

State Law Approaches to Address Digital Food Marketing to Youth



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Table of Contents

Executive Summary	4
Introduction	9
Why Digital Marketing Is Different	12
Packaging: Digital Marketing at the Moment of Truth	22
Personal Jurisdiction	25
Mobile Food & Beverage Marketing	29
Privacy	40
Facebook Advertising	45
Incentives-Based Interactive Food & Beverage Marketing	43
Gaming	68
Appendix: State Law Profiles	77

Executive Summary

State Law Approaches to Address Digital Food Marketing to Youth



Why focus on Digital Food Marketing?

Legal and child development scholars have identified promising theories for why all marketing, including digital food marketing, targeting children under 8 years of age, is inherently deceptive.¹ Prior to age 8, research demonstrates that children cannot understand the persuasive intent of advertising. Food marketing campaigns targeting youth integrate food packaging, websites, mobile applications (apps), and viral marketing techniques to get children and teens to request and consume unhealthy food and beverage products. Our research into the digital marketing tactics currently being deployed with children and teens found a number of clearly articulable and specific state consumer protection law issues that warrant regulatory oversight.

State governments are at a critical juncture with respect to ensuring the future health of their residents. Diet-related disease threatens the current and future well-being of children and teens. The Centers for Disease Control projects that by 2050, 1 in 3 U.S. adults could have diabetes.² The number of diabetics living with limb loss is projected to triple by 2050, and African American and Hispanic diabetics are almost 3 times as likely as non-Hispanic white diabetics to lose a limb.³ Medical costs associated with diet-related disease are projected to rise between \$22 and \$48 billion per year by 2030 with a substantial portion paid for by Medicare and Medicaid.⁴ This chronic disease burden begins in childhood when eating preferences and food culture are ingrained. Food marketing plays a major role in the foods children and teens desire, perceive as tasting good, request their parents to buy for them and ultimately purchase for themselves. State oversight of digital food marketing is integral to protecting vulnerable child and teen consumers.

The State Consumer Protection Approach

This report focuses on how state consumer protection law can be used to limit harmful digital food marketing to children and teens. State consumer protection laws grant state attorneys general (SAGs) broad authority to protect consumers from unfair and deceptive marketing. The Federal Trade Commission (FTC) and self-regulatory bodies like the Better Business Bureau's Children's Advertising Review Unit (CARU) have, to date, been the primary players in oversight of food marketing to children. The magnitude of the health threats posed by diet-related disease and their impact on state health-care systems is on par with tobacco-related disease. As occurred with tobacco marketing, intervention by SAGs is the game-changer needed to accelerate progress on food marketing to children.

State Law Profiles

Ten states were selected based on the percentage of the child population residing in the state, prior SAG action to address food marketing, prior SAG action to address digital marketing in general, scope of consumer protection authority granted under state law, and geographic diversity. For each of the ten states we generated a digital marketing legal profile of laws and regulations beyond general prohibitions on unfair and deceptive acts and practices that might be used to curtail digital food marketing to children. See Appendix for AR, CA, CT, FL, IL, MA, NY, OR, TX and VA state profiles.

Digital Food Marketing Tactics Selected for Legal Analysis

Digital food marketing encompasses a broad range of tactics. Marketing tactics were selected for state con-

sumer protection legal analysis based, in part, upon whether the tactic:

- Is material to the purchase of a food or beverage item by a child, teen or, in some cases, a parent
- Is unaddressed by self-regulatory guidelines (e.g., marketing targeting adolescents)
- Falls outside of the scope of the FTC’s current rulemaking authority (e.g., unfair advertising to children)
- Has been the subject of prior self-regulatory enforcement, but remains relatively unchanged and widespread
- Exploits age-specific vulnerabilities of child and teen consumers.

This report also covers personal jurisdiction issues related to digital food marketing and federal preemption of state regulation of mobile food marketing.

Key Digital Food Marketing Characteristics

Digital food marketing works in conjunction with traditional marketing campaigns using television, print media, and food packaging. There are, however, some key differences between digital and traditional food marketing tactics:

Digital Marketing is Harder for Youth to Identify as Marketing:

Digital food marketing works in conjunction with traditional media such as television, print media, and food packaging by integrating websites, mobile applications (apps), viral marketing techniques and location-based tactics to get child consumers to request and consume unhealthy food and beverage products. Research into children’s ability to identify digital marketing as a form of advertising indicates that digital marketing is harder for them to identify than traditional television commercials.

A 2013 study explored the ability of children versus adults to recognize advertisements embedded in mock

webpages.⁵ Adults identified all of the advertisements, but 6-year-olds identified just one quarter, 8-year-olds about half, and 10-year-olds identified about three-quarters of the advertisements shown. The study authors noted that similar studies of children’s ability to identify television commercials have found that children can identify commercials as distinct from programming by the age of six and understand persuasive intent around 8 years of age. Thus, digital advertisements are harder for children to identify as marketing than television commercials.

Digital marketing tactics such as food-company produced websites and apps with engaging, branded content for children likely are even harder to identify than advertisements embedded in webpages. Whether or not young consumers can even identify marketing that utilizes new media as advertising is a key starting point when analyzing whether or not digital food marketing is unfair or deceptive to its target audience of child consumers, because deceptive marketing in the form of entertainment or news has been deemed a deceptive trade practice with adults.⁶

Marketing is No Longer a One-Way Communication:

Traditional marketing tactics delivered a commercial message on television, radio or in print, and that was the extent of the communication. The new food and beverage marketing is interactive, delivered online and via handheld devices, and is driven by huge caches of data that consumers generate when they make online or mobile purchases. Marketers have unprecedented access to consumer data that can be used to target and tailor marketing messages to maximize sales.

Path-to-Purchase: The “path-to-purchase” model of marketing integrates physical location, purchase and consumption history, and prior engagement with unhealthy food and beverage marketing to guide consumers as they make food purchasing decisions. This tactic may seriously undermine public health efforts to reduce the consumption of unhealthy foods and beverages. As the core demographic for junk food marketing and heavy

mobile device users, teens are prime targets for path-to-purchase marketing.

The Power of Social Marketing: Social media marketing is designed to get consumers to share commercial messages. It is most successful when young consumers share commercial content without realizing that they have become marketing proxies for large corporations.

Key Consumer Protection Findings

State consumer protection laws have yet to fully catch up to advances in digital marketing, but there exist many opportunities for SAGs to play a more robust role to protect children and teens from harmful digital food marketing. The following are key areas where SAGs can play a productive role using their existing legal authority:

Unfair and Deceptive Food Packaging: Food and beverage packaging is a prime jumping-off point for children into the digital marketing world. Food packaging often directs children to company websites for activities, videos, and contests. Product packaging is a major loophole in CFBAI’s self-regulatory framework governing the nutritional quality of foods marketed to children under 13.⁷ The integration of digital marketing components into food packaging is designed to prolong children’s exposure to unhealthy food marketing and exploits children’s natural curiosity. These packaging features are totally unrelated to any actual food product characteristics. As such, they are not governed by the federal Nutrition Labeling and Education Act and are subject to state consumer protection law provisions.

Disguising advertising as entertainment so that the target audience is unable to identify it as commercial in nature has been found to be deceptive with adults.⁸ Child-directed codes, invitations to visit a website, directions for how to download a mobile app to play a game or to experience an augmented reality feature designed to interact with packaging are similarly deceptive because they are intended to lead children to engage with content that

they likely cannot even identify as advertising.

Privacy: Privacy protections are important to protect children and teens from aggressive digital junk food marketing. States have successfully enforced the Children’s Online Privacy Protection Act (COPPA) to protect children under 13 years old. Teens, however, are a key target demographic for digital food marketing and are not protected by COPPA. Other state privacy and general consumer protection laws can be invoked to protect them. SAGs can play a vital role to fill the gap around teen privacy, especially with regard to targeted and localized digital marketing.

Advergaming: The FTC’s 2009 report on food marketing expenditures to youth found extensive use of advergames by food marketers.⁹ Advergaming are digital games and apps produced by food companies that integrate products or contain food and beverage company branding. Advergaming have been repeatedly cited by CARU for blurring the line between commercial and non-commercial content, yet they remain commonplace and relatively unchanged.¹⁰

The detrimental impact of advergames on child health is supported by sound research linking them to increased overall calorie intake as the result of increased snacking after playing advergames featuring food.¹¹ Food companies use direct inducements on retail food packaging and on food company websites in order to enhance the advergaming experience. Inducements to purchase that are linked to advergames make the tactic highly material to the purchase of unhealthy food products.

Such direct inducements to purchase products linked to advergames are difficult for children to filter or avoid because they simply do not recognize the inducement as marketing. Instead, children view such inducements only as an opportunity to play a game. Children cannot avoid the health harm caused by playing advergames—the powerful cueing effect on eating behavior—because it is deeply subconscious.

Advergaming offends the established consumer protection law principle against deceptive marketing in the form of entertainment or news that a reasonable member of the target audience likely will not recognize as marketing. Advergaming violates this principle because children likely perceive advergaming simply as entertainment and not as a form of marketing. All of these factors render the use of advergaming with young children an unfair trade practice.

Similarly, advergaming is a deceptive trade practice, because children likely cannot recognize advergaming as marketing. This means that children are likely to be misled into requesting or purchasing products in order to play games.

Digital Sweepstakes and Contests: Incentives-based, interactive marketing uses digital technology to deploy sweepstakes to younger and younger audiences. Complex digital sweepstakes schemes are being deployed by major food companies like Kraft Foods with children 6 to 12 years old. SAGs have primary responsibility for policing promotions and children, who cannot protect themselves, are in need of protection from predatory sweepstakes.

In the past five years, CARU has issued 12 complaints against its member companies for sweepstakes and instant win games that exploit children’s inability to comprehend that a free means of entry exists or the actual odds of winning prizes.¹² Food companies were responsible for half of these cases. CARU’s work has uncovered a pattern of abuse in the use of sweepstakes with children under 12 years-old warranting more robust legal interventions by SAGs.

