

BEAUTY INDUSTRY WEST

2024 Key Regulatory Update

MoCRA, Consumer Data, and Sustainability Issues Confronting the Cosmetics Industry

Ronie M. Schmelz
Avril G. Love
March 12, 2024

Disclaimers!!!

- This presentation and the material included herein are provided for general educational purposes only.
- This presentation supports an oral briefing and should not be relied upon solely on its own to support any conclusions of law or fact.
- This presentation presents only a **subset of U.S. laws** and regulations that may be applicable to the manufacturing, processing, advertisement, and sale of cosmetic products. Time does not permit an exhaustive presentation of all applicable laws, and this presentation should not be construed as comprehensive in scope.
- ***Regulations Change! Laws Change!*** Consult us before reaching any conclusions about the legality of conduct you're about to engage in!

What We'll Cover

MoCRA Updates

- Key deadlines
- Overview of responsibilities and key tasks

Emerging Contaminants

- State ingredient bans and reporting rules
- Prop 65 updates
- Benzene testing

Consumer Data Concerns

- Social media, influencers, and the FTC
- Consumer privacy issues
- Marketing with AI, tracking tools, analytics

Sustainability Issues

- Sustainability Claims
- Packaging Issues

MoCRA Updates

01 Key Deadlines

02 Overview of Firm Responsibilities

03 Priority Tasks

Key Deadlines for MoCRA Compliance

Safety Substantiation	December 29, 2023
Adverse Event Tracking and Reporting	December 29, 2023
Record Retention	December 29, 2023
FDA Records Access and Recall Authority	December 29, 2023
Labeling of Professional Use Products	December 29, 2023
Facility Registration and Product Listing	July 1, 2024
Labeling for Adverse Event Contact	December 29, 2024

Key Deadlines for MoCRA Compliance

Proposed Rule for Standard Talc Testing	This spring
Proposed Rule: Fragrance Allergens List	June 29, 2024
Proposed Rule for GMP Compliance	December 29, 2024
Final Rule for GMP Compliance	December 29, 2025
PFAS Safety Assessment Summary	December 29, 2025

Key Responsibilities For Firms



Contract Manufacturer

Facility registration
US Agent for Foreign Facilities
GMP adherence
Record keeping
FDA inspections



Brands

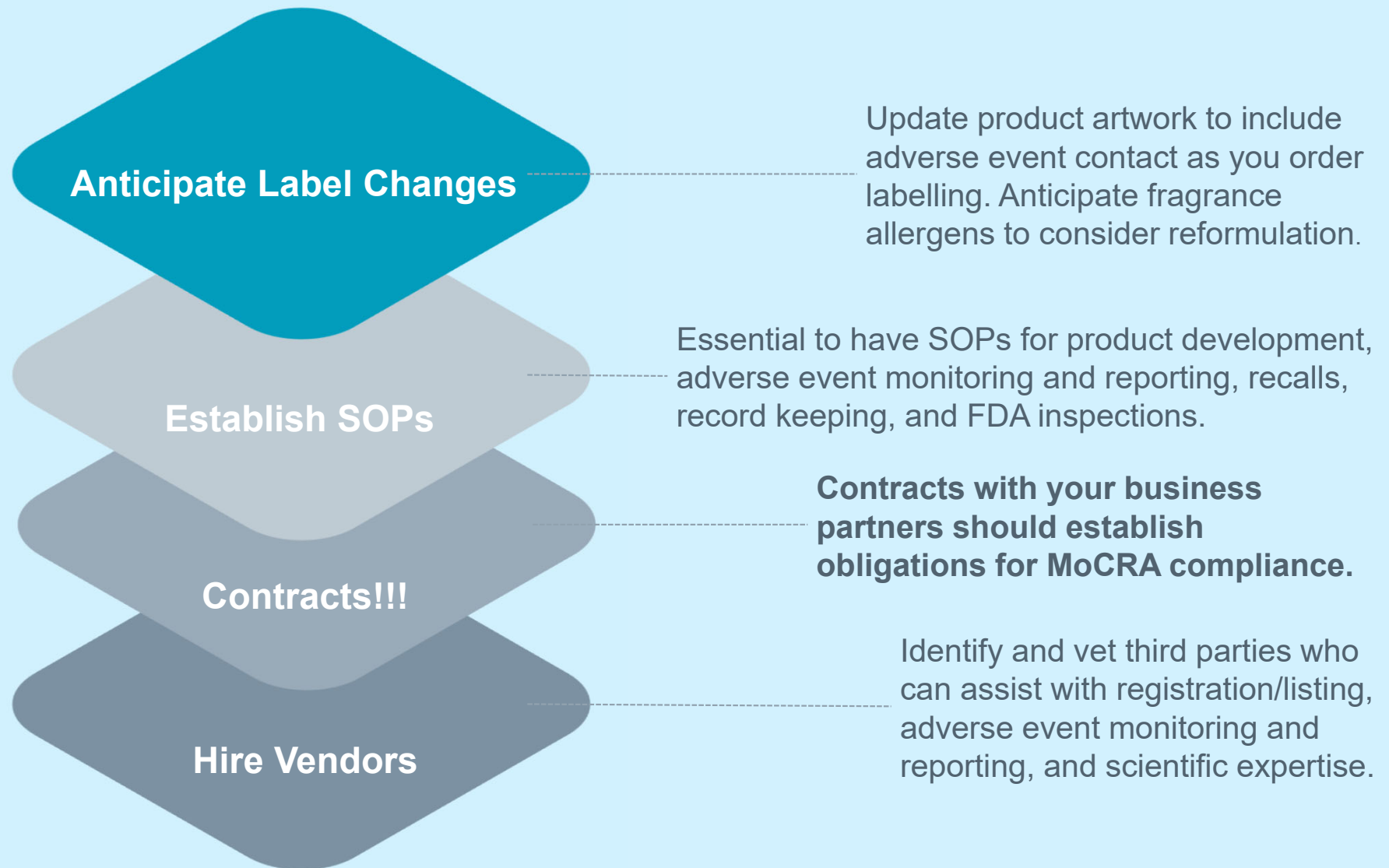
Product listing
Safety substantiation
AE tracking / records
SAE reporting
Label changes
FDA records access and recalls
Fragrance allergen disclosure



