

# ADVERTISING AND PRIVACY LAW

## DESKTOP REFERENCE GUIDE



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## INTRODUCTION

The laws regulating advertising and privacy can seem daunting. The potential for liability arising from inaccurate or misleading advertising or lax privacy practices can be significant, both as a consequence of regulatory enforcement and of litigation. The Advertising & Marketing and Privacy & Information Security practice groups at Kelley Drye & Warren LLP have organized this “Advertising and Privacy Law Desktop Reference Guide” to help your company navigate the legal landscape. While this practical guide is not exhaustive, it addresses key legal topics relevant to advertising and marketing, privacy, data security, and consumer product safety and labeling. Feel free to contact us to discuss any specific claims, privacy or data security practices, or for any other questions.

## I. ADVERTISING AND MARKETING STANDARDS

The U.S. Federal Trade Commission (FTC) is the primary agency responsible for handling consumer protection matters. The FTC regulates and prohibits unfair or deceptive acts or practices in commerce pursuant to Section 5 of the FTC Act. As a general rule, claims in advertisements must be truthful and not misleading, express and implied claims must be substantiated before they are made, and qualifying information must be presented whenever a disclosure is required to avoid misleading consumers.

State authorities, other federal agencies, and self-regulatory bodies, may also be involved in advertising regulation and enforcement. For example, all 50 states and the District of Columbia have enacted legislation prohibiting unfair or deceptive acts or practices (UDAP) in trade or commerce. Most of the UDAP laws are general and cover any kind of practice deemed “unfair” or “deceptive” in the state. In addition, advertising practices associated with food and drugs are heavily regulated by the U.S. Food and Drug Administration (FDA), while advertising for alcoholic beverages are primarily regulated by the Alcohol and Tobacco Tax and Trade Bureau (TTB). The National Advertising Division (NAD) of the Council of Better Business Bureaus also monitors and evaluates truth and accuracy in national advertising.

The general principles of advertising law apply to both traditional forms of advertising, as well as to advertisements online, in social media, and on mobile platforms.

### A. Claim Substantiation

All objectively provable claims — both express and implied — must be substantiated with competent and reliable evidence. Competent and reliable evidence generally consists of tests, analyses, research, studies, or other evidence that: (a) is based on the experience of professionals in the relevant area; (b) has been conducted and evaluated

in an objective manner by persons qualified to do so; and (c) uses procedures generally accepted in the profession to yield accurate and reliable results. The degree and type of substantiation may vary, however, depending on the type of claim, subject area, and target audience. All substantiation must be gathered prior to making a claim.

The only instance in which a claim does not require substantiation is when that claim constitutes “puffery.” The term “puffery” generally refers to (a) statements that are so subjective that they cannot be measured or otherwise proven to be true or false or (b) representations that are so exaggerated that no one is likely to believe them.

When substantiating claims, consider the following tips:

1. Start by determining the type of claim being made. An advertiser must be able to support all objective claims that a reasonable consumer might take away from an advertisement, whether those claims are express or implied.
2. Determine what is needed to support the claim. If a claim specifies the type of substantiation relied upon — for example, “a clinical study showed...” — then that level of substantiation is required. If a claim does not specify the type of substantiation, then an advertiser must have a “reasonable basis” for making the claim. Note that health and safety claims generally require a higher level of substantiation than other types of claims.
3. The amount and type of evidence required to establish a reasonable basis for making a claim depends on a number of factors, including, most importantly, what experts in the relevant field believe is reasonable. Other factors to consider include (a) the type of product involved, (b) the type of claim made, and (c) the ease of developing substantiation for the claim.
4. Tests or research should be tailored to support the specific claim. Moreover, test results should be statistically significant at the 95% confidence level. The typical consumer should reasonably be expected to achieve the touted results, under normal conditions.

## **B. Health Benefit Claims**

Americans spend billions of dollars every year on foods, supplements, weight loss programs, and other devices in hopes of maintaining or improving their health and fitness. As a result, health benefit claims have been the source of significant FTC and FDA scrutiny in recent years and require a higher level of substantiation than other types of claims.

In addition to FTC’s authority to prevent unfair or deceptive acts or practices in or affecting commerce, Section 12(a) of the FTC Act specifically makes it unlawful to disseminate any false or deceptive advertisement, by any means, if its purpose is to

induce the public to buy food, drugs, devices, or cosmetics. The FTC assumes broad discretion to regulate both advertising and labeling practices.

Conversely, the FDA has specific statutory authority over food labeling and only indirect authority over advertising. The Food Drug and Cosmetic Act (FDCA) provides that a food is misbranded and subject to seizure if its labeling is false or misleading. The FDA's indirect authority over food advertising arises when promotional materials, including advertisements, tout the ability of a food or dietary supplement to reduce the risk of a disease or health-related condition.

Following are some pointers to keep in mind when crafting a health benefit or related claim:

1. Health benefit claims must be substantiated by competent and reliable scientific evidence. Scientific evidence must be conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
2. Health benefit claims must be based on evidence that is consistent with the larger body of evidence and cannot be based on outlier studies.
3. The FTC is increasingly interested in the data underlying health claims. In some cases, the FTC has required at least one (if not two) randomized, controlled trial to support such claims. Before relying on an unrelated study conducted by a third party, consider whether the company should conduct its own clinical trial or other study to support the claim.
4. Consider whether an expert is needed during the claims development process to help evaluate substantiation and proposed claims.

### C. Comparative Advertising

Companies often want to claim that their products or services are better than the products or services offered by a competitor. Comparative claims tend to be highly scrutinized by competitors and subject to challenge.

Claims comparing a product's attributes, performance, or consumer preferences should generally: (a) be substantiated with appropriate research, tests, studies, or other relevance evidence; (b) be appropriately tailored to the substantiation; (c) be based on the current version or features of the products being compared; (d) compare the advertiser's product to the most similar of the competitor's products; and (e) be supported by head-to-head testing.

All comparisons must be truthful, balanced, accurate, and free of misleading omissions. Here are some helpful points to consider if your company is making a comparative claim:

1. Naming or referring to competitors is acceptable as long as the advertisement does not falsely or unfairly attack a competing product or service.
  - A. Comparisons must be based on specific differences between the products and compare similar features. An advertisement should clearly reveal the basis of comparison.
2. If material differences exist between the products being compared, these differences must be clearly disclosed.
3. A comparative claim may not distort or exaggerate differences between products or otherwise create a false, deceptive, or misleading impression. Any advertised differences in performance or results should be meaningful to consumers.
4. If a claim does not specify the products being compared, the advertiser should generally possess support for the claim with respect to 85% of the applicable market category for that particular product, based on unit share.
5. A comparative claim that was accurate when it was first made may become inaccurate if the competitor changes its formulation or other product attributes. When that happens, a company will no longer be able to make the claim. For that reason, companies should exercise caution when making comparative claims on things like product packages that may be difficult to change.

## **D. Materiality and Clear and Conspicuous Disclosures**

Sometimes claims also require a disclosure or qualifier to prevent them from being misleading. Disclosures must be noticeable, readable, and understandable by consumers. The relevant standard is that disclosures should be presented in a “clear and conspicuous” manner.

When evaluating whether disclosures are necessary and how they are presented, consider the following:

1. An advertisement should convey all information that is material to the consumer’s decision to purchase the product.
2. Claims about performance, features, safety, price, rates, or effectiveness are usually material. Material information may also include any restrictions on an offer, such as date limitations, geographic limitations, and restrictions on the number of purchases.