Sweepstakes trigger existing state consumer protection laws governing games of chance and illegal lottery laws. These promotions should be viewed from the perspective of the vulnerable children that they target. Sweepstakes are lawful when they remove the element of consideration. This is done by providing an “alternative means of entry” (AMOE). A free AMOE “allows

participants to enter a sweepstakes without purchasing a product, paying money, devoting a substantial amount of time and effort, or otherwise giving anything to the sweepstakes sponsor in exchange for the opportunity to participate.”¹³

Young children, however, lack the sophistication to understand the concept of “no purchase necessary” or that an AMOE exists. A 2004 report by the American Psychological Association on advertising to children found that young children do not comprehend the intended meaning of even the simplest commonly used disclaimers. The report noted that “fewer than one in four kindergarten through second grade children could grasp the meaning of ‘some assembly required’ in a commercial,” and even the use of child-friendly language like “you have to put it together” only resulted in half of children being able to understand the disclaimer.¹⁴ Young children simply cannot be expected to understand disclaimers conveying that an AMOE exists. When the target audience is not adequately informed that an AMOE exists, sweepstakes are rendered illegal lotteries for failure to remove the element of consideration.

Sweepstakes are the province of state regulators, and industry self-regulation has uncovered widespread use of sweepstakes in ways that exploit children’s inability to comprehend that a free means of entry exists, and to understand the actual odds of winning prizes. The use of games of skill where young children play simple videogames is also highly suspect as such games may not be adequately skill-based. SAGs have primary responsibility for policing promotions and children, who cannot protect themselves, are in need of protection from these predatory marketing practices.

This report also explores how food companies use videogames produced by the entertainment software developers as a marketing platform. It contains a guide to social media food marketing using Facebook and Facebook marketing tactics that raise consumer protection concerns for teen consumers.

Endnotes

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⁴ Y. Claire Yang et al., *Health and Economic Burden of the Projected Obesity Trends in the USA and UK*, 378 THE LANCET 815, 818 (2011); Jeffrey Levi et al., *F as in Fat: How Obesity Threatens America's Future 2012*, 1, 32 (2012), <http://healthyamericans.org/assets/files/TFAH2012FasInFatFnlRv.pdf>.

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⁶ For a summary of case law related to stealth marketing see Center for Digital Democracy, et al., *Complaint and Request for Investigation of PepsiCo's and Frito-Lay's Deceptive Practices In Marketing Doritos to Adolescents* [hereinafter *CDD Complaint*], (Oct. 19, 2011), http://digitalads.org/sites/default/files/publications/digitalads_ftc_complaint_2011.pdf (last visited September 12, 2013).

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⁸ *CDD Complaint*, *supra* note 6.

⁹ FED. TRADE COMM'N, *A REVIEW OF FOOD MARKETING TO CHILDREN AND ADOLESCENTS: FOLLOW-UP REPORT 70* (DECEMBER 2012), [HTTP://WWW.FTC.GOV/](http://www.ftc.gov/)

¹⁰ See, e.g., Press Release, Children's Advertising Review Unit (CARU), *CARU Recommends Spangler Revise 'Dum Dum' Website to Clearly Disclose That Games, Activities are Advertising; Company Agrees to Do So* (Dec. 17, 2010), <http://www.caru.org/news/2010/CARUDumDumPR.pdf> (last visited Nov. 18, 2013).

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¹³ Tywanda H. Lord & Laura C. Miller, *Playing the Game by the Rules: A Practical Guide to Sweepstakes and Contest Promotions*, 29 FRANCHISE L. J. 3, ___ (Summer 2009).

¹⁴ Dale Kunkel et al., *Report of the APA Task Force on Advertising and Children. Section: Psychological Issues in the Increasing Commercialization of Childhood*, 5, 10 (Feb 20, 2004), http://www.sfu.ca/cmns/faculty/kline_s/320/06-spring/resources/sup_readings/childrenads.pdf (last visited Nov. 18, 2013).

Introduction

State Law Approaches to Address Digital Food Marketing to Youth

This report is intended to be a practical resource for state attorneys general concerned about the impact of digital food marketing on the health of children and teens in their states, and describes state legal approaches available to address harmful digital food marketing.

Digital marketing encompasses a vast range of marketing tactics and uses a variety of technologies to market foods and beverages to child and teen consumers. Food and beverage marketing is designed to make consumers aware of products, build brand recognition and brand loyalty, and ultimately to drive purchases. Purchases by younger children are often achieved by generating a purchase request to a parent. One food company that markets to youth reported to the Federal Trade Commission (FTC) that “75% of purchasers surveyed said they bought the product for the first time primarily because their child requested it.”¹ Food and beverage marketing to older children and teens is designed to secure a share of their direct purchasing power. Food industry market research into teen spending habits submitted to the FTC found that “food is the most common item purchased” by teens.²

What Is In This Report?

Put simply, the “whole point of taking action to reduce the amount of food marketing to children is to lessen preference for, and sales and consumption of, fatty, sugary and/or salty processed foods.”³ This report focuses on how state consumer protection laws can be used to limit harmful food marketing to children, and covers the following topics:

- Key differences between digital and traditional food marketing
- The use of food packaging as a jumping-off point into digital food marketing
- State jurisdiction to regulate digital food marketing



- Mobile food and beverage marketing
- The role states can play to address privacy concerns raised by digital marketing
- Facebook advertising
- Incentive-based interactive food marketing promotions targeting youth
- Gaming as used with young children and teens to market unhealthy foods
- Summaries of the laws and regulations of ten states relevant to digital food marketing

Each of these topics is covered in an individual section that can be read on its own or in conjunction with other sections.

Why Are Certain Digital Marketing Tactics Included In This Report?

Inclusion of a particular marketing tactic in this report is based upon whether the digital marketing tactic:

- Is material to the purchase of a food or beverage item by a child, teen or, in some cases, a parent
- Is unaddressed by self-regulatory guidelines (e.g., marketing targeting adolescents)
- Falls outside of the scope of the FTC’s current rulemaking authority (e.g., unfair advertising to children)
- Has been the subject of prior self-regulatory enforcement, but remains relatively unchanged and widespread
- Is accompanied by complex disclaimers, rules or privacy disclosures
- Extracts time and effort from children and teens to market foods and beverages to their peers
- Is designed to increase the number of “eating

- occasions” of an unhealthy food product
- Exploits age-specific vulnerabilities of child and teen consumers

Each of the tactics discussed in this report meet some or all of these criteria.

What Is the Harm?

Diet-related chronic disease is a major concern for state and local governments. Many states are at a critical juncture with respect to the future health of their residents. The toll in human suffering and healthcare costs from diet-related disease is stark:

- The percentage of teenagers testing positive for diabetes or pre-diabetes more than doubled from 9% in 1999-2000 to 23% in 2007-2008.⁴
- The Centers for Disease Control estimates that as many as 1 in 3 U.S. adults could have diabetes by 2050.⁵
- Diabetes is the leading cause of non-traumatic lower limb amputation among adults in the United States.⁶
- Researchers estimate that the number of people in the United States with diabetes who are living with the loss of a limb will nearly triple by the year 2050.⁷
- African Americans and Hispanics are almost 3 times as likely as non-Hispanic whites to suffer from lower-limb amputations.⁸
- The current medical cost of adult obesity in the U.S. is estimated at \$147-\$210 billion per year, \$61.8 billion of which is paid for by Medicare and Medicaid.⁹
- Medical costs associated with treating obesity-related disease are conservatively estimated to increase by an additional \$22 billion per year by 2020 and \$48 billion per year by 2030.¹⁰

Successful public health efforts to support healthy diets in childhood and adolescence will put children on a path for lifelong health. Addressing digital food and beverage marketing targeting youth that is designed to maximize consumption of unhealthy foods and beverages is a key step in the process towards ensuring a healthy future.

Endnotes

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Why Digital Marketing is Different

State Law Approaches to Address Digital Food Marketing to Youth

Food and beverage marketing that targets youth is fully integrated into print, radio, television, movies, schools, youth serving organizations and in the retail space. The rapid proliferation of digital devices and new media platforms is often described as a “shift” to digital. Traditional children’s media outlets like Nickelodeon have “gone digital,” and companies are shifting their media mix to encompass digital and mobile marketing (see Nickelodeon Case Study). Young consumers have not simply shifted away from traditional media, however, but rather “[e]ach month consumers are spending more time with more media, across all devices under the sun.”¹ This means that there are more and more opportunities to layer and reinforce food and beverage marketing to youth in educational settings, at home and while otherwise spending time with their friends in person, online or via mobile devices. The use of location data to tailor and target marketing messages in real time makes digital marketing campaigns that much more effective at maintaining and increasing sales of unhealthy foods and beverages.

Marketing is No Longer a One-Way Communication

Perhaps the starkest contrast between digital and traditional marketing is the way in which food and beverage marketing has gone from a one-way communication to a multi-faceted exchange. Traditional marketing tactics delivered a commercial message on television, radio or in print, and that was the extent of the communication, absent some additional action by consumers typically involving the telephone, mail or in-person interaction with a salesperson. These features of traditional marketing are reflected in state laws governing phone solicitations, promotions conducted through the U.S. mail and door-to-door sales practices. The new food and beverage marketing is delivered online and via handheld devices,



and is driven by huge caches of data that consumers generate online, on mobile devices and when they make purchases. Marketers have unprecedented access to a wealth of data about individuals, peer groups and demographic segments of the population that can be used to target and tailor marketing messages to maximize sales. Specific state consumer protection law provisions have yet to catch up with advances in digital marketing, but existing broad prohibitions on unfair and deceptive acts and practices can be utilized to protect children and teens from unfair and deceptive digital food and beverage marketing.

Digital Marketing is Harder for Youth to Identify as Marketing

The bulk of social science research into children’s ability to recognize marketing as commercial messages with persuasive intent has dealt with television advertising. Research has found that children can identify commercials by the age of 6, but children under 8 cannot understand the persuasive intent of television advertising.² A 2013 study compared the ability of children versus adults to identify advertisements on mock webpages.³ The mock webpages contained a total of 27 ads. Every adult in the study identified all ads shown. In stark contrast, 6-year-olds identified just one quarter of the ads, 8-year-olds about half of the ads, and 10-year-olds identified about three-quarters of the ads shown. The authors of the study concluded that “the developmental sequence derived from the television advertising research cannot be applied to children’s awareness of advertising in other media, because we can no longer assume that the ability to recognize an advertisement always precedes the ability to understand the purpose of advertising.”⁴

This study dealt with ads embedded in editorial webpages; one can imagine that websites for food and beverage brands, like www.frootloops.com, where the entire site's content is marketing, are even more difficult for children to identify as commercial in nature. Moreover, marketing delivered via handheld devices on small screens likely is even harder to identify. It is an established consumer protection law principle that marketing consumers cannot recognize as advertising is deceptive.⁵ Whether or not the target audience of children and/or teen consumers can even identify marketing that utilizes new media as advertising should be a starting point in the consumer protection analysis of potentially unfair or deceptive digital food and beverage marketing campaigns.