Ingredient Suppliers

Be prepared to provide:
Safety analyses on ingredients
Disclosure of fragrance allergens
Testing for asbestos in talc
Toxicological assessment of PFAS

Priority Tasks for MoCRA Compliance



Emerging Contaminants

01 State Ingredient Bans and Reporting Rules

02 Prop 65 Updates

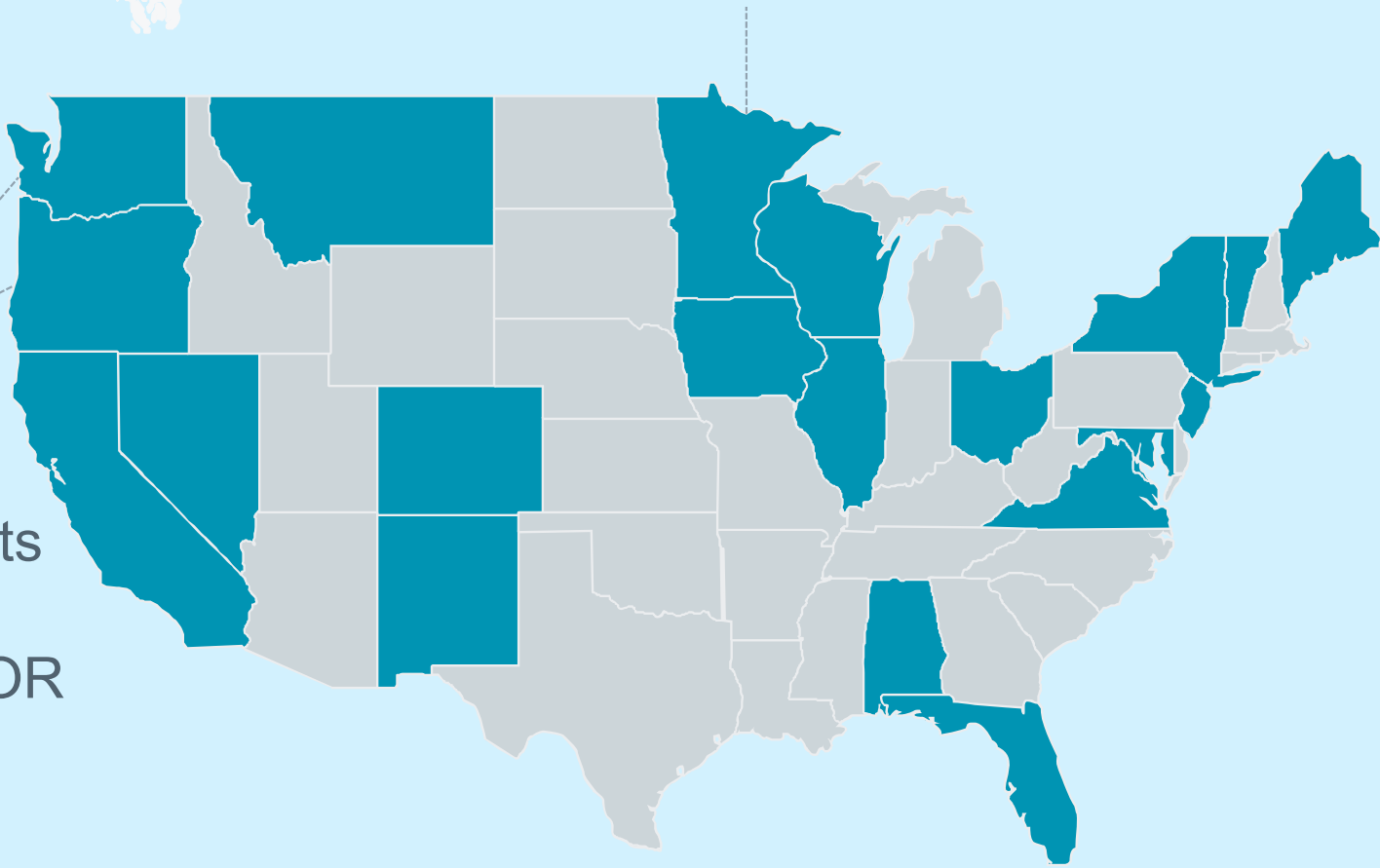
03 California Air Resources Board VOC Limit Changes