3. If a reasonable consumer would find a claim to be misleading without additional information, that information should be disclosed in a “clear and conspicuous” manner. To determine whether a particular disclosure is clear and conspicuous, consider:
  - A. **The prominence of the disclosure.** A disclosure is more effective if it is prominent in size, type, and color. Using graphics to help display a disclosure may also make the disclosure more prominent.
  - B. **The placement of the disclosure in the advertisement and its proximity to the claim it qualifies.** A disclosure is more effective if it is placed near the claim it qualifies or other relevant information. Proximity increases the likelihood that consumers will see the disclosure and relate it to the relevant claim or product.
  - C. **The presentation of the disclosure.** The disclosure should be understandable to the intended audience. Advertisers should use clear language and avoid “legalese” or technical jargon. Disclosures should be as simple and straightforward as possible.
  - D. **Whether there are distracting elements in the advertisement.** Elements like graphics, sound, text, and links that lead to other screens or sites may result in consumers not noticing, reading, or listening to the disclosure.
4. Disclosures or qualifiers should not contradict or be inconsistent with the claims they qualify.

## E. Sweepstakes and Contests

Marketers often use the words “sweepstakes” and “contest” interchangeably, but the words refer to different things that can be subject to different legal requirements. In general, a sweepstakes is a promotion in which prizes are awarded based on chance, and a contest is a promotion in which prizes are awarded based on skill.

Promotions are subject to laws across all 50 states. The most important principle under these laws is that companies cannot require people to make a purchase or payment in a promotion in which winners are selected on the basis of chance. There are two common ways to deal with this prohibition: (1) don’t require a payment; or (2) don’t involve chance.

In most cases, a company can have a method of entry that involves a purchase, as long as it also provides a free method of entry. For example, some companies will allow people to enter for free by submitting a request through the mail. It is important to ensure that both methods are treated equally, and that the free option is clearly and conspicuously disclosed.

Companies may have more flexibility to require a purchase in a skill contest, but it is not always easy. States define skill differently, so a promotion that qualifies as skill-based in one state may not qualify as skill-based in another. Moreover, some states prohibit purchase requirements, even in skill contests.

Most states require companies to make certain disclosures about their promotions, and these disclosures are often grouped together in “Official Rules.” In addition, some states — such as Florida, New York, and Rhode Island — may require companies to register, and even post a bond, before they can launch certain promotions.

Following are some key requirements to consider when planning a sweepstakes or a contest:

1. If you run a sweepstakes, make sure that people are not required to make a purchase. If one method of entry does involve a purchase, you should also have another free method of entry. The alternate method should be clearly and conspicuously disclosed.
2. If you run a contest, make sure that you have clear and objective criteria against which all entries will be judged. You should generally attempt to ensure that chance does not play a role in the selection of winners.
3. Consider whether you need to register or post a bond in any state before launch.
4. Ensure that your Official Rules include the disclosures required by the relevant states, as well as provisions designed to protect your company, in case things go wrong. Advertisements should generally include an abbreviated version of the rules that direct people to the full version for complete details.
5. Remember that if you run your promotion on a third-party platform, such as Facebook or Twitter, those platforms may have their own requirements.
6. A promotion may also trigger related laws. For example, any online contest or sweepstakes directed at children under the age of 13 must comply with the Children’s Online Privacy Protection Act (COPPA). COPPA imposes requirements and restrictions regarding the collection or maintenance of a child’s personal information for the operator of a website directed to children.

## **F. Endorsements and Testimonials**

Because consumers often value opinions from other consumers before deciding whether to purchase a product or service, many companies include consumer endorsements in their advertisements.

An endorsement is generally any advertising message that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser. Endorsers can range from experts or celebrities who are paid to talk about a product on TV to consumers who are given incentives to review a product on social media. As with all advertisements, endorsements must be truthful and not misleading. This fundamental principle applies regardless of who is endorsing the product or program, or the media through which the endorsement is disseminated (e.g. blog, social media, newspaper, infomercial, “word of mouth” marketing, or talk show appearance).

When any person is paid to be a spokesperson, that person’s endorsement is considered a commercial message. Companies should advise any spokesperson about what they should (or should not) say about a product. Companies also should counsel endorsers about the need to disclose their relationship or any other material connection they have to the company during interviews and other media events in which they refer to the company or its programs.

When using endorsements and testimonials, consider the following tips:

1. Endorsements and testimonials must reflect the honest opinions, beliefs, findings, or experience of an endorser. They may not contain any claims that cannot be substantiated independently, and may not be misleading.
2. If there is a material connection between an endorser and the seller of the advertised product, and the connection is not reasonably expected by the audience, that connection must be disclosed. The disclosure should be presented in a clear and conspicuous manner.
3. In determining whether there is a material connection, consider: (a) whether the endorser is compensated by the advertiser; (b) whether a product was provided for free by the advertiser; (c) the terms of any agreement; (d) the length of the relationship; (e) the previous receipt of products, or the likelihood of future receipt of products; and (f) the value of the products received.
4. Where an advertisement represents that the endorser uses a product, the endorser must be a bona fide user.
5. Consumer endorsements and testimonials must be representative of what consumers will generally achieve with the advertised product or service. Otherwise, an advertiser must clearly and conspicuously disclose that the advertised result is not typical and/or describe the result that consumers should expect.
6. An expert’s endorsement or testimonial must be supported by an actual exercise of his or her expertise in evaluating product features or characteristics.

7. Endorsements or testimonials by organizations must be reached by a process that fairly reflects the collective judgment of the organization.
8. A written release should generally be obtained from the individual or organization providing the endorsement. If the endorsement comes from an organization, the release must be signed by a person with authority to represent the organization.
9. Be sure to train and monitor endorsers. Advertisers may be liable for an endorser's actions, including when there is a failure to disclose any material connections, or when the endorser makes false claims. Advertisers may be liable even if they did not authorize, approve, or use the claims themselves.

## G. Warranties and Guarantees

Companies often offer warranties and guarantees to entice consumers to purchase products. These offers often come in the form of an opportunity to receive repair service or a refund if a product does not live up to expectations.

A company must clearly and conspicuously disclose all material conditions or limitations upon which a warranty or guarantee is dependent. These disclosures must be made prior to the sale, so that consumers receive the full details and can factor them into their decision of whether or not to make a purchase.

Here are some helpful points to consider if your company is considering any warranties or guarantees:

1. If an advertisement mentions a warranty, the advertisement should state where consumers can read the entire warranty before purchase.
2. A service contract should be clearly distinguished from the manufacturer's warranty. If a service contract does not become effective until after the manufacturer's warranty expires, that must be clearly and conspicuously disclosed.
3. Absent any qualification, "Satisfaction Guarantee," "Money Back Guarantee," or similar representations will be construed as a guarantee that the full amount paid by the purchaser will be refunded without question.
4. Any material conditions, such as exclusions from the refund amount or a requirement that a consumer return the product within a specific time, must be disclosed prominently.
5. If "Lifetime Guarantee," "for life," or similar terms are used in advertising to indicate the duration of a guarantee, and they relate to any life other than that of the purchaser or original user, the "life" referred to must be clearly explained.

## H. Environmental Marketing Claims

Maintaining a “green” business can have positive effects for not only the environment, but also for the company. Promoting the environmental benefits or the reduced environmental impact of a product, package, or service can serve as a good way for companies to engage consumers. However, companies must ensure that all environmental claims are truthful and non-misleading. Whether a claim is deceptive will depend on the net impression of the advertisement, label, or other promotional material at issue.

Key things that marketers should keep in mind when making “green” claims include:

1. All environmental benefit claims should be qualified to the extent necessary to avoid consumer deception. Qualifiers should be clear and conspicuous.
2. All environmental marketing claims, express and implied, must be substantiated.
3. Claims should specify whether they refer to the product, the product’s packaging, a service, or just a portion of any one of these.
4. Use precise language for the claim, and don’t overstate the environmental benefits.
5. Unqualified general environmental benefit claims — such as “green,” “eco-friendly,” or “environmentally friendly” — are difficult, if not impossible, to substantiate because consumers may interpret them very broadly. These claims should generally be qualified by clear and conspicuous language that limits claim to specific benefits.

## I. Pricing and Timing

Companies often offer sales or make other temporary price reductions to induce purchases. Keep in mind that there are specific laws and regulations that apply when advertising products or services as “on Sale,” “Free,” “New,” or using similar language.