Targeting & Measurement

In digital media, marketing, sales, content, and measurement are intertwined. The same data collection capabilities online that permit single users to be targeted — regardless of where they may be — are also used to analyze how they respond to the marketing message. Real-time measurement of campaigns permit an advertiser to closely monitor how successful its effort is, and, if necessary, to make substantial or subtle changes. Through so-called marketing dashboards, a flood of data related to the behavior of consumers is collected, analyzed and made actionable. Consumers, especially teens, are unaware of how their activities and behaviors online are being gathered and measured by advertisers. Increasingly, individuals can also be tracked and targeted across platforms. A campaign that proved successful on a personal computer can be continued when the same user is on a mobile device. The amount and diver-

sity of data that are analyzed for measurement purposes can include minute actions of users (e.g., where their mouse is on a particular page, where they start and stop a video); the sites they visit and keywords used; what they buy and how much they spend; along with information related to their demographics (e.g., race, ethnicity, gender or age). Increasingly, online marketing activities are being tied together with data on actual sales of products. Through the evolution of “data management platforms,” a young consumer’s history and behavior can be compiled and updated on a regular basis for future targeting.

Path-to-Purchase

Digital food marketers are helping drive the shopping experience, using such tools as search, geo-location advertising, mobile coupons and viral peer-to-peer marketing to promote the sales process of a product or a brand. Google is among the digital marketing companies focused on what it calls “path-to-purchase.” Particular consumers are identified through a search or a click on a mobile ad as being interested in a product. Campaigns can be directed to those users and designed to get them into a store by providing them with a range of online experiences. The process is ongoing, sending a steady but subtle stream of branded messages to encourage the consumer to repeat the process. Advances in what are called “shopper sciences,” using technology and other new approaches to help grocery and retail stores more effectively promote their products are part of the path-to-purchase paradigm. As mobile phones morph into mobile wallets used for payment in stores, marketers will be able to identify actual sales with individual users.

Food marketers are in the forefront of companies using these practices. Examples include:

- Global snack food company Mondelez International has signed a data deal with Twitter, so it can use real-time information to promote its products.⁶
- Coca-Cola has developed a framework that

measures the “path to purchase starting before shopping begins, through the sale and then after the good is purchased.”⁷

- McDonald’s, KFC and others are using mobile applications (apps) and mobile payment systems designed to drive and measure sales.⁸

The path-to-purchase model of marketing integrates physical location, purchase and consumption history and prior engagement with marketing for unhealthy foods and beverages in ways that can seriously undermine public health efforts to reduce consumption of these products. As heavy mobile device users and the core demographic for junk food marketing, teens are prime targets for path-to-purchase marketing.

The Power of Social Marketing

One of the great strengths of digital marketing derives from the viral nature of the various and growing social media platforms. The two behemoths, Facebook (with more than a billion users) and Twitter (with about half of that), are all about sharing information within a user’s network. Even smaller social media platforms are significant for advertisers: Vine, an app that allows users to upload short videos, has about 40 million users and Instagram, a photo-sharing app, has about three times that number of users.⁹ Social media marketing predominantly comes from users to their network of friends and followers giving it the personal effect associated with word-of-mouth advertising. That is precisely what marketers want: information about their brands and products to be distributed through communications networks.

Layering of Media

Young people often use their mobile devices (smartphones and tablets) while using other media like television. According to research conducted by Google, 92% of teens use at least two devices simultaneously (e.g., TV, PC, smartphone or tablet) and 35% “use their PC, smartphone and TV at the same time.”¹⁰ A major snack

company executive noted that this “layering of media” means that “for the first time we have a media channel that can work in conjunction with other media channels.”¹¹ Thus, an impromptu event like a power outage at the Super Bowl, the most watched television event of the year, was transformed into a major digital food marketing opportunity when Oreo Cookies sent out a tweet with an engaging visual and the tagline “You can still dunk in the dark” (Figure #). Within one hour, Oreo’s tweet generated 16,000 re-tweets, 18,000 Facebook Likes and 5,000 Facebook shares.¹²

Conclusion

The fact that digital food marketing is harder for young children to identify than traditional marketing makes it potentially even more unfair and deceptive than traditional marketing tactics. The lines between commercial and non-commercial content is further blurred as traditional children’s entertainment companies like Nickelodeon evolve into elaborate digital marketing ecosystems. Young consumers’ use of computers and mobile devices reveal a vast amount of information that food marketers can track and use to target their marketing to boost consumption of their unhealthy products. The path-to-purchase marketing model exemplifies this concept by integrating consumer demographic information, location, prior product consumption and payment into a powerful mechanism to drive purchases. Social media marketing is designed get consumers to share commercial messages. It is most successful when young consumers share commercial content without realizing that they have become marketing proxies for large corporations. Digital marketing delivered on mobile devices, tablets and laptops also is being designed to work in conjunction with traditional media like television. These key differences between traditional food marketing and digital marketing targeting children raise a range of consumer protection concerns for youth.

CASE STUDY

Nickelodeon: From Television Network to Digital Marketing Ecosystem

Nickelodeon, a subsidiary of mega-media company Viacom, is a major source of children's entertainment. The Nickelodeon television network is comprised of the channels Nickelodeon, Nick Jr. (for preschoolers), and TeenNick, and consistently reaches top ratings with child audiences. Nickelodeon "has been the number-one-rated basic cable network for 18 consecutive years."¹³ Nickelodeon is "the biggest source of food ads viewed by kids," displaying 26% of all TV food and beverage ads seen by children and adolescents.¹⁴ The overwhelming majority of these ads promote junk food to children. Nickelodeon has made some progress in improving the nutritional quality of foods marketed with 69% of advertisements in 2013 marketing unhealthy items as compared to 88% in 2005.¹⁵

Nickelodeon is much more than a successful TV network: the company has embraced new media to become a sophisticated digital marketing ecosystem. This expansion is not limited to simply moving television content to the Internet, but also includes developing a variety of digital media platforms to reach children.¹⁶ These platforms are of particular concern to child health advocates, because they offer far lengthier, engaging and interactive branded experiences than the traditional 30-second TV ad.¹⁷ Nickelodeon's digital transformation targets the youngest and most vulnerable viewers, as part of the company's goal to reach "the newest generation of kids, the post-millennials, born between 2005 to present."¹⁸

Nickelodeon's Current Digital Focus

Presently, Nickelodeon is a leading digital marketing organization and a key purveyor of junk food advertising to children. The company uses a variety of established and

cutting-edge techniques enabled by digital technology to deliver marketers' messages to children.



Dedicated websites

Nickelodeon websites are some of the most popular digital destinations for kids on the Internet. From July 2009 to June 2010, Nick.com was the most popular web site among children, with an average of 2.69 million monthly visitors among children aged 2-11.¹⁹ Nickelodeon's online universe includes websites for each of the network's channels and dedicated websites for popular shows such as iCarly.com, which reached a monthly average of 900,000 children during the same time period.²⁰ These sites are rich with features intended to engage children for periods far longer than the traditional 30-second TV ad. Such features include games, videos, logins to develop personalized profiles, and virtual worlds that allow children to explore elaborate and interactive online landscapes.

Nickelodeon's websites are a significant source of children's exposure to junk food marketing online: a recent study found that more than 1 billion food ads were displayed on Nick.com between July 2009 and June 2010, comprising 32% of all ads shown on the site. The same study analyzed the top 20 websites most visited by children and found that 84% of the food products advertised were for junk foods, and that Nick.com was the number one website.

Major food companies have made self-regulatory pledges via the Council of Better Business Bureau’s Children’s Food and Beverage Advertising Initiative (CFBAI) to only promote products that meet specified nutrition criteria to children under 13 in media where the audience is comprised of a certain percentage of children under 13 (e.g., 35%). Despite the large numbers of child visitors to Nickelodeon websites, and the astounding numbers of junk food ads shown, children under 13 were never more than 35% of the total audience composition for any of these sites.²¹ As a practical matter this means that CFBAI pledges do not technically apply to marketing featured on Nickelodeon websites because they do not meet the audience thresholds.²² This is a major self-regulatory gap.

Display advertising



Figure 1: Nick Jr. Interstitial Ad Featuring Teddy Grahams

Food advertisements on Nickelodeon’s websites commonly appear as display ads, ranging from banners or sidebar ads to “interstitial” ads, which the viewer must watch before a webpage loads. A recent visit to the preschool-aged targeted NickJr.com included an interstitial ad for Teddy Grahams, promoting that cookie’s fruit content (Figure 1).

Even seemingly innocuous banner ads include interactive features designed to lure children’s attention. For

example, an ad may react as the user scrolls her mouse across the ad space (Figure 2). Display ads appear both on dedicated sites such as Nick.com, as well as on other Viacom properties, such as Neopets.com, that are intensely popular with children.