03 Recent Benzene Testing

State Ingredient Limits and Reporting Rules

MN: Amara's Law bans nonessential PFAS

OR and WA: Toxic Free Cosmetics Acts ban multiple compounds; OR law requires reporting



Common Ingredient Bans

- Phthalates – Ortho-phthalates, Dibutyl Phthalate, Diethylhexyl Phthalate
- Forever chemicals – Perfluoroalkyl and Polyfluoroalkyl substances (PFAs)
- Formaldehyde and formaldehyde releasing agents; Paraformaldehyde
- Methylene glycol
- Mercury and mercury compounds
- M-Phenylenediamine, o-Phenylenediamine and their salts
- Triclosan
- Isobutylparaben, Isopropylparaben

Prop 65 Updates

- 2023: **4,138 notices** filed with CA Attorney General – the highest number since Prop 65 was enacted.
- Top targeted product categories:
 - Food and dietary supplements
 - Personal care products and sanitizers
 - Tote bags and luggage
 - Gasoline
- Many updates to listed chemicals

Prop 65 Litigation

- Nat'l Assoc. of Wheat Growers v. Bonta
 - Challenged glyphosate (herbicide) listing based on 1st Amendment
 - 9th Circuit affirmed finding against CA, holding that glyphosate listing was unconstitutional
 - “the overall message that glyphosate is unsafe...is, at best, disputed...” and forced “plaintiffs to convey a controversial, fiercely contested message that they fundamentally disagree with.”
- PCPC v. Bonta
 - Challenging titanium dioxide listing based on 1st Amendment
 - Pending in CA federal court (ED CA)

California Air Resources Board VOC Limits

- Agency oversees all air pollution control efforts in California
- Goals: reduce volatile organic compounds (VOCs) emissions, toxic air contaminants, and greenhouse gases from consumer products to reduce smog, fight climate change, protect public health
- CARB regulations limit substances contributing to air pollution in cosmetic products; limitations set per product category
- Enforced through administrative actions, in which CARB is authorized to seek per unit civil penalties of up to \$1,000/day for strict liability violations and up to \$25,000/day for negligent violations
 - Hair Finishing Spray/Hair Shine/Temporary Hair Color
 - No Rinse Dry Shampoo

Recent Benzene Testing by Valisure

Cancer-causing chemical can form at 'unacceptably high levels' in certain acne products, independent lab claims



Consumer Data

01 Social Media, Influencers, and Consumer Reviews

02 Consumer Privacy Rights

03 Marketing With AI, Tracking Tools, and Biometric

FTC Regulatory Oversight

Endorsement Guides: Updated guides combat:

- fake and manipulated online reviews
 - Disclosures must be “**unavoidable**” and appear in same format as triggering claim (visual, audible).
- undisclosed material connections between endorser and company, including:
 - provision of free products unrelated to endorsed product
 - early access to products
 - possibility of winning a prize



FTC Regulatory Oversight

[Proposed] Rule on the Use of Consumer Reviews and Testimonials

Would **prohibit**:

- Selling or obtaining fake consumer reviews/testimonials
- Review hijacking
- Buying positive/negative reviews
- Insider reviews/consumer testimonials
- Company controlled review website
- Illegal review suppression
- Selling fake social media indicators



Other Social Media and Marketing Pitfalls

- **Intellectual Property Rights**
 - Social posts on TikTok, IG, and other platforms should not violate intellectual property rights with use of music or images
- **Email and SMS marketing**
 - Laws governing unsolicited emails and text messages
- **Required Consumer Disclosures and Choice**
 - Auto-renewal laws govern subscription services; FTC enforcement against dark patterns

FTC Regulatory Oversight

Dark Patterns: defined by FTC as design practices that **trick or manipulate users** into making choices they would not otherwise have made and that may cause harm.