When making these types of claims, advertisers should consider the following general guidelines to ensure that consumers are not misled:

1. Price comparisons — including comparisons to a company’s former price — are regulated by detailed state and federal laws, and should be reviewed by counsel. There must be factual proof for any price comparisons made in an advertisement. All price comparisons must be current.
2. An advertisement that makes a price reduction or savings claim for a specific item must base the claim on either: (a) the advertiser’s own usual or customary price for the item in the regular course of business; (b) the usual and customary retail

price of the specific item sold by other merchants in the area; or (c) the current selling price of comparable merchandise sold in the area by the advertiser or by other merchants. The claim may not be based on an artificial mark-up above the usual retail price of the item.

3. The word “new” can be used to describe a product, service, feature, or offer that is new or different in some significant way. Use of the claim should generally be limited to a period of about six months after the product, service, or feature has achieved substantial distribution.
4. When making a “free” offer, extra care must be taken to ensure that the offer clearly discloses all conditions for obtaining the “free” product or service (e.g., “free” with the purchase of another product or service).
5. When “free” merchandise or service is offered with the purchase of another product, the advertiser’s usual price for the purchased merchandise may not be increased to recoup the loss on the free product.
6. “Free” offers in connection with the introduction of a new product/service should be limited in time. In any 12-month period, a “free” offer for a single product or service should not run for more than six months, be conducted more than three times, and/or exceed 50% of the total volume of all sales of that product or service. At least 30 days should elapse between “free” offers for a single product or a single kind of service.
7. Any time-limited offer must be truly limited to the period specified in the advertisement.

## **J. Textile, Wool, Fur, and Care Labeling Rules**

The FTC imposes specific labeling requirements for clothing and related items under the Textile Products Identification Act, Wool Products Labeling Act, Fur Products Labeling Act and Care Labeling Rule. It is very important that representations made in product advertising, including websites, conform to the labeling standards prescribed by these rules, particularly because consumers do not have an opportunity to inspect the actual product prior to purchase. It is not typically necessary to use the same level of detail in advertising as on the actual label, however.

Most household textiles, such as towels, and wearing apparel are covered by one or more of these requirements, but there are exceptions. For example, the Textile Act applies to wearing apparel, but excludes hats and shoes. Thus, a 100% cotton hat would not be subject to those requirements. If a hat is wool, however, it would still be subject to the requirements in Wool Act. Likewise, if a pair of boots has real fur trim, it would not be subject to the Textile Act, but would be subject to the Fur Act.

Below are a few tips when labeling and advertising products subject to these requirements:

1. All required labeling information for textiles, wool, and fur must: (a) be in English; (b) either state the full name under which the company is doing business, or Registered identification number (RN) issued by the FTC of the manufacturer or of one or more persons marketing or handling the product; and (c) specify the country of origin where the product was processed or manufactured.
2. In Textiles and Wool Products, if a particular fiber is present in 5% or more of the total fiber weight, the generic name of each natural or manufactured fiber must be listed together with the percentage of each fiber present, by weight, in the total fiber content of the product.
3. If a particular fiber is present in less than 5% of the total fiber weight, any fiber (or group of fibers) that is 5% or less by weight of the total fiber content must be designated as “other fiber” or “other fibers.”
4. For products that contain real fur, the animal name must be indicated, and the fur country of origin must be included for imported fur. For items that are Faux Fur, consider stating “Faux Fur” on the label.
5. Textile wearing apparel is required to have a care label that: (a) states what regular care is needed for the ordinary use of the product; (b) has a washing or dry-cleaning instruction (if both can be used, label can have only one instruction); and (c) if the product cannot be cleaned without being harmed, states “Do not wash—do not dry-clean,” or something similar.





## II. PRIVACY AND DATA SECURITY

Privacy issues are a major focus of Congress, government agencies, state Attorneys General, the media, industry, and consumers. The rules governing privacy and data security are rapidly changing — from looming comprehensive federal legislation; to a patchwork of federal and state laws, regulations and guidance; to expanding industry association requirements and guidelines.

Federal and state authorities continue to remain laser-focused on protecting consumers' privacy and security online, offline, and in the mobile environment. While nearly any company that financially benefits from the collection or use of consumer personal data is a potential target, understanding the particular practices that may be considered as unlawful, misleading, or deceptive can be challenging.

To help navigate that task, we provide a brief overview of key considerations when implementing privacy and data security practices in your company.

### A. Privacy Practices

Companies that collect personal and other information from consumers should think about their privacy practices from the beginning of the product development and through each state of the product lifecycle. Such analysis often includes: (a) assessing whether there are legitimate business reasons for collecting each type of information; (b) understanding all the ways the information will be used; (c) ensuring limits on the collection and retention of such data; (d) implementing procedures to promote data accuracy and integrity; and (e) employing reasonable security and access restrictions.

If your company is collecting personal or other information from consumers, it is also important to have a good sense of exactly what data is being collected, the purpose of the data collection, and how this information is being collected, processed, stored, transferred, or otherwise used. Having a good sense of the company's data collection and use practices will allow the company to accurately describe this information in its privacy policy and provide adequate protection for securing the data.

Here are a few tips to get a good sense of your company's data collection and use practices:

1. Understand what types of personal information is being collected. Personal information may include, for example, name, address, telephone number, email, financial information, health or medical information, birth date, or Social Security number.

2. Understand what type of non-personal information is being collected. Non-personal information may include, for example, geolocation, IP address, device serial number, and cookies.
3. Understand where this information is collected (whether offline, online, via a mobile app, or other mechanism), and whether it is collected automatically or requires the consumer to manually enter the information.
4. Have a good sense of where this information is stored (whether on the company's network or a central computer database), and whether the information can be transferred off of the secure network to, for example, individual employee laptops, or smartphones.
5. Know what controls are in place to prevent unauthorized access to the information, both from unauthorized third parties (i.e., hackers) and company employees.
6. Understand how the company shares or discloses the personal or other information with third party vendors, service providers, or others that help to operate the product, service, website, or app, and how the information is secured upon transfer to these third parties.
7. Consider developing a records retention or other similar policy to identify what information must be kept, how to secure it, how long to keep it, and how to dispose of it securely when the company no longer needs it.
8. When collecting personal information online from children under the age of 13 (including on websites, mobile apps, or other online services), companies must comply with COPPA.

## **B. Privacy Policy**

Every company that collects information from consumers, or somehow uses consumers' personal or other identifying information, should have a privacy policy in place that explains their privacy practices. Not posting a privacy policy on a web site, mobile app, or other online service that collects personal information is not only contrary to FTC guidance, but may also be a violation of state law. With states like California implementing specific requirements for privacy policy disclosures, it is important to continually review, evaluate, and update your company's privacy policy and privacy practices. Privacy policies will vary, however, depending upon a company's specific business model or products and services offered.

The key considerations provided below are offered as a general overview. However, this should not take the place of seeking assistance from skilled professionals who will have a better understanding of your company's specific privacy practices and needs.

1. Companies should clearly and plainly describe their data collection, use, disclosure, and protection practices in a privacy policy that is available to consumers before they purchase, download, or use the company's products or services. Key points to consider when developing a privacy policy include, but may not be limited to:
  - A. Whether the privacy policy applies to only a website, app, and/or other online services;
  - B. What types of data (both personal and non-personal) are being collected, is the collected data submitted by the user or collected automatically, and is the collected data merged or stored together with other data types;
  - C. Whether the company uses any third party vendors or service providers to operate the website, app, or service, and how is information shared between, or disclosed to, these parties;
  - D. Whether the website, app, or service allows or causes communications to be sent to users outside the website, app, or service (e.g., email messages, text messages), or includes advertising or causes advertising to be sent to users;
  - E. Whether and how the website, app, or service utilizes any user tracking technology or conducts online behavioral advertising;
2. The only way to ensure that privacy practices are described accurately is to know what personal and non-personal information the company actually collects, and how it is used, shared and protected.
3. Companies should make sure to periodically review and update their privacy policies as needed and make sure that all of their additional representations and consumer-facing materials remain consistent with statements made relating to their privacy practices.
4. Any "material" change to a privacy policy must be accompanied by appropriate notice and choice to consumers.
5. Privacy policies should include the effective date.