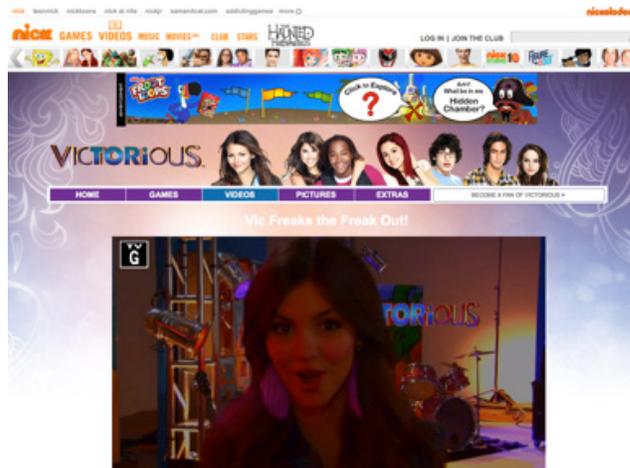


Figure 2: Nick Jr. Interactive Froot Loops Display Ad

Licensing characters for cross-promotions

A key element of promotional work, especially for introducing new food and beverage items, is the use of celebrity tie-ins. Tie-ins leverage a star’s popularity to help generate publicity and create goodwill toward the new product. The recent “iCarly iCook with Birds Eye” campaign illustrates the vast potential to use digital technologies to expand this marketing technique.²³ Jennette McCurdy, the star of the Nick show iCarly, acted as Birds Eye’s brand ambassador for its frozen vegetables. The campaign utilized Twitter, online video,²⁴ and an “iDish” gaming contest in which kids competed to create “whacky” recipes using Birds Eye’s Steamfresh products. One winner, with a “Yakimaniac Veggie Martians” recipe, was featured on an iCarly episode, and Ms. McCurdy Tweeted about the winner to encourage further submissions. Other digital media components incentivized product purchases: the Steamfresh Chef of the Week, for example, encouraged kids to submit photos of themselves cooking the recipes that were put on the site,

and kids (or parents) who entered a Birds Eye UPC code could gain access to special “crazy veggie videos.”²⁵

The campaign generated more than 40,000 sweepstakes entries, 16,000 recipe submissions and 255,000 page views on a dedicated micro website jointly hosted by Nickelodeon and Birds Eye.¹² It is important to note that the Birds Eye campaign was also a large-scale market research scheme to elicit child-generated content: Birds Eye plans to use the recipes submitted by children (and their parents) to guide the development of new child-targeted products.¹²

The iCarly campaign was a rare instance of a Nickelodeon marketing campaign promoting frozen vegetables. The network has a long history of licensing its characters to marketing unhealthy foods to children. For instance, the highly popular character SpongeBob Square Pants has been linked to junk foods including fast food children’s meals and pre-sweetened cereals.²⁶ The lessons learned from the highly successful iCarly campaign have enormous potential to be used to expand the company’s promotion of junk food.

Apps

Applications (apps) for mobile devices like tablets and smartphones are a core element of Nickelodeon’s child-targeted strategy going forward. The company estimates that some seventy percent of U.S. households have a mobile device, and that tablet use is growing faster among children than any other group.²⁷

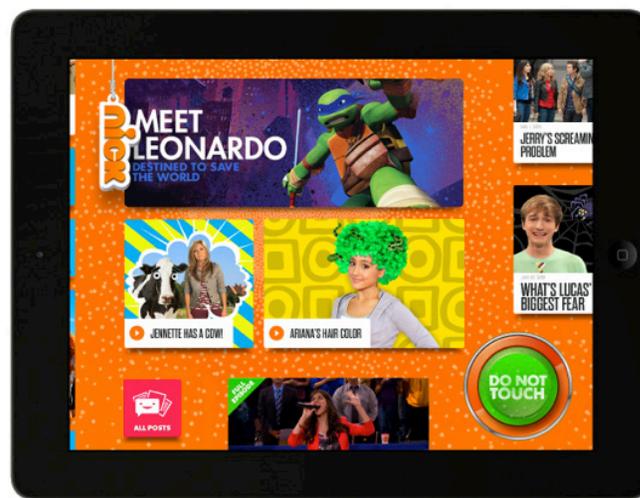


Figure 3: “Nick App” a multi-dimensional digital experience, not just TV episodes (iPad version)⁵⁰

Nickelodeon recently launched the “Nick App” that, according to executive Vice President and General Manager of Digital Media for Nickelodeon Steve Youngwood, is the first step in “creat[ing] a brand-new experience that begins to reimagine what a TV channel is for today’s digital kid.”²⁸ To that end, the Nick App delivers clips and full-length episodes, as well as a variety of interactive content such as games, a “Do Not Touch” button that releases surprise features, and a “favorites” drawer to save favorite content to encourage future interactions (Figure 4).²⁹ The app’s interface features an interactive series of tiles that children can click on and rearrange to create a “noisy, colorful smorgasbord of animated clips, irreverent music videos and the occasional deluge of the network’s trademark green slime.”³⁰ Nickelodeon has plans to generate content for the Nick App via its afternoon TV show, “Nick Studio 10,” that features a daily contest in which four children compete with each other live to be the funniest person that day.³¹

Initially launched via the iPad in February 2013, the Nick App was downloaded 400,000 times in its first week,³² and 1.3 million times by May 30, 2013³³ (it is now available for the iPhone and iPod Touch). The Nick App is proving to be far more engaging than Nickelodeon websites: users are spending on average “more than 20 minutes per day per unique visitor — 25% higher than for

Nick websites accessed on computers.”³⁴ According to Youngwood, the app is successful because it “creates a new platform unlike anything else available to kids today. The Nick App is the one place where kids can watch and play Nickelodeon and experience the complete fun and funny of our brand, wherever and whenever they want.”³⁵ The company is expected to release a Nick Jr. specific app targeting preschoolers by the end of the year.³⁶

Advertising is at the core of Nickelodeon’s app strategy. The medium is entirely ad-supported, as the apps are free to download. Presently, in-app advertising includes direct advertising, such as commercial breaks during episodes and clips; watching episodes and clips on the app requires viewing an equal amount of ads and content as on TV.³⁷ Apps also have the potential for further integration via features such as “advergames,” which integrate products and brands into the game.

Though the Nick app has just launched, there is concern over its potential to exploit the medium to target children with junk food advertising. For example, one of the earliest advertisers to take advantage of the app was the popular Disney movie *Croods*. This advertising link illustrates the potential for junk food marketing to children. Not only is *Croods* itself linked to multiple food industry promotions (including McDonald’s Happy Meals),³⁸ but entertainment tie-ins are also a major expenditure the food industry uses to push junk foods to children and adolescents.³⁹

What’s On the Horizon?: Emerging Digital Platforms

To maintain its position as a leading children’s entertainment company, Nickelodeon is preparing new platforms to extend its reach in the ever-changing world of digital media.

Internet-connected gaming consoles

In addition to apps for mobile devices, the future of Nickelodeon’s digital presence includes reaching young people through apps accessed on gaming consoles that allow users to view content via an Internet connection, such as Microsoft’s Xbox or Sony’s PlayStation. This is an important complement to reaching youth via mobile devices because on average, adolescents spend 1 hour and 13 minutes every day using video game devices, providing ample additional opportunities to reach this audience.⁴⁰ The app for Xbox 360, considered by Nickelodeon to be “the most relevant”⁴¹ for their target audience, was initially slated to be released June 25, 2013,⁴² but has been delayed and is expected to be released by the end of the year.

Importing content from the internet to TV

One of Nickelodeon’s most innovative strategies involves the show “AwesomenessTV” that debuted on Nickelodeon on July 1, 2013. The show is unique in that it intersperses sketch comedy content that was initially developed by and aired on the AwesomenessTV YouTube channel and original content developed for the TV show.⁴³ Awesomeness TV’s YouTube channel routinely ranks in the top ten of the top 25 YouTube channels.⁴⁴ The partnership between Nickelodeon and AwesomenessTV illustrates that the relationship between traditional TV and digital media is a two-way street. Not only can TV episodes and clips be distributed via digital devices, but content can also migrate from the Internet onto television. Though in its infancy, this innovation may spur additional opportunities for marketing to children that will continue to build upon the immersive and interactive nature of digital media.

Children as research subjects

A core element of Nickelodeon’s approach to evolving its child-targeted digital marketing ecosystem is to glean information from its target audience: children themselves. Nickelodeon uses extensive market research on the “post-millennial” generation of children, classified as those born from 2005 to the present, to inform the techniques and content it develops. Nickelodeon recently touted its understanding that this cohort of children is part of a “Velcro family” structure in which parents are highly involved and perceived as heroes in their children’s eyes. These children also prize humor as a trait so important it can be used as a “social currency.”⁴⁵ Nickelodeon plans to exploit the insights mined directly from their audience, for instance, by innovating its delivery of comedic content. Instead of having separate content on each medium, the company intends to use popular bits from the Nick Studio 10 television show to feed the Nick mobile app and to bring popular content from the app to the show.⁴⁶ To the extent that any of this information is used to inform the development of advertisements for post-millennials, this research is extremely troublesome from a children’s health perspective. The Institute of Medicine found that children 8 years old and younger – the same group targeted by Nickelodeon – is unable to understand the persuasive intent of advertising, rendering them extremely vulnerable to all marketing messages.⁴⁷ Moreover, research has shown that children up to 10 years old often cannot even identify advertisements embedded in webpages.⁴⁸ This vulnerability is further heightened by marketing designed by research about this cohort’s desires, preferences, and intimate views of their family systems.

Conclusion

Nickelodeon has long been known for its successful children’s television programming. To date, its marketing policies governing these shows and their popular characters to promote unhealthy foods to children have drawn the vast majority of attention from advocates for children’s health.⁴⁹ It is clear that Nickelodeon has embraced a wide variety of Internet-based and mobile techniques that together constitute a digital marketing ecosystem used by junk food marketers to reach children. At the same time, Nickelodeon has not joined the CFBAI, the main food and beverage industry’s self-regulatory system. The CFBAI also contains important shortcomings, such as the requirement that children aged 2-11 must be at least 35% of a website’s audience to be considered child-directed media. This rule exempts Nickelodeon’s websites that have exposed children to billions of food advertisement, the majority of which were for junk foods. As a result, even CFBAI member companies are able to exploit these gaps and use Nickelodeon’s dominant online presence to target children with digital advertisements for junk food products.