FTC v. Amazon: Sued for dark patterns

- “Visual imbalance” between links to enroll in or decline Prime
- “Confirmshaming” to guilt users into selecting Amazon’s favored option
- “The *Iliad* Flow,” a labyrinthine cancellation process mimicking Homer’s epic about the long, arduous Trojan War



FTC Resources

.com Disclosures: How to Make Effective Disclosures in Digital Advertising

<https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf>

Complying with Made in USA Standard

<https://www.ftc.gov/system/files/documents/plain-language/bus03-complying-made-usa-standard.pdf>

Disclosures 101 for Social Media Influencers

https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf

Guides Concerning the Use of Endorsements and Testimonials in Advertising

<https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf>

Featuring Online Customer Reviews: A Guide for Platforms

https://www.ftc.gov/system/files/documents/plain-language/1006a_featuring-online-customer-reviews-508_0.pdf

Soliciting and Paying for Online Reviews: A Guide for Marketers

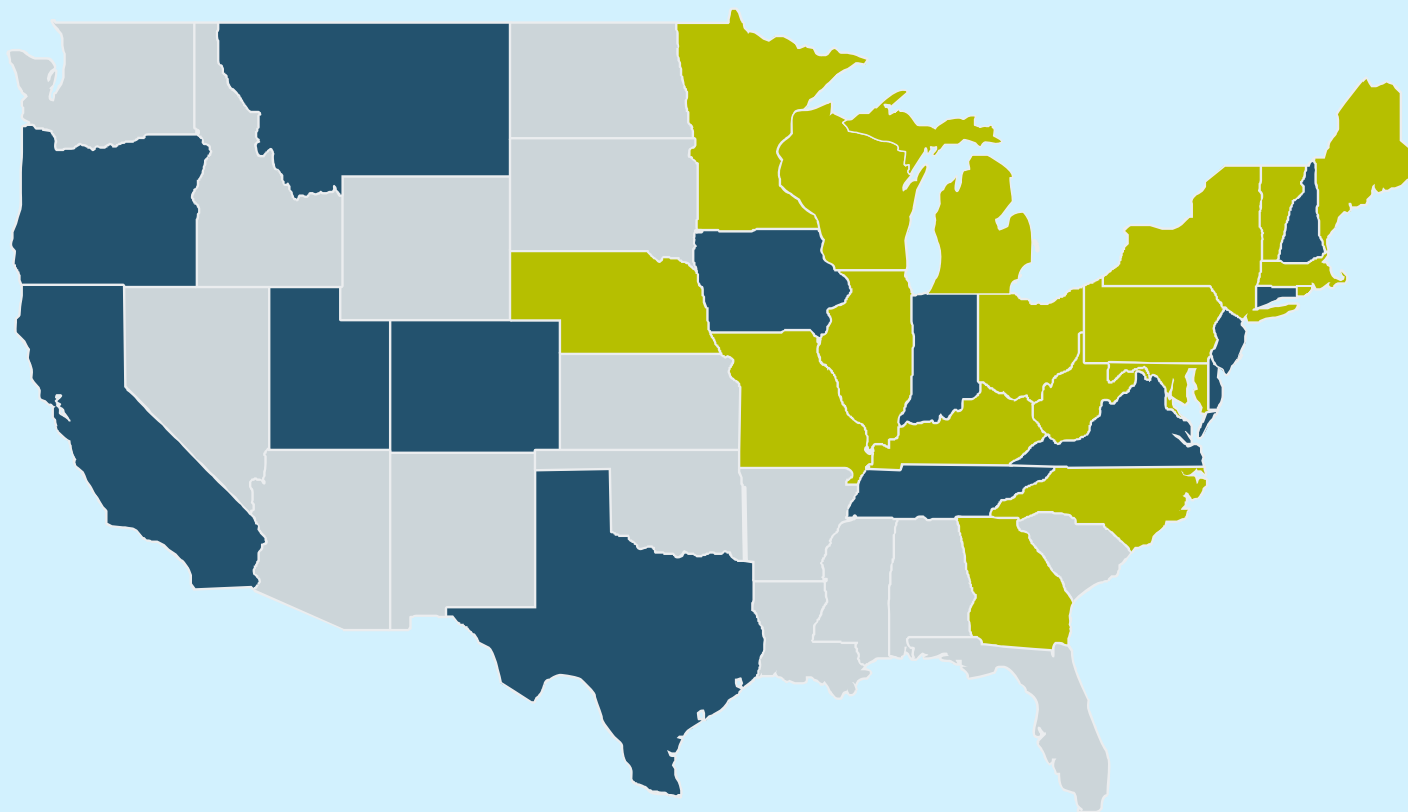
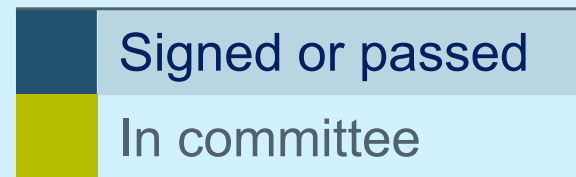
https://www.ftc.gov/system/files/documents/plain-language/1007a_soliciting-and-paying-for-online-reviews-508_0.pdf