### C. Data Security

Implementing and maintaining data security is a never-ending challenge. As cyber-criminals evolve, so must the companies that collect personal and other identifying information. Staying one step ahead of these hackers will help to prevent or at least minimize the risk of experiencing a data breach. Threats to data may transform over time, but the fundamentals of sound security remain constant. This is why companies should consider data security from product development and throughout a product's

life cycle. Assessing data security options and making reasonable choices based on the nature of the business and the sensitivity of the information involved will help to ensure that the data remains protected and secure.

When looking at data security throughout a product's lifecycle, here are a few tips to help ensure that your company's data, and any data it collects and stores, remains secure:

1. Some states have enacted laws requiring businesses to maintain data security standards to protect state residents' personal information from being compromised. These laws typically require businesses to implement and maintain reasonable security measures.
2. Understand what security measures are in place at each point of collection, storage, access, and transfer to ensure that the data is secure throughout its lifecycle. Consider conducting a formal risk assessment to identify threats to, and vulnerabilities, in the information system, the potential impact or magnitude of harm that a loss of confidentiality, integrity, or availability would have, and the security controls that are needed.
3. Maintain extensive computer system security requirements (e.g., secure user authentication protocols or passwords, secure access control measures, monitoring of systems, up-to-date firewalls, and virus or malware protection), and require meaningful password protections.
4. Implement intrusion detection and prevention tools to monitor the network for malicious activity, and have an effective process or policy in place to receive and address security vulnerability reports.
5. Secure all data that is carried over an unsecured or wireless network (e.g., HTTPS).
6. Encrypt all data containing personal, sensitive, or other identifying information. Also ensure that all sensitive information (e.g., Social Security numbers, payment card information) is masked or truncated.
7. Require third-party service providers receiving personal information, by contract, to maintain reasonable security measures.
8. Train employees on compliance with data security policies.
9. Develop and maintain a comprehensive written policy outlining the company's physical, administrative, and technical information security measures.
10. Regularly monitor and review security measures, at least annually, to ensure they are preventing unauthorized access to personal and other information.

## D. Data Breach Notification

The world of information technology has vastly expanded over the past few decades. Consumers entrust personal information to many different types of businesses on a daily basis and expect companies to safeguard their information during collection, use, retention, and disposal. Despite growing awareness of the need for strong data security, however, data breaches continue to occur at an alarming rate.

To date, 47 states and the District of Columbia have enacted legislation requiring private entities to notify individuals of any breach involving personally identifiable information for individuals in their state. Only Alabama, New Mexico, and South Dakota have not enacted state data breach notification laws. While adoption of a preemptive, federal standard has been a goal of many key businesses, and a variety of bills have been introduced, at present the matter is left to state law. This creates significant complexities in terms of breach notification due to differences in the applicable legal requirements.

When a data breach occurs, a company must notify every individual whose personal information was breached. In some states, notification may also be required to state regulators. Notification of a breach is governed by the laws in the state where the individual whose data was breached resides. This means that multiple state laws could apply to the same breach.

Below are some tips to follow to assist the company in responding to a potential data breach.

1. Create a written data breach incident response policy. Companies should review their breach notification policies and response mechanisms, and consider purchasing cyber liability insurance.
2. If the company believes a data breach has occurred, investigate as soon as possible. If a breach is confirmed, the company should take appropriate steps to send consumer notice within a reasonable time period, in accordance with state law.
3. The type of personal information breached is key to determining the specific notification requirements, and which state laws will apply. In all states with data breach notification laws (except D.C.), personal information includes first name/initial and last name plus another personal identifying element (e.g., SSN, driver's license number). Some states have expanded the definition to include additional personal information, such as medical and health insurance information, or biometric data.

4. A smart, organized vendor due diligence and security program can help to mitigate the occurrence and scope of data breaches caused by third parties or service providers that collect or use the data collected by the company.
5. Have agreements in place with service providers requiring them to notify the company in the event a data breach occurs that affects the consumer information collected from the company's website or service.
6. If a data breach has occurred, be sure to review and address the existing vulnerabilities to prevent future occurrences.

## E. E-Mail Marketing

In 2003, Congress enacted the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM Act) to regulate unsolicited commercial e-mail. The Act does not prohibit unsolicited commercial e-mail messages, but it does provide specific requirements for the content of those messages, including a requirement that the messages include an opt-out mechanism.

The Act applies to all commercial e-mail messages, whether they are sent to individual consumers or businesses. A commercial e-mail message is generally a message which has a "primary purpose of . . . commercial advertisement or promotion of a commercial product or service." Specifically, the CAN-SPAM Act imposes the following requirements for commercial messages:

1. **Header Information:** The transmission information of commercial e-mail messages and transactional or relationship messages cannot be false or misleading.
2. **Subject Heading:** The subject heading of a commercial e-mail message cannot be deceptive.
3. **Opt-Out Mechanism:** All commercial e-mail messages must contain clear notice of the recipient's right to opt out of future messages from the sender, and a compliant opt-out mechanism.
4. **Honoring an Opt-Out:** The opt-out must become effective within ten business days and remain valid until the recipient affirmatively opts back into receiving commercial e-mail messages from the sender.
5. **Identification as Advertisement:** The sender must clearly identify that the commercial e-mail message is an advertisement or solicitation.
6. **Address:** The commercial e-mail message must contain the sender's valid physical postal address.

Most of the Act's requirements do not apply to transactional e-mail messages, such as messages that confirm the receipt of an order. If a message includes both commercial and transactional content, the "primary purpose" of the e-mail will dictate what requirements a company must follow.

Consider the following tips when planning an e-mail campaign:

1. Scrub the mailing list against your "do not e-mail" list at the last possible, commercially reasonable moment.
2. Don't require recipients to do anything more than reply to the e-mail or visit a single web page in order to opt out. If you provide a menu of opt-out options, include an option to opt out of all commercial e-mail messages from the business.
3. Don't sell, share, or use your opt-out list for any reason other than to comply with the law.
4. Monitor your company's (or vendor's) compliance with the Act.
5. Have written contracts with third-party service providers, including affiliate marketers, that clearly set out each party's responsibilities for compliance and appropriate and adequate remedies for non-compliance.

## **F. Telemarketing**

At the federal level, the U.S. Federal Communications Commission (FCC) and the FTC share jurisdiction over telemarketing regulation. State attorneys general have the authority to investigate and enforce violations of federal telemarketing law, as well as applicable state-specific telemarketing laws.

The federal Telephone Consumer Protection Act of 1991 (TCPA) and the Telemarketing Sales Rule (TSR) prohibit:

1. Autodialed calls and text messages to cell phones without the appropriate, written consent.
2. Prerecorded message calls to cell phones and landlines without the appropriate, written consent and disclosures.
3. Fax advertisements without the required consent and/or opt-out language.
4. Telemarketing calls to numbers on the National Do Not Call Registry.
5. Telemarketing calls to company-specific do-not-call lists.

As a result, when crafting a campaign, it is important to consider:

1. **Message Type:** Is the message commercial or informational?
2. **Technology Used:** Are you contacting the consumer via phone and/or text, or using an autodialer or prerecorded message?
3. **Target Audience:** Is the consumer a current, former, or prospective customer?
4. **Consent:** Is consent required? If so, is it valid and in writing?
5. **Vendors:** Have you conducted due diligence/monitoring of your third-party service providers?



### III.CONSUMER PRODUCT SAFETY

The Consumer Product Safety Commission (CPSC) imposes safety requirements on a broad range of consumer products. Manufacturers and importers are generally responsible for ensuring that their products meet any mandatory standards, rules, or regulations prior to those products being distributed in commerce. In general, if a company obtains information that reasonably supports the conclusion that a product fails to meet a consumer product safety rule, standard, or ban, contains a defect which could create a substantial product hazard, or creates an unreasonable risk of serious injury or death, the company is required to report that information to the CPSC and may be required to recall the product.