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Packaging: Digital Marketing at the Moment of Truth

State Law Approaches to Address Digital Food Marketing to Youth



Product packaging of foods and beverages sold at food retailers like grocery and convenience stores and fast food restaurants is a prime jumping-off point for children and teens into the digital marketing world. Product packaging currently represents a major loophole in the self-regulatory framework governing the nutritional quality of foods marketed to children under 13 administered by the Children’s Food and Beverage Initiative (CFBAI) of the Council of Better Business Bureaus.¹ According to food marketing experts, “[m]arketing depends heavily on the visual communications of packaging to inform and persuade consumers both at the point of purchase and at the point of consumption.”² With respect to the power of mobile marketing at the point of purchase, one food industry executive noted that mobile devices allow food marketers to interact with the consumer “in-store, in-aisle, at the moment of truth, which we’ve never been able to do before at the moment of purchase.”³ According to the Federal Trade Commission (FTC), food “[p]ackaging often directed children to...[a] company website for advergames, activities, videos and contests.”⁴

The Types and Cost of Food Packaging

Food companies invest in packaging for food preservation and its value as a marketing medium. There are three main types of food packaging: (1) containers to hold multiple units of a particular packaged food item, (2) outer boxes or bags to be displayed on the store shelf, and (3) an interior wrapper holding multiple servings of food (e.g., the bag inside a cereal box holding the cereal) or wrappers around individual servings of food (e.g., single-serve snack wrappers). Major food and beverage companies reported to the FTC that in-store marketing and packaging targeting youth accounted for 9.3% of total youth-targeted food marketing expenditures

in 2006 and 6.3% in 2009.⁵ The United States Department of Agriculture’s Economic Research Service estimates that 4 cents of each food dollar spent in the U.S. pays for packaging, as compared to 2 cents for other advertising expenses.⁶

Digital Marketing Heightens the Need for Increased State Regulatory Oversight of Food Packaging

Marketing on food and beverage packaging is subject to the applicable consumer protection law provisions of each state where it is sold. Child-directed food packaging features typically have nothing to do with actual food characteristics or health claims so they are not governed by the federal Nutrition Labeling and Education Act. Product packaging targeting children under 13 is not covered by the CFBAI. The self-regulatory gap for food packaging is especially significant because food packaging is highly material to purchases because “it communicates to consumers at the time they are actually deciding in the store.”⁷

Traditionally, food packaging like cereal boxes, that accompany the ongoing use of a product, create multiple opportunities to communicate information to consumers and instill brand loyalty.⁸ A study of elementary school-aged children found that when asked to draw a “cereal box” they could spontaneously and from memory draw a picture of a cereal box that included a number of different attention elements including slogans, spokescharacters, and product names.⁹ The advent of digital marketing and mobile marketing in particular has converted formerly “one-time-use” wrappers like candy wrappers, yogurt tubes, paper bags and chip bags into the means

to: access exclusive content online; obtain loyalty points; obtain a code to play a game; and to obtain a code to gain access to a game or to improve the experience on a food-company website. The FTC found that packaging on food products marketed to youth “frequently promoted contests or sweepstakes, usually entered via the website with a code provided on or in the box....”¹⁰ As one food industry executive noted, “mobile is disrupting the consumer path of purchase, as well as the overall in-store experience. It presents opportunities with the ability to interact with shelf talkers or physical activation in-store, as well as product packaging.”¹¹

Food Packaging from the Perspective of the Target Audience of Young Consumers

Marketing is to be viewed from the perspective of the target audience. A young consumer will be drawn in by bright colors, a familiar spokescharacter or licensed character, a tie-in with a popular television program or movie, a toy premium or a code, or a game on the box—features that have nothing to do with the actual food product contained inside the packaging. From the perspective of young consumers, “[i]n a real sense, the packaging has become the product.”¹² This is problematic because packaging features are used to drive purchases and consumption of unhealthy foods and beverages.

Adults interpret and interact with product packaging differently than children. Parents are likely motivated to purchase a particular brand because their child asked for it, it is perceived to be of good quality, a good value, and it is appropriate for children. Marketers capitalize on these differences by including marketing messages on packaging that appeal to both parents and children (Table 1). A number of these features are described and analyzed in other sections of this report.

Table 1. Food packaging features and the likely target audience

Packaging Features¹³	Youth-Focused	Parent-Focused
Colors	X	
Spokescharacters (e.g., Keebler Elves)	X	
Cross-Promotions (television shows and movies)	X	
Size and Shape	X	X
Brand Name	X	X
Product Name	X	X
Sweepstakes	X	X
Toy Premiums	X	
Codes to Use on a Website or with an App	X	
Interactive features (requiring the use of a mobile phone)	X	
Nutrition Facts Panel	X	
Nutrition-Related Claims	X	X
Points for use with a loyalty program	X	X
Public Relations Features (cause-marketing campaigns)	X	X
Instant Win Games	X	X

A Regulatory Focus on Food Packaging Can Have a Meaningful Impact on Digital Food Marketing

Packaging directly relates to digital marketing because it is used to make young consumers aware of tie-ins and promotions to be accessed online or via mobile devices. Food packaging is currently unaddressed by self-regulatory guidelines governing the nutritional

content of foods marketed to children and is highly material to actual product purchases. The majority of the packaging features described above have nothing to do with the actual food or beverage product being sold. These packaging features exploit the vulnerabilities of children and teens in order to drive sales of unhealthy food products. A regulatory focus on packaging features could go a long way towards leveling the playing field for parents and young consumers in the retail environment and to reduce exposure to digital food marketing.

Endnotes

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²James U. McNeal & Mindy F. Ji, *Children's Visual Memory of Packaging*, 20 J. CONSUMER MARKETING 400, 403 (2003).

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⁴FED. TRADE COMM'N, *A Review of Food Marketing to Children and Adolescents* 1, 74 (December 2012), <http://www.ftc.gov/os/2012/12/1212221foodmarketingreport.pdf>.

⁵Lisa M. Powell et al., *Food Marketing Expenditures Aimed at Youth: Putting the Numbers in Context*, __ AM. J. PREVENTATIVE MED. 3 (2013), available at http://www.yaleruddcenter.org/resources/upload/docs/what/advertising/Food_Marketing_Expenditures_AJPM_8.13.pdf.

⁶Patrick Canning, *A Revised and Expanded Food Dollar Series: A Better Understanding of Our Food Costs* 1, 20-21 (Feb. 2011), <http://www.ers.usda.gov/publications/err-economic-research-report/err114.aspx#.UjHTGMaa4ZQ>.

⁷Corinna Hawkes, *Food Packaging: the Medium is the Message*, 13 PUB. HEALTH NUTRITION 297, 297 (2010).

⁸James U. McNeal & Mindy F. Ji, *Children's Visual Memory of Packaging*, 20 J. CONSUMER MKTG. 400, 403 (2003).

⁹*Id.* at 400.

¹⁰FED. TRADE COMM'N, *A Review of Food Marketing to Children and Adolescents* 75 (December 2012), <http://www.ftc.gov/os/2012/12/1212221foodmarketingreport.pdf>.

¹¹Atifa Silk, *Mobile Believer: Modelez's Bonin Bough*, CAMPAIGN ASIA-PACIFIC (May 6, 2013).

¹²Corinna Hawkes, *Food Packaging: the Medium is the Message*, 13 PUB. HEALTH NUTRITION 298 (2010).

¹³*Id.* at 297; James U. McNeal & Mindy F. Ji, *Children's Visual Memory of Packaging*, 20 J. CONSUMER MKTG. 400 (2003).

Personal Jurisdiction & Digital Food Marketing

State Law Approaches to Address Digital Food Marketing to Youth



Personal jurisdiction refers to a “court’s power to bring a person into its adjudicative process.”¹ Personal jurisdiction over corporations and individuals is determined through an analysis of a defendant’s “minimum contacts” with a forum state. A court can exert its power to adjudicate when a defendant has purposely availed itself “of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws, ’...[including] acts intentionally directed toward the forum state with knowledge that effects would result there.”² In order to satisfy due process requirements, exertion of personal jurisdiction also must be reasonable and in accord with fair play and substantial justice.

Personal jurisdiction is further categorized into specific jurisdiction and general jurisdiction. “Specific jurisdiction exists when there is a connection between the forum and the acts of a nonresident defendant generating the controversy.”³ The connection can take the form of an action by the defendant within the forum to wrong the plaintiff, or the use of “the mails or another mode of communication as a substitute for actually going to the forum.”⁴ Business activity within a forum state is a typical reason for the exertion of personal jurisdiction over a defendant.⁵ Where business activity stems from the acts of a business affiliated with an out-of-state defendant, courts will first make a legal determination as to whether an agent-principal relationship exists. If such a relationship is found, “courts will attribute the affiliate’s contacts [with the forum state] to the defendant” to determine whether personal jurisdiction exists.⁶ While not discussed here, state long-arm statutes should also be consulted.

The Zippo Test

The evolution of digital technologies has greatly complicated personal jurisdiction because the minimum

contacts framework is difficult to apply to Internet actors using a communication medium that is nationally accessible and can be used to simply post information or to contact specific individuals, execute sales contracts, deliver software or facilitate communication between people all over the country. In 1997, a judicial doctrine known as the “Zippo test” was developed to establish personal jurisdiction over online actors.⁷ The test uses a sliding scale to evaluate “the level of interactivity and commercial nature of the exchange of information that occurs” between a website and a consumer in a forum state to determine whether an actor has purposefully availed him or herself of the benefit of a state’s laws.⁸

There are a number of factors courts take into consideration to determine whether the exercise of personal jurisdiction over a defendant conducting business online is proper, including:

- The level of business activity conducted in the forum state
- Property ownership within the forum state
- Advertising and solicitation of forum residents
- Internet presence⁹

Internet presence is gauged by the amount of traffic on a given website by forum state residents, whether the site uses cookies, acceptance of payments, tailoring content for forum state residents, maintaining a chat feature, transmitting products or services, and the use of a location-sensitive gateway to bar forum residents from accessing the website.¹⁰ The same factors can be applied to mobile sites and the downloading and subsequent use of mobile applications (apps).¹¹

Under Zippo, an entity that actively conducts business via its website to persons in a forum state will be subject to personal jurisdiction in the state (“active sites”), while

an entity that merely provides a passive website that makes information available but does not interact with consumers will not (“passive sites”).¹² Websites that fall in the middle are said to be in the “gray zone” and courts seek to determine whether a defendant “purposefully directed its activities towards the forum state” and will look to whether the defendant “targeted the forum with advertising ... or other emblems of a forum presence.”¹³

The Business of Marketing Foods and Beverages

Personal jurisdiction is highly fact-specific and case law with respect to internet commerce is inconsistent at best. Mobile commerce has yet to even work its way into major civil procedure texts. Food and beverage sales and marketing, however, have some unique characteristics that provide insight into personal jurisdiction issues that may arise with respect to digital food marketing.