FTC Endorsement Guides: What People Are Asking

<https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking>

Comprehensive Consumer Privacy Laws

As of March 2024:



Consumer Privacy Rights

Right to Know



Access your personal data

Right to Correct



Correct your personal data

Right to Delete



Delete your personal data

Right to Opt Out



Of sale, profiling, or advertising

Right to Limit Use of Sensitive Information



Genetic, biometric, financial, health, demographic, etc.

Kids' Right to Opt In



Stronger rights for kids' data

Right to Equal Treatment



Nondiscrimination based on privacy choices

Right to Notice

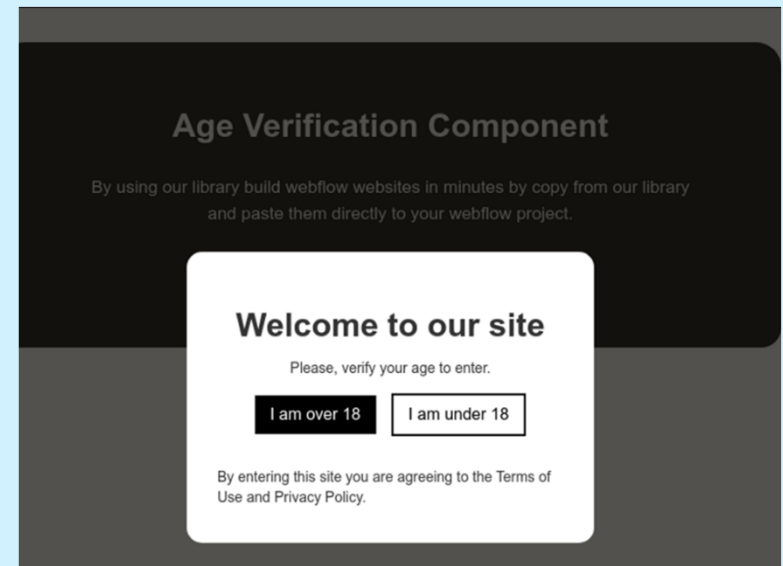
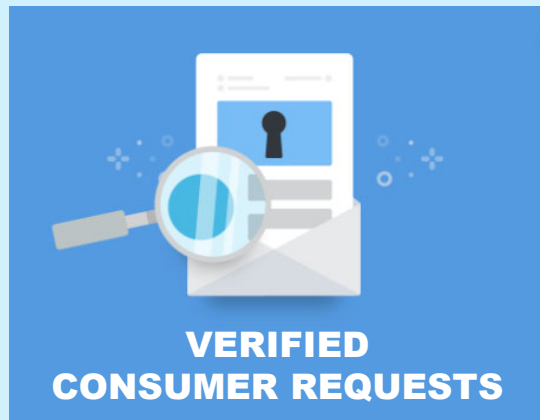
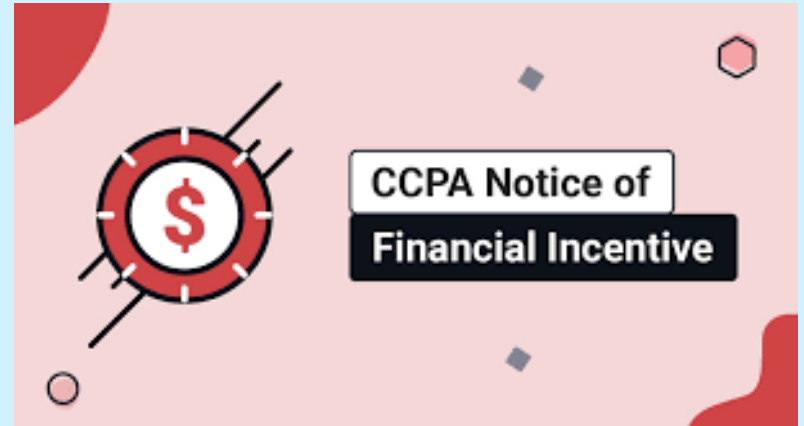


Of rights before collection of data

Privacy Infrastructure on Your Website



Do not sell my personal information



Privacy Enforcement

- **California Attorney General**

- August 2022: Sephora settled for **\$1.2M**
- February 2024: Doordash settled for **\$375,000**




- **California Privacy Protection Agency**

- February 2024: Litigation over when CPPA can start enforcing regulations is resolved. Enforcement begins now.