#### A. Premarket Considerations

Before selling a product, it is important to consider the specific hazards that can occur during the normal and reasonably foreseeable use, damage, or abuse of the product. Some hazards may be so significant that the product should not be offered for sale. Other hazards may be addressed by a clear and conspicuous warning.

As a general rule, manufacturers and importers of children's products are required to issue a written Children's Product Certificate (CPC) certifying compliance with all applicable children's product safety rules based upon the passing test results of third party testing. Similarly, manufacturers and importers of certain general use products (i.e., non-children's products) for which consumer product safety rules apply, must certify in a written General Certificate of Conformity (GCC) that their products comply with those applicable rules, based on testing or a reasonable testing program. Periodic testing may also be required to ensure continued product compliance after certification testing.

When considering what product safety standards may apply, consider some of these common requirements:

1. **Drawstrings:** Due to risk of strangulation, the CPSC prohibits drawstrings at the hood and neck area of children's upper outerwear in sizes 2T to 12. In addition, the CPSC drawstring standard places three requirements on drawstrings at the waist and bottom of children's upper outerwear in sizes 2T to 16.
2. **Small Parts:**
  - A. Products intended for children under 3 cannot include small parts.
  - B. For products intended for use by children who are at least 3 but less than 6 that have small parts must have a warning "Choking Hazard – Small parts – Not for children under 3 yrs" prominently displayed on the product packaging.

- C. Any toy or game that requires a cautionary statement about the choking hazard associated with small parts must bear that cautionary statement in the product's advertising, if the advertising provides a direct means to purchase or order the product.
  - D. Additional statements are required on latex balloons (or toys or games that contain a latex balloon), small balls (or toys or games intended for use by children ages 3 to 8 that contain a small ball), and marbles (or toys or games intended for children ages 3 to 8 that contain a marble). E Products that are intended for children under 6 years of age must also comply with the Small Parts Regulations under the Federal Hazardous Substances Act (FHSA).
3. **Sharp Points or Edges:** Products intended for use by children under 8 years of age must not contain sharp points or edges. The CPSC's regulations apply to products with points or edges exposed during intended use or through foreseeable damage or misuse of a product.
- A. These regulations do not apply to toys that by their nature include functional sharp points or edges, such as toy sewing kits or toy scissors, as long as each such toy is conspicuously, legibly, and visibly labeled as having such points or edges. Further, these regulations do not apply to other, non-toy items having functional sharp points, such as ball point pens.
  - B. Toys with functional sharp points or edges should be clearly and conspicuously labeled, e.g., "WARNING: This product has sharp edges that may cut or puncture. Handle with care."
4. **Total Lead Content and Lead in Paint and Other Similar Surface Coatings:** The CPSC enforces two limits related to lead in children's product.
- A. Pursuant to the Consumer Product Safety Information Act (CPSIA), the majority of children's products may not contain more than 100 ppm of total lead content in accessible parts. "Accessible parts" does not include component parts that are not accessible to a child through normal and reasonably foreseeable use and abuse of the product.
  - B. In addition, with a few limited exceptions, all children's products, including toys and some furniture, must not contain a concentration of lead greater than 90 ppm in paint or any similar surface coatings.
5. **Phthalates (Children's Toys and Childcare Articles):** Six types of phthalates are currently banned for use in children's toys and certain child care articles. Phthalates are chemical plasticizers that are often used in the production of many types of plastics, certain inks, paints, and other products.

6. **Electronically- and Battery-Operated Toys and Other Products Intended for Use by Children:** All electronically operated toys and other electronically operated products intended for use by children must meet requirements of the CPSC regulations enforcing the FHSA. For the purposes of these regulations, an electronic toy is one which is intended to be powered by electrical current from nominal 120-volt branch circuits. These regulations do not apply to toys or other products powered by circuits of 30 volts r.m.s. or less, articles used primarily by adults and only incidentally by children, or video games.
7. **Certification (Children's Products):** All children's products must be tested by a CPSC-accredited third-party laboratory for compliance with applicable children's product safety requirements. Testing must occur initially, periodically, and if a material change is made to the product which does or could affect the product's ability to comply with applicable product children's safety requirements. Manufacturers and importers of children's products must then certify, in a written Children's Product Certificate, based on these test results, that their children's products comply with applicable children's product safety requirements.
8. **Flammability:** The Flammable Fabrics Act bans the sale of any fabric that does not conform to flammability standards. Standards have been established for the flammability of clothing textiles, vinyl plastic film (used in clothing), carpets and rugs, children's sleepwear, and mattresses and mattress pads.

## B. Reporting to the CPSC

Once a product has been distributed into commerce, companies have the obligation to report any potential safety concerns to the CPSC, and potentially conduct a recall. A manufacturer, retailer, or distributor of a consumer product must report to the CPSC if it obtains information which reasonably supports the conclusion that such product: (1) fails to comply with an applicable consumer product safety rule or with a voluntary consumer product safety standard; (2) fails to comply with any other rule, regulation, standard, or ban under this chapter or any other Act enforced by the CPSC; (3) contains a defect which could create a substantial product hazard; (4) creates an unreasonable risk of serious injury or death; or (5) involves an incident in which a child (regardless of age) chokes on a marble, small ball, latex balloon, or other small part contained in a toy or game and that, as a result of the incident, the child dies, suffers serious injury, ceases breathing for any length of time, or is treated by a medical professional.

Failure to fully and immediately report this information may lead to substantial civil or criminal penalties. CPSC civil penalties have generally been on the rise, often exceeding \$1 million. To avoid being the subject of a CPSC civil penalty investigation, below are some general tips to keep in mind.

1. Companies should develop a compliance program designed to ensure compliance with all applicable product-safety standards, rules, and regulations; have a system in place to maintain and review all safety-related information received about their products; and have a system of internal controls and procedures to ensure timely and accurate reporting.
2. If a reporting obligation arises, reporting is required “immediately” (*i.e.* within 24 hours of obtaining reportable information). While businesses may conduct a reasonably expeditious investigation in order to evaluate the reportability, the investigation and evaluation should not exceed 10 working days unless the company can demonstrate that a longer time is reasonable in the circumstances.
3. “Defect” could include any fault, flaw, or irregularity in a consumer product that causes weakness, failure, or inadequacy in form or function.
  - A. A defect could be the result of a manufacturing or production error, or may also arise when product is manufactured exactly in accordance with its design and specifications, but the design of the product, or materials used, results in a defect that presents a risk of injury to the public
  - B. The primary limitation to the “defect” requirement is that the defect must create a “substantial product hazard.” The CPSA defines “substantial product hazard” as a product defect that “creates a substantial risk of injury to the public.”
  - C. The CPSC will review the following factors to determine whether a defect is serious enough to create a substantial product hazard: (1) pattern of defect; (2) number of defective products distributed in commerce; (3) severity of risk; and (4) likelihood of injury.
4. In determining whether a product presents an unreasonable risk of serious injury or death, a company should examine the utility of the product, or the utility of the aspect of the product that causes the risk, the level of exposure of consumers to the risk, the nature and severity of the hazard presented, and the likelihood of resulting serious injury or death.
  - A. The CPSC takes a very broad view of the term “serious injury or death” to include any “significant injury.”
  - B. The requirement that notification occur when a responsible party “obtains information which reasonably supports the conclusion that” its product creates an unreasonable risk of serious injury or death is intended to require companies to report even when no final determination of the risk is possible.



# PRACTICE POINTERS

## ADVERTISING AND MARKETING

### A. SUBSTANTIATION

Each claim, whether express or implied, must be supported by a reasonable basis.

- Adequate substantiation depends on the type of claim being made.
- Subjective claims are generally far less of a concern than objective claims in terms of substantiation.

### B. HEALTH BENEFIT CLAIMS

- Health benefit claims must be substantiated with competent and reliable scientific evidence.
- Consider whether it is necessary to conduct a clinical trial or other study to support the claim.