Packaged food and beverage companies maintain sophisticated distribution systems that ensure consumers have access to their products in convenience stores, grocery stores, dollar stores, big box stores and via vending machines.¹⁴ Quick service and fast casual restaurant chains work to ensure that their franchisees are located strategically and with sufficient density to capture large numbers of consumers within a given state. Packaged food and beverage companies enter into slotting fees and in-store marketing arrangements with food retailers, and restaurant franchisees are subject to elaborate contracts. Typically a portion of franchise fees are earmarked for marketing to be executed by the franchisor. In short, the business model demands extensive business contacts in each state where products are sold, and a series of principal-agent relationships. If successful, substantial revenues are derived from product sales to citizens of each forum state. This level of business activity in and of itself should be sufficient to establish personal jurisdiction over nonresident food industry defendants when they use digital means to market products to child and teen consumers in a given forum state.

Additional factors supporting the exercise of personal jurisdiction of food industry defendants

Digital food marketing encompasses a vast range of tactics and techniques and food companies use digital means to: execute contests, sweepstakes, instant-win games and coupon offers; deliver branded content to young consumers; interact with consumers; and foster peer-to-peer marketing. One of the major shortcomings of the Zippo test is that it was designed to address websites, and since its development there has been an explosion of the use of mobile devices.

Under Zippo, websites that are used to conduct sales to forum state residents are typically found to be “active” websites whereas “informational websites viewable from the forum state as well as everywhere else usually do not support personal jurisdiction....”¹⁵ Food company websites accessed on desktop computers or as mobile sites on handheld devices typically are not used to execute actual online sales of food products to children and teens, but a 2009 study of food company websites with child-directed areas found that 55% of them contained an online store selling branded merchandise.¹⁶

Food company websites and apps and other social media platforms like Facebook are widely used to execute instant-win games, sweepstakes, contests, loyalty programs and other promotions. Instant-win games, sweepstakes and contests are subject to state laws and are only allowable as exemptions to state illegal lottery laws. Loyalty programs and rewards are subject to statutory protections (e.g., gift card regulations) and state common law protections such as the doctrine of escheat. When a food company uses digital media to conduct these activities, the company purposefully avails itself of the ability to do business within the forum state.¹⁷ Allowing citizens of the forum state to create a user profile and enter or redeem codes via a website or to download an app onto one’s smartphone or tablet is interactive in nature.¹⁸ Moreover, sweepstakes and contests are marketed to consumers in the forum state

via food packaging and traditional media like radio and television. Digital marketing with these features meet Zippo's "active" criteria.

Food company-maintained websites and mobile apps directed to young children typically contain advergames (games that integrate branded food products), branded downloads, opportunities to interact with spokescharacters, virtual worlds and the ability to enter codes featured on food packaging to access exclusive digital content. Food company websites that maintain online stores would likely be found to be "active" websites. Websites and apps that are solely branded content-delivery-oriented likely fall within the gray zone of Zippo's sliding scale. Children's food marketing websites and mobile apps contain many interactive features that are used to determine personal jurisdiction.¹⁹ A 2009 study of food company websites with child-directed areas found that 69% allowed children to register or create an account (as compared to just 37% of food company websites without a child-directed area) and 61% had a member sign-in.²⁰ Food companies also heavily promote their child-directed digital marketing on food packaging and on television, which amounts to targeting child consumers in the forum state.

Conclusion

Since the development of the Zippo test, the Internet has taken on a major role in advertising and commerce. With respect to digital food marketing, the extensive business activities of food, beverage and restaurant companies that sell food in a given state, combined with the use of traditional media and product packaging to promote digital marketing campaigns targeting child and teen consumers in the forum state all militate towards findings of personal jurisdiction over out-of-state food company defendants that employ digital food marketing tactics with children and teens.

Endnotes

¹ BLACK'S LAW DICTIONARY (9th ed. 2009).

² KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE 249-250 (3d ed. 2012) (citing *Hansen v. Denckla*, 357 U.S. 235, 253 (1958)).

³ GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 79 (4th ed. 2012).

⁴ *Id.*

⁵ KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE 261 (3d ed. 2012)

⁶ *Id.* at 263.

⁷ *Zippo Mf. Co v. Zippo Dot Com*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

⁸ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *Zippo Mf. Co v. Zippo Dot Com*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

⁹ 59 AM. JUR. 3D *Proof of Fact* §13 (2013) (Proof of minimum contacts with forum state such that exercise of personal jurisdiction is appropriate; checklist).

¹⁰ 59 AM. JUR. 3D 1 *Proof of Fact* §13 (2013).

¹¹ See, e.g., Joanna Sibilla Taatjes, *Note: Downloading Minimum Contacts: The Propriety of Exercising Personal Jurisdiction Based on Smartphone Apps*, 45 CONN. L. REV. 357 (2012).

¹² *Zippo Mf. Co v. Zippo Dot Com*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

¹³ MICHAEL L. RUSTAD, INTERNET LAW IN A NUTSHELL 74 (Thomson Reuters 2009).

¹⁴ For an excellent description of the soda industry supply chain see Christine Fry et al., *Breaking Down the Chain: A Guide to the Soft Drink Industry* (2011), http://changelabsolutions.org/sites/phpnet.org/files/Beverage_Industry_Report-FINAL_20110907.pdf

¹⁵ KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE 267 (3d ed. 2012).

¹⁶ Anna E. Henry & Mary Story, *Food and Beverage Brands that Market to Children and Adolescents on the Internet: A Content Analysis of Branded Web Sites*, 41 J. OF NUTRITION EDUC. & BEHAVIOR 353, 356 (2009).

¹⁷ Kevin M. Clermont, Principles of Civil Procedure 267 (3d ed. 2012).

¹⁸ Joanna Sibilla Taatjes, *Note: Downloading Minimum Contacts: The Propriety of Exercising Personal Jurisdiction Based on Smartphone Apps*, 45 CONN. L. REV. 357 (2012).

¹⁹ For a checklist of factors used to determine minimum contacts with a forum state to support the exercise of personal jurisdiction over a defendant see, 59 AM. JUR. 3D 1 *Proof of Fact* §13 (2013).

²⁰ Anna E. Henry & Mary Story, *Food and Beverage Brands that Market to Children and Adolescents on the Internet: A Content Analysis of Branded Web Sites*, 41 J. OF NUTRITION EDUC. & BEHAVIOR 356 (2009).

Mobile Food & Beverage Marketing

State Law Approaches to Address Digital Food Marketing to Youth

Essentially every new youth-focused food marketing campaign includes mobile components or is mobile-focused. Federal and state laws have not kept up with rapidly evolving mobile technologies, and jurisdictional issues may forestall state regulators' efforts to protect child and teen consumers in their states. This section will describe the mobile food marketing industry, location-based tactics, the harm mobile marketing poses, and the federal and state legal frameworks governing mobile marketing.

Mobile Marketing



Figure 1: Dum-Dum Flick-A-Pop App

In 2010, the mobile marketing industry in the United States netted \$24 billion, with as much as \$80 billion in earnings projected for 2011.¹ The direct mobile marketing industry is comprised of wireless service providers (companies with which consumers contract for cell phone and mobile data services, such as Verizon Wireless and T-Mobile) and companies involved in the third-party wireless content industry, who are in the business of delivering wireless content to consumers' mobile phones. This category includes advertisers, content and application providers, aggregators of third-party



mobile content and Internet marketing companies. Since consumers can now access the Internet on their smart-phones, even companies that send traditional commercial messages by e-mail to consumers participate in mobile marketing. Companies that make marketing calls and/or send short message service (SMS) texts to wireless phones also utilize mobile marketing techniques.



Figure 2: Chuck E. Cheese "Say Cheese" Augmented Reality App

A major component of mobile marketing is the use of applications (apps) that consumers download to their mobile devices. Advertisers and app developers form relationships for their mutual benefit; advertisers get their ads out to the mobile audience, while app developers get paid when users click on the ads. Advertisements may be used to partially or completely subsidize the price of a mobile app or the services provided by an app.² Food companies can design and disseminate apps that are advergames (Figure 1). Apps can be designed to interact with other marketing materials like product packaging, e.g., a consumer downloads an app that displays augmented reality features when aimed at product packaging. Augmented reality puts the consumer in an artificial digital environment that utilizes some aspects of the physical world (Figure 2). Apps designed and disseminated by food companies are very popular with children.³ Food companies also can reach chil-

dren and teens through in-app advertising in the form of banners, splash pages utilized eye-catching effects, links and mobile coupons that are designed to be easily shared with friends.⁴

Location-Based Techniques

The power of mobile marketing is amplified by the fact that it can be combined with a user's location data. Location-based mobile marketing allows food marketers to make pedestrians and drivers aware that they are in close proximity to fast food restaurants, make travelers aware that a certain product is available in an unfamiliar place, or alert youth when they enter a shopping center's parking lot of special offers available in the food court.⁵ 77% of teenagers own mobile phones,⁶ and they are more likely than adults to use their mobile devices for text messaging, social networking and accessing entertainment and information, making them prime targets for location-based advertisements for unhealthy snacks, beverages and fast food.⁷ In this section we describe location-based marketing using apps, and how "geo-fencing" and "micro-fencing" can be used to target young consumers with food marketing.

Mobile apps

Apps running on smartphone operating systems equipped with Global Positioning System (GPS) technology have access to information about consumers' geolocation,⁸ and can use it to provide a specific service, such as identifying and connecting users playing a game with others playing the same game in a geographical area, delivering special offers or providing directions to a retail location.⁹ Even when a user's location information is not necessary to provide the service associated with the app, apps may still collect location data.¹⁰

Food company-designed apps and in-app advertisers use consumer geolocation information in several ways. They use it to reach users in a particular geographic location, and/or to display different messages to users

based on their precise location.¹¹ For example, advertisers can use location information to provide alerts and serve offers when a customer is near a unique store location. Advertisers may use "check-in"-based contests and games that reward users with discounts or coupons for visiting store locations and "checking-in" via their GPS-enabled mobile devices.¹² When the consumer checks in at the location, she provides a valuable marketing service to the food company because her location is broadcast to her friends on Facebook or her followers on sites like Foursquare.