AI, Tracking Tools, and Biometric Data

- **Fun and useful marketing tools can have big risks.** Do you:
 - Use **AI** to detect consumer skin type and make recommendations?
 - Use a **chatbot** for customer service?
 - Use **pixel tracking** to monitor the effectiveness of video content?
 - Have a **try-on tool** for hair color or makeup?
 - Use a **digital product passport** to access customers?



Powered by Patented Face Analyzing Tech

The patented AgileFace® Tracking technology creates a hyper-realistic AR virtual makeover shopping experience.

- ✓ Powered by **AI deep learning tech**
- ✓ **Jitter-free & lag-free** face tracking
- ✓ Ultra **precise tracking** in real-time
- ✓ Optimized for **all ages** and **ethnicities**

GET A FREE DEMO →

FTC Rulemaking on Privacy

- **FTC asked for public comment on:**
 - “Commercial surveillance”
 - Dark patterns
 - Ad targeting
 - Illegal discrimination
- **FTC proposed strengthening the COPPA rule:**
 - To require separate opt-in for targeted ads
 - To prohibit conditioning participation on data collection
 - To limit retention of data
 - To limit nudging kids to stay online with push notifications
 - To strengthen data security requirements



AI, Tracking Tools, and Biometric Data

- **FTC is enforcing against AI tools:**
 - **February 2024:** FTC v. Blackbaud – following a 2020 data breach FTC Act challenge alleged “shoddy” data security and deceptive claims about extent of breach. Blackbaud settlement mandates deletion of data, data security program, data retention policy, and FTC reporting.
 - **March 2022:** FTC v. Weight Watchers – COPPA challenge alleging app was marketed to children, collected their data without parental consent, and retained the data longer than necessary. WW settlement mandates deletion of data, algorithms, and all data derived therefrom.



Old Laws For New Tech

Video Privacy Protection Act

Cases allege pixel tech constitutes unlawful sharing with social platforms

Mitigate risk with plan for video distribution, sharing of data, and possibly user consent. This trend is dissipating with increasing defense rulings.

California Invasion of Privacy Act

Class actions allege chatbot and other tools are wiretapping

California also has a law that regulates chatbot tools and requires specific disclosures.

Illinois Biometric Information Privacy Act (BIPA)

Class actions challenge collection of facial scans without consent

Other states that regulate biometric data: TX, WA, and those with comprehensive privacy laws that define biometric data as “sensitive data.”

