loans.
- The complaint alleged that the defendant:
 - Regularly purchased leads from lead generators whose websites included misrepresentations that are likely to mislead consumers into believing that lenders in defendant's network have been evaluated and meet certain standards.
 - Defendant performed an introductory review of lead generators' websites when it onboarded the lead generators, but did not monitor those websites after lead generators were onboarded.
 - Defendant's lead generators incorrectly represented that they were themselves lenders, and falsely suggested that they would help consumers find the best rates or lowest fees or that they would review consumers' applications to match them with appropriate lenders, when in reality, consumers were not matched with lenders who provided the lowest rates
 - Contrary to representations by lead generators, consumers were likely to be steered, through defendant's ping tree, to lenders offering less-favorable terms than may otherwise be available to them, which was not sufficiently disclosed to consumers.

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Private Lawsuits: Lead Generation

- *Optima Tax Relief LLC v. Channel Clarity, Inc.*, 2015 WL 12765016, at *7 (C.D. Cal. Aug. 26, 2015)
- *Gilbert v. MoneyMutual, LLC*, 2018 WL 8186605, at *1 (N.D. Cal. Oct. 30, 2018)
 - Alleged that defendants marketed, promoted, and facilitated the making of illegal payday loans by the Unlicensed Lenders, in violation of the Deferred Deposit Transaction Law (CDDTL) and California's unfair competition law.

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