

AdTech Privacy & Advertising Data Compliance

In today's quickly evolving digital space, companies around the globe are using emerging advertising technologies to reach their consumers and better understand their preferences. Companies are looking for ways to leverage AdTech and the data collected, created, or enhanced by AdTech to understand, segment, and target consumers and propel marketing analytics. The regulatory and litigation landscape is thorny in light of recent privacy and data security crises that have elevated data privacy issues to a board-level issue. Our team provides comprehensive, cutting-edge advice on your use of emerging advertising technologies.

Companies need a robust, full-time team of privacy, data security, and advertising attorneys with comprehensive knowledge of the AdTech landscape to assist them in navigating through the myriad changes in regulatory and self-regulatory schemes and trends in class action litigation in the advertising technology space. This is not realistic for most in-house legal departments, but Alston & Bird, a global leader in privacy and data protection counseling, provides a team of seasoned attorneys who concentrate on the convergence of these issues.

The Alston & Bird AdTech Privacy & Advertising Data Compliance Team is part of a larger group of attorneys at Alston & Bird, including the firm's [Privacy & Data Security](#) and [Cybersecurity Preparedness & Response](#) teams, that focus on privacy and data security issues and collaborates to meet our clients' needs.

AdTech Privacy Counseling in High-Risk Areas

Companies often believe that their advertising efforts are insulated from privacy and data security issues because they are using aggregated and "anonymized" data generated through advertising technology to anticipate trends, customize product offerings, streamline communications, and increase revenue. Yet this is not the case.

- ***Digital Targeting / Behavioral Advertising.*** We advise clients on legal requirements and best practices for conducting targeted marketing, analytics, and behavioral advertising. We have counseled clients on privacy and compliance as they relate to the practices of creating customer profiles, using email matching programs to create and share audience groups with third parties, the use of audience-matching tools offered by social networking platforms, leveraging data to create customized reports for sale to third parties, and leveraging data management platforms and customer relations management databases. In providing our legal advice, we draw from our detailed knowledge of more than 26 Federal Trade Commission (FTC) regulatory complaints and orders relating to digital targeting for both analytic and advertising purposes as well as the more than 200 U.S. class actions filed relating to behavioral tracking, summarized on www.alstononottrack.com. We also counsel clients on principles of compliance published by industry associations (e.g., the Digital Advertising Alliance (DAA), Network Advertising Initiative (NAI), and Interactive Advertising Bureau (IAB)). Our counseling includes not only detailed knowledge of guidance documents published by these industry associations but also a clear understanding of where those guides diverge from litigation rulings and FTC and other regulatory guidance.
- ***Big Data / Cross-Device Tracking / Data Analytics Privacy Compliance Counseling.*** Many companies use Big Data platforms and cross-device tracking to better understand their digital customer base

across websites and mobile apps. We have negotiated with regulators about our clients' use of Big Data. Our counseling advice is grounded in litigation avoidance and regulatory compliance best practices. Our experience is not limited to the U.S.—we have worked with local counsel on Big Data compliance in the EU, Brazil, India, and Singapore.

- **Emerging AdTech.** Alston & Bird's team stays on the cutting edge with new technologies. We have thought through how best to comply with privacy regulatory and industry standards involving smart devices, IoT, chatbots, artificial intelligence, machine learning, virtual reality, and so much more.
- **Mobile and AdTech.** Our team provides guidance across industry verticals (e.g., health care, financial, entertainment, and retailers) on AdTech issues associated with mobile platforms, including the creation of short-form notices, proprietary icons to be used for those notices, and best practices for privacy and data security by design.
- **Health and AdTech.** Increasingly, health care providers and app developers that focus on health care services are jumping into AdTech. This is an exciting new space where possibilities for greater connection with medical providers and friends can be facilitated. That said, it is important to note that in the U.S., HIPAA is not the only law covering this activity. California's Confidentiality of Medical Information Act (CMIA) and its penalties of \$240,000 per violation are also at play. Alston & Bird is experienced with HIPAA, CMIA, and the state and federal agencies responsible for enforcement (e.g., California Attorney General's Office, California Department of Public Health).
- **Fintech and AdTech.** The implementation of AdTech in financial technology products and services creates unique risks at the intersection of federal and state privacy, consumer protection, and advertising compliance laws. Alston & Bird has advised payment processors, Fintech mobile app developers, and established financial institutions in compliance with privacy legal requirements and best practices during the development of mobile and electronic payment systems.
- **Video Privacy Compliance Counseling.** Video is an important feature in the AdTech space. The FTC recently declared that video data is "sensitive" personally identifiable information requiring opt-in consent on devices where consumers would not expect to have their video viewing behavior tracked. There have also been more than 40 lawsuits and decisions under the Video Privacy Protection Act relating to tracking users' video viewing online or via a mobile app. Alston & Bird's team has developed strategies for compliance with video tracking laws and has represented major studios, cable programmers, e-commerce entities, retailers, and companies of all kinds that implement video components on their websites or mobile apps.
- **Other Digital Advertising Practices:**
 - **Advertising via Third-Party Platforms** ("Like" Social Networking Providers). Each social media platform has its own terms of use that determine issues of ownership and control of the content and activities on that platform. Some websites and other social media platforms prohibit any commercial use other than as a paid advertiser. Our team stays abreast of developments on social media platforms and have developed guidance documents that can be shared with you regarding best practices for compliance.
 - **Commercial Text Messaging for Marketing Initiatives.** Companies are obligated under the Telephone Consumer Protection Act (TCPA) in the U.S. and the Canadian Anti-Spam Law (CASL) in Canada to obtain prior express consent before sending commercial texts to consumers. Our

team evaluates when a message may qualify as a “commercial text” and prepares the appropriate, sometimes very specific, forms of consent.