Applications that require location information to provide a specific service to users and those that collect it unnecessarily may share that data with third parties involved in mobile marketing.¹³ Ad networks such as AdMob by Google connect advertisers and publishers, allowing application developers access to a pool of ads, and marketers access to the mobile audience. Ad networks manage mobile campaigns and use consumer information provided by applications to insert ads that are relevant to consumers' demographic information, interests and geolocation.¹⁴ Service providers providing the advertising content and other services within an app may also be privy to consumers' geolocation information.¹⁵

Geo-fencing

Geo-fencing companies are independent businesses that contract with telecommunications carriers or retailers to place virtual boundaries around stores, events and other locations. Geo-fences allow retailers to reach consumers on their mobile phones within a defined geographic area in two ways: subscribers may download an app onto their phones and receive information via the app when they are inside a geo-fence, or consumers are alerted by their mobile carriers via a text or multi-media text.¹⁶ In the first scenario, the geo-fencing company assists the retailer in developing an app that cell phone users can download onto their phones, places virtual boundaries around certain stores or events, and sends alerts to consumers who have downloaded the app and

have it running when they enter a geo-fenced area.¹⁷ In the second scenario, wireless carriers such as AT&T offer such messages as an opt-in service to their subscribers. The mobile carrier contracts with a geo-fencing company, who places virtual boundaries around stores and events and then “pings” or communicates with the carrier’s network periodically to see which users are inside a geo-fence. Those users then receive a message alert on their phones. In this scenario, consumers do not need to have smartphone technology, and can be reached at any time.¹⁸

Micro-fencing

Since GPS technology does not work indoors, micro-fencing companies are rapidly developing ways to deliver indoor consumer location. Food retailers can use indoor location information to send special offers and walking directions to a store. The micro-fencing market is relatively new, and currently there are a number of competing technologies. These include: near-field communication and radio frequency identification (RFID) that both require tags and tag readers; light field communication whereby light bulbs are retrofitted to emit different strobes in various locations throughout a building that are not visible to the human eye but that can be captured by a mobile phone camera to determine precise indoor location;¹⁹ and Wi-Fi access point triangulation that leverages a building’s network of Wi-Fi access points to determine a user’s indoor location.²⁰ The legal and privacy implications of micro-fencing are rapidly emerging. In addition to the serious privacy issues raised, especially for teens who are not covered by the Children’s Online Privacy Protection Act (COPPA), the powerful cueing effect of receiving a special coupon or a reminder to visit a food retailer or vending machine should be of concern to the public health and state regulatory communities when children and teens are targeted.

What Is the Harm?

Food marketers are at the forefront of mobile marketing targeting youth, and present a new set of issues for regulators. Food and beverage marketers don’t simply want young consumers to recognize their brands or desire their products -- their ultimate goal is to generate actual purchases. Mobile marketing dramatically shortens the distance between a company’s marketing message and the consumers’ purchase decisions. Food and beverage company marketing executives are not shy about the intent of their mobile campaigns. When discussing Coca-Cola’s marketing plan to “reach every hand with a mobile phone,” one Coca-Cola executive said: “I am looking at how we can use mobile technology and content to get a transaction. We are not just in the brand building business, we are in the direct response business.”²¹ A major snack company executive echoed the sentiment: “We want to use mobile to drive impulse purchase behavior.”²²

Young people are especially vulnerable to predation by mobile marketers because they often grant permission to access personal information and location data or agree to pay for services without fully understanding the commercial nature of the messages delivered to their phones.²³ A survey of girls 6 to 16-years-old found that almost one quarter (22%) reported that they always tap on mobile ads they see in mobile apps regardless of whether they are interested in the featured product, and more than half (56%) said they tap on ads for products that interest them. Forty-two percent reported that they share ads they like with friends via text and in-ad share buttons.²⁴

Unfair and deceptive mobile food marketing harms young consumers economically through the purchases of food items they would not otherwise have purchased. It also harms their health from the excess calories, sodium, caffeine, etc. consumed as the result of the marketing. Potentially unfair and deceptive mobile food marketing practices targeting youth include campaigns that

are designed to: trigger impulse purchases of unhealthy products; blur the line between entertainment or mobile content and marketing; and appear to be from friends when in fact they are generated by a food company.

State Attorney General Oversight of Mobile Marketing

Mobile marketing is subject to the federal and state laws that regulate other types of advertising, but is complicated by the fact that it is deployed using telephonic and Internet-based communication systems. The Federal Trade Commission (FTC) regulates unfair and deceptive advertising practices, and the Federal Communications Commission (FCC) regulates interstate communication.²⁵ The FTC is granted the statutory power to enforce the Federal Trade Commission Act (FTCA), and every state has its own consumer protection law enforceable by the state Attorney General (SAG).²⁶

Jurisdictional challenges

Mobile marketing claims brought under state Unfair and Deceptive Acts and Practices (UDAP) statutes and anti-fraud laws must contend with jurisdictional challenges and federal pre-emption. Defendants may claim that the FTC or FCC has primary jurisdiction over claims brought against mobile marketers' advertising practices, and/or that the agencies' regulations pre-empt state law. The primary jurisdiction doctrine provides that when an issue falls within the special competence of an administrative agency, such as the FCC, it should be referred to that agency.²⁷ In cases involving fraud or deceptive practices perpetrated by wireless carriers and other communications companies, courts have repeatedly upheld states' authority to protect their citizens.²⁸ Claims brought under state UDAP and anti-fraud laws may also face subject-matter jurisdiction challenges. Defendants may attempt to remove such claims from state to federal court, under the theory that the FTCA or other federal law justifies pre-emption of state claims and removal of claims to federal court.²⁹ Courts have

held that the FTCA and other FTC and FCC regulations do not have the pre-emptive force to require removal of claims brought under state laws to federal court simply because consumers could have pursued complaints in federal court.³⁰

Mobile marketing as a violation of anti-spam laws

Mobile marketing practices may violate federal and state anti-spam laws. Anti-spam laws protect against unsolicited bulk e-mail and malicious attachments, viruses and links to fraudulent websites frequently contained in spam e-mail. In 2003, Congress passed the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM) in order to reduce spam and end false and deceptive spamming practices. CAN-SPAM empowered the FTC and FCC to promulgate a large body of complementary regulations.³¹ The FCC was granted the specific authority to promulgate rules regulating wireless spam, which it did in 2005.³²

Marketers are able to send marketing messages directly to a consumer's mobile phone by using an e-mail address consisting of a combination of the consumer's phone numbers and an Internet domain name provided by a wireless carrier.³³ The resulting message is called a mobile service commercial message (MSCM) and arrives to the recipient's phone in the form of a textual or multi-media message.³⁴ MSCMs differ from SMS texts, which are texts sent from other mobile phones without passing through an e-mail channel. The FCC has created a list of commercial domain names belonging to wireless service providers; senders of MSCMs utilizing domain names found on the list are subject to specific FCC regulations. Among other requirements, marketers using domain names on the FCC's list must obtain the consumer's express consent prior to sending MSCMs (opt-in consent), with exceptions for transactional and relationship messages.³⁵ The FCC's regulations apply only to messages sent using domain names registered on the FCC's website. They do not apply to messages

sent from other phones, messages sent to consumers' e-mail addresses and forwarded to or accessed on consumers' mobile phones, or to MSCMs sent using domain names not listed on the FCC's website.

Marketers can also send e-mails containing commercial content from other e-mail addresses, which recipients frequently access on their Internet-capable mobile phones. CAN-SPAM and complementary FTC rules apply to commercial messages sent to consumers' e-mail addresses, including those accessed on mobile devices.³⁶ Among other requirements, the relevant laws allow marketers to send unsolicited commercial e-mail as long as recipients are given the option to refuse the receipt of future messages (opt-out consent).³⁷

State authority to regulate SPAM

CAN-SPAM grants SAGs enforcement authority, but limits that power to the sections of the statute that impose requirements on the transmission of spam sent to consumers' email addresses on their computers (non-wireless spam).³⁸ SAGs are thus empowered to enforce CAN-SPAM's prohibitions on commercial e-mail containing false or misleading transmission paths and deceptive subject headers. They can also enforce CAN-SPAM's requirement that senders place warning labels on commercial e-mail that contains sexually explicit material.³⁹ SAGs are empowered to prosecute persons who engage in a "pattern or practice" that violates CAN-SPAM's mandates that senders cease to send e-mails after the recipient objects, that marketers clearly identify messages as advertisements, and that senders of commercial e-mail include functioning opt-out mechanisms and accurate return e-mail and physical addresses.⁴⁰ CAN-SPAM expressly pre-empts state laws regulating commercial e-mail, but contains a savings provision for state laws that prohibit "falsity or deception" in commercial e-mail that are not specific to electronic mail, and that are related to fraud and computer crime.⁴¹ Courts have split on which state laws fall into CAN-SPAM's exemption from pre-emption for state laws, including UDAP

statutes, prohibiting "falsity or deception" in commercial e-mail.⁴²

Mobile marketing as a violation of telemarketing laws

When mobile marketers make calls or send text messages to consumers' wireless phones, federal and state legislation regulating telemarketing practices apply. Such legislation is designed to protect consumers from harassing phone contacts and fraudulent and unfair telemarketing practices.⁴³ The exact laws that apply depend on whether a call or text is sent by a live person or an auto-dialer.