### C. COMPARATIVE ADVERTISING

- Comparisons must be accurate.
- Disclose the basis for comparisons to other products or prices.
- Reference price claims, such as “dollars off” offers, must be based on prices at which products or services have been offered and sold.

### D. MATERIALITY AND CLEAR AND CONSPICUOUS DISCLOSURES

- Disclosures must be easily noticed and understood by the consumer.

- Qualifying information must be proximate to the claim that it qualifies and be “unavoidable.”
- Online disclosures should be unavoidable and optimized for cross-platform compatibility.

### E. SWEEPSTAKES AND CONTESTS

- Ensure any contest, sweepstakes, or promotion complies with all applicable state laws.
- Disclose all material terms and conditions of the promotion.
- Determine whether the promotion triggers any related laws, such as COPPA.

### F. ENDORSEMENTS AND TESTIMONIALS

- Endorsements and testimonials must be substantiated and not misleading.
- Always obtain a written release for all endorsements and testimonials.
- Consumer endorsements must be typical or must clearly disclose that the results are not typical and may vary depending on relevant circumstances.
- Expert endorsement must be based on independent evaluation.
- Organizational endorsements must be based on collective judgment and experience.
- Endorsers must disclose material connections to the company.

## **G. WARRANTIES AND GUARANTEES**

- Advertisements discussing warranties must state where the entire warranty can be seen before purchase.
- All material conditions to a warranty, guarantee, or rebate must be prominently disclosed prior to purchase.

## **H. ENVIRONMENTAL MARKETING**

- Qualify all environmental benefit claims to avoid consumer deception.
- All environmental benefit claims must be substantiated.
- Look to the FTC's Green Guides for guidance on specific claims.

## **I. PRICING AND TIMING**

- The term "free" should never be used in a misleading manner.
- Regular prices cannot be altered to recapture any portion of the costs of free items.
- "Free" offers that introduce new products/services should be time-limited and unbundled for a fair amount of time after termination.

## **J. TEXTILE, WOOL, FUR, AND CARE LABELING RULES**

- Specific information must be provided in the labeling for textiles, wool, and fur products.

# **PRIVACY AND DATA SECURITY**

## **A. PRIVACY PRACTICES**

- Consider privacy at the outset of product development.
- Know what data is being collected from consumers.
- Understand who will have access to this information and their purpose for accessing the data.

## **B. PRIVACY POLICY**

- Know what personal and other information is collected, stored, transferred, or otherwise used.
- Privacy policies should be reviewed and updated regularly to ensure that the privacy practices are current.
- Consumers must be notified of any material change to a privacy policy.

## **C. DATA SECURITY**

- Consider data security from product inception and throughout the product life cycle.
- Implement reasonable data security measures for data both in transit and at rest.
- Require third-party service providers receiving personal information to maintain reasonable security measures.

## **D. DATA BREACH NOTIFICATION**

- Have a written data breach response policy in place, before a breach occurs.
- Investigate a data breach as soon as there is any indication that a breach has occurred.

## **E. E-MAIL MARKETING**

- Make sure commercial e-mail messages contain a compliant opt-out mechanism, and that you honor and monitor the effectiveness of that opt out.
- Contractually obligate vendors to comply with the CAN-SPAM Act, and actively monitor their compliance.

## **F. TELEMARKETING**

- Consider whether consent is required and, if so, if it is valid and in writing.
- Monitor your third-party service providers.

# **CONSUMER PRODUCT SAFETY**

## **A. GENERAL PREMARKET CONSIDERATIONS**

- The CPSC imposes safety requirements on a broad range of consumer products.
- Make sure to consider reasonably foreseeable harms that a product might cause, test for product safety if necessary, and disclose material hazards with a clear and conspicuous warning.

## **B. CHILDREN'S PRODUCTS**

- Use of drawstrings are prohibited in the hood and neck area of children's upper outerwear in sizes 2T to 12.
- There are restrictions on the use of small parts in children's products up to the age of six, including prohibiting the use of small parts in products intended for children under three, and requiring certain cautionary statements.
- Products intended for use by children under eight must not contain any sharp points or edges.
- Lead and phthalate restrictions also apply to certain children's products.
- All children's products must be tested by a CPSC-accredited third-party laboratory and certified by the manufacturer or importer for compliance with applicable children's product safety requirements.

## **C. OTHER PRODUCTS**

- Clothing textiles, vinyl plastic film (used in clothing), carpets and rugs, children's sleepwear, and mattresses and mattress pads must conform to flammability requirements.

## **D. REPORTING OBLIGATIONS**

- Report to the CPSC if the company obtains information that reasonably supports the conclusion that a product fails to meet a consumer product safety rule, standard, or ban, contains a defect which could create a substantial product hazard, or creates an unreasonable risk of serious injury or death.



## WHO WE ARE

### Advertising and Marketing Practice

Kelley Drye's Advertising and Marketing practice has a national reputation for excellence. No other firm can match our record in advertising litigation and NAD proceedings, our substantive expertise in the area of advertising, promotions marketing and privacy law, and our experience at the FTC, the offices of state Attorneys General, the NAD, and the broadcast networks. Kelley Drye has successful, longstanding relationships with clients in a broad range of industries, from communications and technology, to manufacturing and marketing. Our advertising attorneys practice exclusively in this area of law, which provides you with comprehensive legal support as well as greater efficiency for the breadth of your advertising-related legal matters. Whether you seek to substantiate your advertising claims, execute preventative marketing strategies, or challenge your competitor's claims, our lawyers know where to begin and how to finish on top.

Our Advertising and Marketing practice is highly respected in the field, ranked by U.S. News/Best Lawyers in Tier 1 – National for Advertising Law. Chambers USA 2014 ranks Kelley Drye in the National Advertising Litigation and Transactional & Regulatory categories, recognizing the firm's prominent billing in the advertising sector with impressive coast-to-coast coverage. Chambers heard from one client, "They have a robust practice. They are one of the stellar firms in this space." In addition, US Legal 500 recognizes this practice, which they observe is "particularly well regarded for its regulatory prowess, with core strength in FTC matters and proceedings before NAD and NARB." Our attorneys are frequently given individual accolades. For example, five of the last six years *Best Lawyers* named a Kelley Drye attorney the Washington, D.C. Advertising "Lawyer of the Year."

We serve an extensive client base, which includes wireless carriers, telecommunication companies, media companies, Internet service providers, consultants, major retailers and direct marketers, as well as manufacturers of computers, dietary supplements, fast food, engine oils, paint, home appliances, sporting goods and other consumer products.

### Privacy and Information Security Practice

Privacy issues are a major focus of Congress, government agencies, state Attorneys General, the media, industry and consumers. The rules are changing rapidly – from looming comprehensive federal legislation; to a patchwork of federal and state laws, regulations and guidance; to expanding industry association requirements and guidelines. Kelley Drye is at the forefront of this evolving area of law. We counsel clients on privacy and security laws governing the collection, use and protection of

personal information, and on managing risks and reducing exposure to investigations and litigation arising from how companies handle personal data. We have a national reputation for providing high quality legal services and practical, efficient and timely advice on a broad range of privacy and data security issues. Our team includes several former FTC officials and a deep bench of consumer protection law specialists, which uniquely positions us to guide our clients through all aspects involved in privacy and data security matters.

Kelley Drye's Privacy and Information Security practice group helps clients achieve their business goals and a competitive edge while balancing the risks of maintaining customer and employee data. Our attorneys assist clients in designing and updating marketing programs; perform privacy and/or data security compliance and strategic planning and business reviews, including data mapping; draft and amend information security policies and programs; prevent and optimally resolve data breaches; design oversight and monitoring programs for third party handling of customer and employee data; develop and provide privacy training, and represent clients in connection with FTC and state Attorney General investigations and class action litigation. We serve clients in all types of highly-scrutinized industries, including mobile services and technology, consumer products and retail, hotel and leisure, financial services, and telecommunications, and broadband.