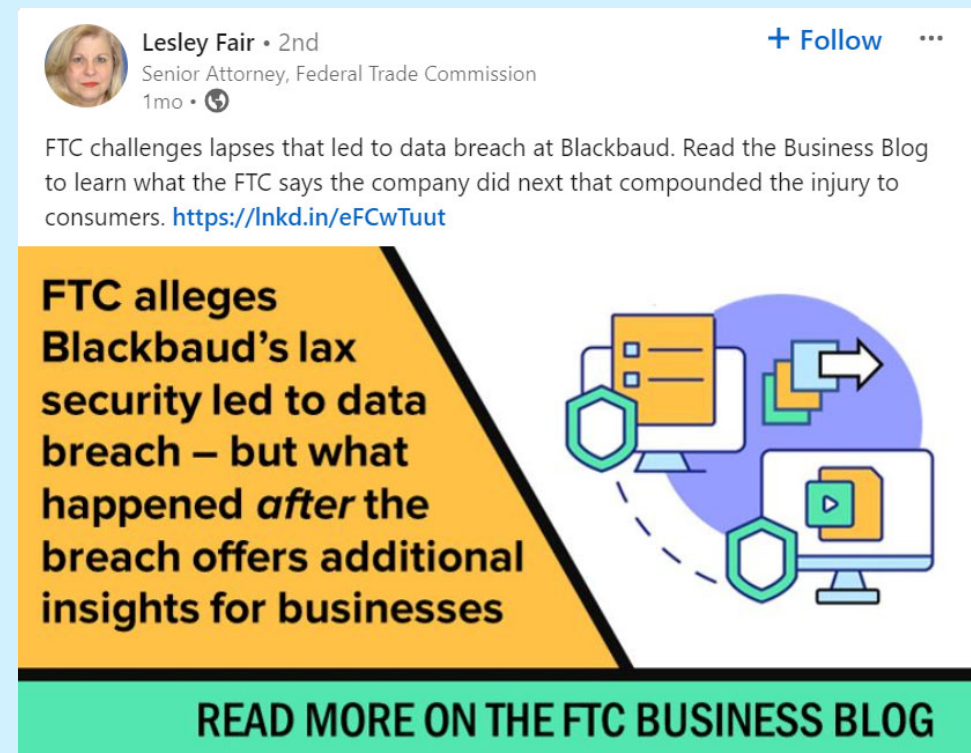
Telephone Consumer Protection Act

Cases allege SMS programs send unsolicited advertising

The Florida Telephone Solicitation Act has been used by plaintiffs so aggressively that the Legislature amended it in 2023 to clarify consent requirements.

AI, Tracking Tools, and Biometric Data

- Before employing new technology tools, carefully weigh the regulatory and business risks of doing so in this legal environment.
 - What are the risks of employing a technology?
 - Whose data will it collect?
 - What kind of data will it capture?
 - Who will the company disclose the data to?
 - Are there contracts with third parties that will have access to personal data?
 - Does privacy compliance make use of the tool impractical?




Lesley Fair • 2nd
Senior Attorney, Federal Trade Commission
1mo • 🌐

+ Follow ...

FTC challenges lapses that led to data breach at Blackbaud. Read the Business Blog to learn what the FTC says the company did next that compounded the injury to consumers. <https://lnkd.in/eFCwTuut>

FTC alleges Blackbaud's lax security led to data breach – but what happened *after* the breach offers additional insights for businesses



READ MORE ON THE FTC BUSINESS BLOG

Sustainability Issues

01 Sustainability Claims and Greenwashing

02 Environmental Package and Labeling Laws

03 Allison Turquoise Kent-Gunn on Stakeholders

Sustainability Claims

Greenwashing: statements that convey positive environmental benefits that cannot be adequately substantiated



FTC Regulatory Oversight

FTC Green Guides: (update to come)

- Guidance on how to avoid greenwashing or misleading consumers
- General principles, particular claims and substantiation, how to mitigate risk
- Update on product certifications, recyclable claims, and renewable energy/carbon offset claims.



Greenwashing Claims

Danger Zones:

- Reef-friendly, reef safe
- 100% Natural, all natural, naturally-derived
- No harmful chemicals
- Organic
- Sustainable, green technology
- Eco-friendly, Ozone friendly
- Compostable, degradable
- Recycled content, recyclable
- Carbon offsets, climate change, energy and efficiency terms



Greenwashing Claims



Greenwashing legal challenges:

- Product Sourcing and Sustainable Manufacturing
- Recyclable, Reusable, and Compostable (waste minimization claims)
- Product Ingredients
- Climate Goals and Carbon Neutral Claims
- Sustainability

Sustainability Claims

Best practices:

- ✓ Make narrow, specific “qualified” claims
- ✓ Disclose details clearly and conspicuously (unavoidable)
- ✓ Back up claims with science and retain support in product dossiers
- ✓ Consider whether claim appropriate where environmental benefit is negligible
- ✓ Clearly identify which materials are recyclable, compostable, etc. when product contains multiple materials

Environmental Package and Labeling Laws

California “Truth in Recycling” or “Truth in Labeling” Law (“Chasing Arrows” Legislation, SB 343)



- Bans use of **ALL** recyclability claims **UNLESS ALL PACKAGING MATERIAL** is listed in the Materials Characterization Study (MCS)
- Enforceable approximately Fall 2025, 18 months after anticipated publication of final MCS by CalRecycle

Truth in Recycling Law

Recyclability claims listed in the statute include:



Chasing arrows symbol

Environmental choice

Ecologically/environmentally/earth friendly

Ecologically/environmentally sound

Ecologically/environmentally safe

Environmentally lite

Green product

Please recycle

Resin identification code with chasing arrows

Any other like term



Truth in Recycling Law

The Materials Characterization Study preliminarily found the following materials are recyclable in California:

- Most, but not all, glass
- Most, but not all, aluminum
- Tin or steel aerosol containers, cans, and lids
- Uncoated corrugated cardboard
- Paper containers and paperboard packaging
- Other mixed paper
- PET, HDPE, PVC, LDPE, PP, most PS
- Mixed plastic multi-use

SB 343 Material Characterization Study Preliminary Findings (DRRR-2023-1728), available at: <https://www2.calrecycle.ca.gov/Publications/Details/1729>.