- **Retail Mobile Location Analytics (RMLA) Advice.** Many retailers use Wi-Fi technology to track customers’ ingress and egress into brick and mortar store locations, and the frequency of their visits to specific departments, as part of their AdTech platforms. Regulators in the EU, as well as the U.S. Congress, have expressed privacy concerns over these practices. Our team has provided counseling and “privacy by design” best practices to assist with compliance and reduce the risk of regulatory enforcement and litigation issues.

Global AdTech Privacy and Advertising Data Compliance Counseling

AdTech does not have borders. Companies need to be aware of their obligations to comply with myriad global laws that often have core similarities to help develop a unified and top-line approach. Alston & Bird’s AdTech Privacy & Advertising Data Compliance Team has helped clients develop a synergistic and holistic approach to data compliance for their advertising initiatives.

- **Global Compliance for Advertising Data.** Your advertising activities generate data that needs to be stored, shared, processed, and managed consistent with a complicated set of rules and regulations across many different jurisdictions. The team provides top-line advice on the management and use of data to assist you with your needs in this space. This includes advice on the new European General Data Protection Regulation (GDPR) and the privacy regimes in jurisdictions such as APEC, Canada, Israel, South America, and South Africa. The AdTech Privacy team leverages the [Alston & Bird Global Privacy and Data Security Network](#) to provide strategic privacy compliance advice across these jurisdictions.
- **Global Privacy and Data Security Legal Assessments for AdTech Programs.** Alston & Bird’s team has performed comprehensive privacy and data security legal risk assessments, comparing companies’ actual AdTech practices against global legal benchmarks derived from more than 104 FTC enforcement actions, regulatory guidance, the NIST Cybersecurity Framework, and established privacy and data security laws in the EU and APEC.
- **Privacy Compliance for AdTech Cloud Storage.** Businesses need to consider privacy laws in various jurisdictions since digital advertising data is commonly stored in cloud environments. Alston & Bird’s team has addressed these issues. In the EU, the Network Information Security (NIS) Directive covers cloud environments, as does the GDPR. China’s Network Security Law has new controls for emerging technologies. Other countries are rapidly developing new and different guidance. Alston & Bird stays on top of these developments for our clients.
- **“Defense in Depth” for AdTech Data.** A variety of international laws and self-regulatory schemes already address consumer data practices and security, which necessarily impact AdTech-generated data. A number of additional measures that will likely impact AdTech-generated data are working their way through global legislative bodies. Companies need to understand their consumer data practices and protect the security of this data, and a team like ours is skilled at navigating these issues.
- **AdTech Vendor Management.** We recognize that many companies use vendors to implement their new digital initiatives. In response, we have developed a streamlined vendor management toolkit, checklist, playbook, and management intake form to help you comply with privacy risks when engaging AdTech vendors. In the age of outsourcing, you need to ensure that your AdTech vendors are complying

with your policies, providing adequate safeguards, defending and indemnifying the company, and maintaining adequate and appropriate insurance. We are familiar with these issues in the context of AdTech and are well-positioned to craft contracts and oversight procedures that help ensure compliance.

Regulatory Defense of AdTech Initiatives

When regulators take interest in your advertising practices, the result can be a time-consuming and intrusive process. Our team has the experience to help you structure and manage your advertising activities to avoid the interest of regulators and to assist in your interactions with regulators.

- ***Federal Regulatory Compliance Counseling and Defense for AdTech Data.*** Our team reviews FTC enforcement actions and has developed best practices checklists so your team can be guided on the FTC's position on emerging AdTech (e.g., marketing via mobile apps, behavioral data, video tracking, and ad delivery). Members of our team hold regular meetings and roundtables with regulators to ensure that our compliance advice to you is synced with regulators' views. However, if you do draw the attention of regulators, Alston & Bird's AdTech team has extensive experience negotiating with federal regulators, including the FTC, Federal Communications Commission, Department of Health and Human Services, and Consumer Financial Protection Bureau. When clients have faced enforcement actions, Alston & Bird's team has been there to negotiate the best resolution of those matters possible, many concluding with decisions by the regulators to not enforce against our clients.
- ***State Regulators.*** Alston & Bird's team maintains solid relationships with state regulators. Our team includes former members of the National Association of Attorneys General and has long-standing relationships within divisions responsible for advertising privacy in some of the more active states, including California.
- ***California Risks.*** California has been on the cutting edge of privacy and data security in legislation, enacting laws and best practices guidance that impact advertising and especially new methods of advertising. Our team is led from California to ensure compliance with this complex web of ever-expanding new laws impacting your advertising practices.