Kelley Drye's Privacy and Information Security practice group includes recognized leaders in the field, including two former directors of the FTC's Bureau of Consumer Protection, an Assistant Director, and attorney advisors. While at the FTC, members of our group directed the implementation and enforcement of COPPA and the Gramm-Leach Bliley Act (GLBA), and targeted Internet privacy, identity theft, and electronic commerce consumer protection issues. Our group also includes the past chair and current vice chair of the American Bar Association's Privacy and Information Security Committee, former editor-in-chief of the ABA's Data Security Handbook and The Secure Times newsletter, the co-chairs of the ABA Consumer Protection Law Developments treatise, and co-chair of the Federal Communications Bar Association's Privacy and Data Security Committee.

The firm's Privacy and Information Security practice is internationally recognized in Chambers Global, is nationally ranked in Chambers USA and U.S. Legal 500, and was named one of the top five privacy advisers among law firms and consulting firms around the world in a survey published by Computerworld magazine. Notably, sources tell Chambers researchers that the group "prioritizes risk to provide practical, thoughtful advice in a timely manner."

## CONSUMER PRODUCT SAFETY PRACTICE

With the complexity of today's product safety regulatory environment and the drastic increase in civil penalty amounts for failure to report safety hazards, it is more important than ever for manufacturers and retailers to retain experienced legal counsel in this area. Lawyers in Kelley Drye's Consumer Product Safety practice have a long, successful history of helping companies identify and resolve potential liability issues confidentially before they escalate and have the potential to draw scrutiny from regulators and negative publicity.

The group regularly advises clients on internal compliance programs and the difficult issues of how and when potentially hazardous consumer products must be reported to the CPSC. In the event that a manufacturer is faced with a product recall, Kelley Drye collaborates with our client and CPSC staff to develop and implement cost-effective communications programs to satisfy product liability concerns quickly while minimizing potential penalties. If the CPSC threatens to or brings enforcement actions, clients count on Kelley Drye to provide appropriate strategies that protect corporate interests and preserve business momentum.

Kelley Drye's Consumer Product Safety group represents a broad spectrum of manufacturers, distributors, and retailers of consumer products, including electronics, fire and security systems, outdoor power equipment, children's and nursery products, and clothing.

## FOOD AND DRUG LAW PRACTICE

Kelley Drye's food and drug team is experienced in the full spectrum of regulatory and legal risk management issues that food and drug companies must navigate to comply with Food and Drug Administration (FDA) and U.S. Department of Agriculture (USDA) requirements, and be successful in the U.S. marketplace. We are skilled at counseling companies throughout product development and marketing, including all premarket clearance requirements for product safety, labeling, advertising and other marketing promotions. We regularly represent companies in food and drug law matters concerning product manufacturing, distribution, supply chain management and import/export requirements. In addition, our food and drug team represents companies in matters concerning defective products in the U.S. marketplace, including postmarket adverse event reporting obligations, recalls, investigations, warning letters and adverse publicity. We also defend companies when the safety, labeling or marketing of their products is challenged in cases brought by the government, competitors, or on behalf of consumers.

### For More Information

Visit our website: [www.kelleydrye.com](http://www.kelleydrye.com) Visit the Ad Law Access Blog: [www.adlawaccess.com](http://www.adlawaccess.com)

## ADVERTISING AND MARKETING PRACTICE GROUP

### Our Team

Below is an overview of Kelley Drye's attorneys with advertising and marketing law expertise. For complete bios, please visit [www.kelleydrye.com](http://www.kelleydrye.com).



#### **Christie Grymes Thompson**

Partner and Chair of the Advertising and Marketing Law Practice Group

202.342.8633

Christie Grymes Thompson is Chair of the firm's Advertising and Marketing Law practice and has an expertise in consumer protection matters, including advertising, product safety, competitor challenges, and promotions. She counsels clients on all aspects of regulatory compliance, with a focus on statutes and regulations enforced by the FTC, CPSC, and state Attorneys General. She also advises clients to ensure that products on the market meet applicable safety standards, including complying with statutes and regulations enforced by the Consumer Product Safety Commission. Ms. Thompson is past chair of the ABA Antitrust Section, Consumer Protection Committee.



#### **August T. Horvath**

Partner

212.808.7528

With a focus on advertising and competition matters, August Horvath represents clients in private false advertising and deceptive practices litigation before the FTC's Consumer Protection Bureau and the National Advertising Division of the Council of Better Business Bureaus, and in courts around the country. He provides legal counsel to assist clients with establishing marketing programs that comply with advertising rules and regulations from the outset of their marketing plan development. His graduate training and hands-on experience in survey research and statistical analysis have enhanced his skills in developing substantiation protocols, designing and assessing research into the implied meaning of advertising claims and working with and against expert witnesses. Mr. Horvath is co-editor of the ABA's Consumer Protection Law Developments treatise and is a council member to the ABA Section of Antitrust Law.



#### **Alysa Zeltzer Hutnik**

Partner

202.342.8603

Alysa Z. Hutnik is a leader in cutting-edge privacy, data security, and related consumer protection issues, from marketing practices to billing compliance. She represents companies before the FTC, the CFPB, and state Attorneys General in such matters with a strong record of

success. Alysa also regularly counsels companies with prompt, practical advice, with a particular emphasis on mobile and emerging technologies. She is the past Chair of the ABA's Privacy and Information Security Committee, co-author of the Section's Data Security Handbook and Consumer Protection Conference, and a frequent speaker and author on the above issues.



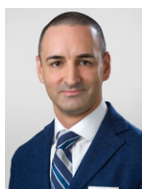
**William C. MacLeod**

Partner

202.342.8811 Washington, D.C.

312.857.7070 Chicago

Bill MacLeod has more than 30 years of experience representing clients in advertising challenges before the FTC, NAD, and courts under the Lanham Act. Mr. MacLeod's practice focuses on advertising and marketing law, with additional expertise in privacy issues and advertising to children. Prior to joining Kelley Drye, he was director, Bureau of Consumer Protection, Federal Trade Commission; advisor to the assistant attorney general, Antitrust Division, U.S. Department of Justice; director, Chicago Regional Office, Federal Trade Commission; and attorney advisor to the chairman, Federal Trade Commission. Mr. MacLeod was named the Best Lawyers 2013 D.C. Advertising "Lawyer of the Year."



**Gonzalo E. Mon**

Partner

202.342.8576

Named 2012 D.C. Advertising "Lawyer of the Year" by Best Lawyers, Gonzalo Mon counsels clients on designing advertising campaigns and promotions in a manner that achieves their business goals while complying with federal and state consumer protection laws. He reviews ads in television, print, Internet and other media and represents clients in both challenging and defending advertisements. As companies have begun to use new technologies to promote their brands, Mr. Mon has helped his clients identify and deal with issues raised by these technologies.



**Lewis Rose**

Partner

202.342.8821

Lew Rose focuses his practice on consumer protection, advertising and consumer product safety law, representing clients before federal and state law enforcement agencies, and self-regulatory bodies such as the National Advertising Division. He handles high-profile investigations by the FTC, particularly enforcement actions involving substantiation of advertising claims and compliance with trade regulation rules. He represents clients across product categories in many state Attorney General proceedings. He is currently Kelley Drye's managing partner. Previously, he was an attorney with the FTC, an Assistant to the Director of the Bureau of Consumer Protection and attorney advisor to an FTC Commissioner.



### **Sarah Roller**

Partner

202.342.8582

Sarah Roller, J.D., R.D., M.P.H., is Chair of the Food and Drug Law practice and a partner in the Advertising and Marketing Law group.

She represents U.S. and global companies engaged in the development, manufacture, and marketing of foods, beverages, dietary supplements, cosmetics and consumer health products. She develops regulatory compliance and legal risk management strategies that enable companies to minimize liability relating to product safety, labeling, and marketing practices. She represents companies in enforcement actions brought by U.S. Food and Drug Administration, Federal Trade Commission, other agencies, and in lawsuits involving product safety, labeling, or marketing.