Truth in Recycling Law

Materials that are NOT recyclable in California include:

- Certain mixed materials
- Plastic films and bags
- Other single use rigid plastics
- Unknown plastic type or mixture of multiple plastic resins (single use)

To qualify, packaging cannot contain any components, inks, adhesives, or labels that prevent recyclability, and do not contain any intentionally added PFAS or other intentionally added hazardous chemicals.

SB 343 Material Characterization Study Preliminary Findings (DRRR-2023-1728), available at: <https://www2.calrecycle.ca.gov/Publications/Details/1729>.

Extended Producer Responsibility Laws

Extended Producer Responsibility (EPR) Laws

- Goal to reduce packaging to meet state waste and climate goals
- Shift responsibility for end-of-life management of products to producers
- Structure includes one or more Producer Responsibility Organizations (PRO)

States with packaging-related laws: California, Colorado, Maine, New Jersey, Oregon, Washington, and 19 more have introduced legislation.

States to watch: California, Connecticut, New York, Massachusetts, and Minnesota.

Exemplary EPR Law in California

California Plastics Pollution Prevention & Packaging Producer Responsibility Act (SB 54)

By 2032:

Cut By



25%

Single-use plastic:

- Packaging and
- Food ware

Recycle



65%

Of single-use plastic:

- Packaging and
- Food ware

Ensure



100%

Of single-use:

- Packaging
- Plastic food ware

Is recyclable or
compostable

CA EPR Law Goals

- **Single-use packaging:** targets material routinely recycled, disposed of, or discarded after contents have been used/unpackaged, and typically not refilled or otherwise reused by producer.
- **Reduce, Recycle, Rethink:** Requires incremental net reduction in plastic material use, increase in actual recycling of single-use packaging, and increase in use of recyclable or compostable materials – starting with at least 30% of material must be recycled by 2028, 40% by 2030, and 65% by 2032. Incentivizes refill and reuse and elimination of unnecessary packaging.
- **PRO Membership Required:** Prohibits “Producers” (including brand owners) from selling, offering to sell, importing, or distributing “Covered Materials” (plastic, glass, paper, bamboo, metal) unless Producer is part of a Producer Responsibility Organization.
Membership registration deadline: July 1, 2024.

PRWho?

Circular Action Alliance has been appointed as the PRO for California, Colorado, and Oregon. It is also applying for Maine.



- 501(c)(3) Organization
- PRO will fund end of life of materials through recycling and processing.

By July 1, 2024: Producers must complete CAA's Obligated Producer Contact Form, available at:

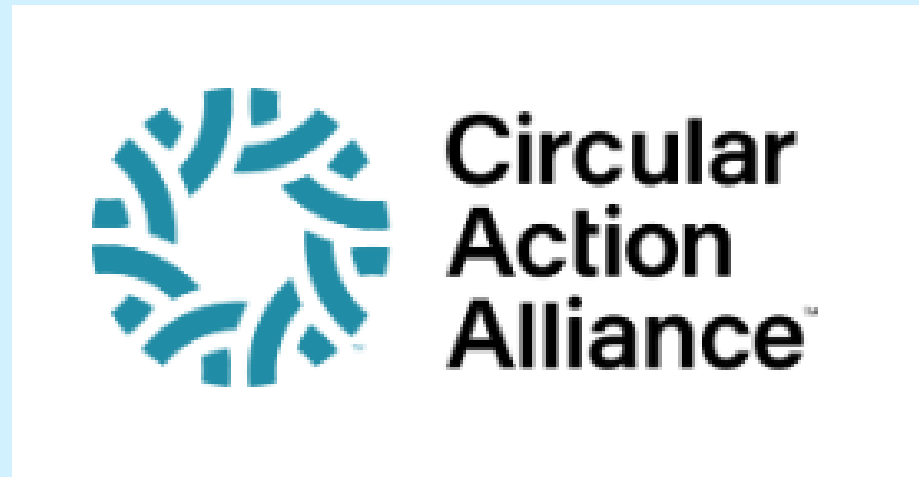
https://docs.google.com/forms/d/e/1FAIpQLSfXla1kkahYCGn6K_YRpWqgCySDahakgZU8CJ4RYxY2qBPscA/viewform?ts=64fb738d

Failure to comply: civil penalties of up to \$50,000/day.

PRWho?

In 2027:

- CAA must remit payment to California of \$500 million each year, starting in 2027 and ending in 2037 to be placed in the California Plastic Pollution Mitigation Fund.
- CAA must implement a program plan in 2027 that will be funded by producer fees.
- CalRecycle may develop rules to clarify the date by which producers must pay fees to the PRO.





Ronie M. Schmelz
ronie.schmelz@klgates.com
310.552.5002

Avril G. Love
avril.love@klgates.com
310.552.5064

Allison Turquoise Kent-Gunn
allisonturquoise@yahoo.com
@allisonturquoise