### **Dana B. Rosenfeld**

Partner

202.342.8588

Dana Rosenfeld's practice focuses on all facets of privacy and data security, advertising and consumer financial protection issues at the federal and state level. Her work includes representation of financial services institutions and their service providers, major retailers, direct marketers, consumer product manufacturers and technology and telecommunications companies. Many of her matters focus in particular on emerging technologies, including mobile and "Big Data"-related services. She frequently represents clients before the FTC, the Consumer Financial Protection Bureau (CFPB) and state Attorneys General. Ms. Rosenfeld is chair of the firm's Privacy and Information Security Practice.



### **John E. Villafranco**

Partner

202.342.8423

A leading practitioner in advertising law, John Villafranco provides litigation, regulatory support, and counseling services to corporations involved in advertising and marketing. Mr. Villafranco has a premier practice representing clients in Lanham Act litigation and proceedings before the National Advertising Division and the National Advertising Review Board. He is the current chair of the ABA Antitrust Section's Advertising Disputes & Litigation Committee, and past chair of the Section's Consumer Protection Committee and Consumer Protection Conference. He served as Editor-in-Chief of the treatise Consumer Protection Law Developments.

**Kristi L. Wolff**

Partner

202.342.8805

Kristi Wolff concentrates her practice on advertising, promotions, and food and drug law matters. Having served as in-house counsel in the healthcare and food products industries, Ms. Wolff has a deep understanding of the client's perspective. Ms. Wolff's advertising and marketing law expertise includes counseling clients on the marketing and sale of retail food, medical food, weight loss and medical device products to consumers and health care professionals through a variety of channels.

**Jennifer Fried**

Special Counsel

202.719.6022

Jennifer Fried's practice focuses on advertising and consumer protection law. Ms. Fried, formerly the Assistant Director of the National Advertising Division (NAD)—the advertising industry's self-regulatory forum—helps marketers navigate the regulatory, self-regulatory, and competitive concerns faced by advertisers. She draws on her experience as a long-time self-regulatory insider as she counsels advertisers on matters involving claim substantiation and dispute resolution in both traditional and new media.

**Christopher M. Loeffler**

Special Counsel

202.342.8429

Christopher Loeffler has a transactional and regulatory practice focused on advertising, licensing, new media, sponsorships, e-commerce, promotions, data security, privacy and other consumer protection issues. He helps clients anticipate and address legal issues through the complete process of designing and implementing marketing strategies. At the outset of advertising campaigns, he regularly participates in the negotiation and drafting of marketing, sponsorship, endorsement and promotion agreements for advertisers and agencies. In the growing area of new media marketing, Mr. Loeffler drafts privacy policies, social/new media policies and website/application terms of use. He advises clients on developing and implementing social media platforms and programs, as well mobile apps and games that comply with consumer protection and privacy laws.

**Katie Bond**

Senior Associate

202.342.8537

Katie Bond provides regulatory counseling and litigation support regarding matters involving the Federal Trade Commission (FTC) and Food and Drug Administration (FDA) to marketers of a variety of consumer products, including dietary supplements, foods, weight loss products,

cosmetics and sports equipment. Ms. Bond reviews product labeling and advertising regularly to determine compliance with federal regulations, and as needed, she assists clients in identifying and working with well-credentialed, independent scientific experts to ensure that claims are properly substantiated.



**Elisa A. Nemiroff**

Senior Associate

202.342.8461

Elisa Nemiroff counsels clients on all aspects of regulatory compliance pertaining to advertising, food and drug, and privacy law. She provides advice to a wide variety of companies, including manufacturers of foods and dietary supplements, a leading company in the quick service restaurant industry, direct marketers, retailers, Internet service providers and other consumer products companies. Ms. Nemiroff works cooperatively with clients' legal and marketing teams to evaluate both legal and business considerations for domestic and international advertising campaigns.



**Sharon Kim Schiavetti**

Senior Associate

202.342.8592

Sherrie Schiavetti's practice includes litigation and counseling on advertising law and consumer protection matters. She represents clients in false and deceptive advertising litigation in federal court and before the National Advertising Division of the Council of Better Business Bureaus. She defends clients in regulatory investigations initiated by the Federal Trade Commission, the Consumer Financial Protection Bureau, and the Consumer Product Safety Commission. Ms. Schiavetti also counsels clients on compliance with consumer protection laws in the areas of privacy and data security, advertising substantiation, financial products and services, and product safety.



**S. Spencer Elg**

Associate

202.342.8466

A former litigation attorney for the Federal Trade Commission, Spencer. Elg focuses his practice on helping clients navigate consumer protection and advertising laws. He counsels clients on a broad range of regulatory issues, including advertising and marketing, consumer finance, debt collection, privacy and data security, and TCPA compliance. He represents clients before state and federal agencies such as the Federal Trade Commission, the Consumer Protection Financial Bureau, and state attorneys general, and non-governmental bodies including the National Advertising Division of the Council of Better Business Bureaus. During his time at the FTC, Mr. Elg led investigations and brought lawsuits to enforce consumer protection laws.





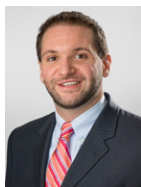
### **Ilunga Kalala**

Associate

202.342.8534

Ilunga Kalala's practice focuses on advertising and marketing, privacy and information security, and other consumer protection law matters.

Mr. Kalala is a Certified Information Privacy Professional for the United States (CIPP/US) by the International Association of Privacy Professionals (IAPP). Prior to joining Kelley Drye, Mr. Kalala worked at the Department of Health and Human Services, Office for Civil Rights and at the Federal Trade Commission, Office of International Affairs.



### **Donnelly L. McDowell**

Associate

202.342.8645

Donnelly McDowell's practice focuses on advertising and marketing, food and drug law, and consumer financial protection matters. Mr.

McDowell advises clients on compliance with relevant federal and state laws in these areas and assists in the development of risk minimization strategies to avoid litigation and regulatory action. He has experience representing clients in a variety of regulatory and litigation matters, including class action defense, investigations initiated by the Food and Drug Administration (FDA), the Federal Trade Commission (FTC), the Consumer Financial Protection Bureau (CFPB), and state Attorneys General.



### **Crystal N. Skelton**

Associate

310.712.6467

Crystal Skelton practices in the areas of advertising and marketing, privacy and data security, and consumer product safety. She counsels clients on all aspects of regulatory compliance, with a focus on

statutes and regulations enforced by the FTC, CPSC and state Attorneys General. Ms. Skelton advises national advertisers and consumer products manufacturers on a wide variety of privacy, data security, and other consumer protection matters, including compliance with laws and regulations governing children's privacy, marketing to children, mobile apps, commercial email messages, online behavioral advertising, contests and sweepstakes, endorsements and testimonials, data breach notification, and cybersecurity.



### **Katherine Riley Townley**

Associate

202.342.8557

Katie Townley's practice focuses on advertising and marketing, privacy and information security, product safety, and other consumer protection law matters. She drafts privacy policies to address current and future information collection and use and advises clients on compliance with federal and state privacy and data security laws. She also assists clients with the development and implementation of social media platforms and programs, as well mobile apps and games that comply with consumer protection and privacy laws. Ms. Townley also reviews advertisements and marketing materials for all media to determine compliance with relevant laws and ensure that claims are properly substantiated, and assists clients in the development and structuring of national and international promotions, including by drafting official rules and prize provider agreements and reviewing ad copy. She also has particular experience regarding compliance with the FTC's apparel labeling requirements.



### **Devon E. Winkles**

Associate

202.342.8634

Devon Winkles represents clients in a variety of matters relating to advertising and marketing, food and drug law, and consumer protection. Ms. Winkles' experience includes advising clients on product names, labeling and packaging, and advertising claim substantiation. She has also worked with clients' legal, marketing, and research and development teams to develop advertising claims for new products and products under consideration, and to comply with new regulatory requirements. She regularly applies U.S. Food and Drug Administration, Federal Trade Commission, and National Advertising Division standards and guidance to assess risks and opportunities for her clients. Ms. Winkles aims to deeply understand her clients' products and industries in order to provide creative, practical solutions.



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