The Telemarketing and Consumer Fraud and Abuse Prevention Act (TCFPA) empowered the FTC to establish the National Do-Not-Call Registry and to issue the complementary Telemarketing Sales Rule (TSR), which governs live calls and text messages sent to wireless phone numbers from other phones.⁴⁴ The TSR prohibits calling phone numbers placed on the Do Not Call Registry, certain deceptive practices, calling at early or late hours, and requires telemarketers to disclose up front the marketing purpose of their call.⁴⁵ These prohibitions may apply to commercial text messages sent to wireless phone numbers.⁴⁶

The Telephone Consumer Protection Act (TCPA) and the complementary FCC TCPA Order govern autodialed and pre-recorded calls and texts made to wireless numbers.⁴⁷ While live telemarketing calls and texts to wireless numbers are permitted as long as such calls comply with relevant laws and regulations,⁴⁸ calls and text messages made using automatic telephone dialing systems (ATDS) (also known as auto-dialers) and/or prerecorded messages are prohibited if the customer is charged for the message, unless consumers give prior consent.⁴⁹ While the TCPA was written before SMS technology was common and does not specifically refer to SMS or text messages, the FCC's TCPA Order and a recent Ninth Circuit decision make clear that the text messages are

considered “calls” and that the TCPA and FCC’s prohibitions on using ATDS or prerecorded messages applies to the sending of text messages.⁵⁰

State authority to regulate

The Telemarketing and Consumer Fraud Prevention Act (TCFAPA) (governing live calls and granting the FTC the power to regulate telemarketing) does not preserve exclusive enforcement power for federal regulators, nor pre-empt state law.⁵¹ The statute grants SAGs the power to enforce FTC rules, and the FTC’s Telemarketing Sales Rule has equivalent provisions.⁵² Both the TCFA-PA and the TSR explicitly specify that state officials are not prohibited from proceeding in state court for violations of state statutes.⁵³ The TCPA grants a private right of action to consumers and enforcement power to SAGs to bring suits in federal court against telemarketers that use ATDS and pre-recorded messages to make calls or send texts.⁵⁴

Jurisdictional challenges

Jurisdictional challenges to cases brought in TCPA suits include motions to dismiss for lack of personal jurisdiction, similar to those brought against CAN-SPAM plaintiffs. Defendants may also argue that because they made calls from a state other than the forum state, the forum state has no authority to regulate the interstate calls.⁵⁵ Although these challenges are framed in pre-emption language, the basis of the conflict is states’ jurisdiction to reach conduct that occurs outside of their borders but affects their citizens. While some courts have upheld states’ ability to enforce state laws against out-of-state defendants,⁵⁶ other courts have upheld defendants’ allegations that the TCPA pre-empted state statutes imposing stricter standards on interstate communications than the federal law.⁵⁷

State oversight of apps targeting youth

Apps that consumers download onto their smartphones present a unique mobile marketing challenge for state regulators and are subject to yet another subset of federal law. Mobile carriers such as Verizon Wireless and T-Mobile are governed by the federal Communications Act and the FCC’s corresponding regulations.⁵⁸ The relevant laws mandate consumer opt-in consent before disclosing or permitting access to personal information, including geolocation data.⁵⁹ These laws currently do not apply to app providers and third parties involved in mobile advertising.⁶⁰ These parties are governed by their contracts with app stores and mobile carriers, and subscribe to a set of industry self-regulation guidelines. A 2012 FTC staff report found that the Apple store, iTunes and the Google Play store contractually require app developers to disclose the information their applications collect but routinely do not enforce these requirements.⁶¹

The Mobile Marketing Association (MMA) and CTIA-The Wireless Association (CTIA) are self-regulatory bodies that maintain guidelines for mobile carriers and third parties using location information. The MMA instructs marketers to notify consumers about how their location information will be used, disclosed and protected, and to obtain user consent before collecting consumers’ precise geolocation data or sharing that information with third parties.⁶² CTIA’s guidelines recommend that consumers receive notice about how location information will be used and shared, and that they consent to the use or disclosure of location information.⁶³ The FTC’s February 2009 staff report on online behavioral advertising also indicates that precise geolocation data is sensitive data which requires express consent to use.⁶⁴

Current data shows that disclosures from application providers are far from adequate. A 2012 FTC staff report examined four hundred mobile applications designed for children and found that the disclosures provided by application providers regarding the collection, sharing and use of geolocation and other personal information

overwhelmingly failed to reveal whether the apps collected any data, the purpose of any such collection and the identity of the entities collecting and/or obtaining access to the data.⁶⁵

Updated COPPA regulations, effective July 1, 2013, are applicable to child-directed mobile marketing, contain an expanded definition of personally identifiable information and extend coverage to the use of that information by third parties.⁶⁶ COPPA is enforceable by SAGs and it applies to apps and the collection and use of location data of children under 13 by marketers and third parties. Even prior to the 2013 COPPA update, which included new protections from marketing practices, state regulators had an impact on child-directed apps. In 2012, New Jersey's Attorney General Jeffrey Chiesa initiated a COPPA lawsuit against 24x7 Digital LLC, a Los Angeles based company that develops children's apps. The suit alleged that the company collected, maintained and transmitted to a third party the personal information of children. The parties settled with a consent decree stipulating that 24x7 Digital would stop collecting personal data from its app users and would destroy all previously collected data that allegedly violated COPPA.⁶⁷ 24x7 Digital was enjoined from failing to provide notice on its website or its mobile device app of the type of personal information it collects from children and from failing to provide notice to parents of the types of information it collects from children and how it is used.⁶⁸

Regulating geolocation tactics

Wireless carriers are governed by the Communications Act and the FCC's regulations; geo-fencing marketing that utilizes mobile carriers' networks will be affected by these laws.⁶⁹ The relevant laws require telecommunications companies to obtain opt-in consent before sharing geolocation or other personal information with third parties -- such as geo-fencing companies -- for marketing purposes. The type of consent required for a mobile carrier to share geolocation data with a geo-fencing company depends on whether the geo-fencing compa-

ny is considered to be a carrier's affiliate or agent, or a carrier's joint venture partner or independent contractor.⁷⁰ Opt-in consent from subscribers is required if the geo-fencing company is a joint-venture partner or an independent contractor. Opt-out consent is required if the geo-fencing company is an affiliate or agent of the carrier.⁷¹ The Communications Act defines an affiliate as "a person that (directly or indirectly) is owned or controlled by, or is under common ownership or control with another person."⁷² Geo-fencing companies are likely to be deemed independent contractors of wireless carriers, requiring wireless carriers to obtain the opt-in consent of consumers before sharing their geolocation.

If a retailer and a geo-fencing company market to consumers via in-app advertising like banners and mobile display ads, they are not subject to laws requiring disclosure and consent. App developers may also get in on the action. Pandora's iPhone app targets ads for McDonald's to consumers using the app while near one of the restaurants (Figure 3).⁷³ As long as the ads consist of visual ads like banners or radio commercials, no privacy laws apply; if the ads are sent via text or multi-media message, the laws discussed below may apply.



Figure 3: McDonald's In-App Marketing on the Pandora Music App

Geo-fencing companies, retailers and carriers sending alerts to consumers via text are subject to CAN-SPAM

and the TCPA. CAN-SPAM requires opt-in consent from consumers in order to send them texts using a combination of their phone number and a domain name from a company on the FCC's list.⁷⁴ There are exceptions, however, for transactional messages or relationship messages such as receipts, warranties or account balances.⁷⁵ Messages that subscribers sign up for as a service provided by their mobile carrier may be deemed to be transactional or relationship messages, as they could be deemed "product updates... that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender."⁷⁶ SAGs do not have enforcement power over this provision of CAN-SPAM.⁷⁷

The TCPA forbids automatically dialed or pre-recorded texts from being sent to wireless phones without express prior consent, even if there is an established business relationship between the sender and the recipient.⁷⁸ A text message that utilizes a domain name but is automatically dialed may be a violation of both CAN-SPAM and the TCPA.⁷⁹ SAGs have enforcement power over the TCPA.⁸⁰

Conclusion

The dramatic growth of highly localized digital marketing enables precise targeting of individual children and teens -- in school, at the playground or near a store. Location-sensitive marketing incorporates information from users' profiles -- their offline and online interests, social relations, shopping behavior, entertainment interests and more. Teens are not covered by COPPA, and as their information and buying experiences are collected and analyzed for subsequent use, these young people become vulnerable to ongoing food marketing campaigns. Location-based mobile campaigns can be fully integrated with social media to create new ways for marketers to promote their products beyond individuals to their social networks. The rise of location marketing requires robust safeguards that protect the privacy and well-being of teens.

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Privacy

State Law Approaches to Address Digital Food Marketing to Youth

Privacy protections are often framed in terms of child safety from online predators. Privacy protections also are important to protect youth from junk food marketers seeking to capitalize on the wealth of information one's mobile and online habits provide—highly valuable information that can be used to segment and target young consumers as individuals and peer groups to boost sales and consumption of unhealthy foods and beverages. Privacy is one area of digital marketing that has been the subject of regulatory action at the state and federal level. In 1998 the Children's Online Privacy Protection Act (COPPA)¹ was enacted and granted the Federal Trade Commission (FTC) the authority to regulate the online collection and use of personal information from children under the age of 13.² COPPA granted the FTC rulemaking authority and initially promulgated rules and guidance after its passage. The FTC recently revised COPPA to expand the definition of personally identifiable information and the range of parties subject to COPPA compliance.³

Teens and the COPPA Revision Process

Teens are not covered by COPPA. The FTC initiated a review of its COPPA rules in 2010.⁴ One of the proposed changes made by child privacy advocates was to expand the definition of the term "child," defined as "an individual under the age of 13," to include adolescents. The FTC declined to advocate for the change to include adolescents in the definition of "child" and its rationale provides insight into how it envisions its role with respect to protecting adolescents.⁵ First, the FTC stated that it would be inappropriate to include adolescents under COPPA.⁶ Adolescents face unique privacy challenges online, and the FTC claimed COPPA was not designed to address those particular challenges. A core component of COPPA is the requirement that companies obtain verifiable parental consent prior to gathering certain



KEY TAKEAWAYS

Privacy protections are important to protect children and teens from aggressive junk food marketing.

States have successfully enforced COPPA.

Teens are a key target demographic for digital food marketing. They are not protected by COPPA. Other state privacy laws and consumer protection laws can be invoked to protect them.

State AGs can play a vital role to fill the gap around teen privacy, especially with regard to targeted and localized digital marketing.

types of personal information. This process depends on children providing their parents' contact information. The FTC asserted that adolescents are more likely to falsify or not provide their parents' contact information, and lie about their age. Second, the FTC noted that "courts have recognized that as children age, they have an increased constitutional right to access information and express themselves publicly." The FTC feared that expanding COPPA to cover adolescents would intrude upon their constitutional rights. Third, the FTC stated that it is difficult to distinguish between websites adolescents visit and websites frequented by adults. Therefore, it reasoned that expanding COPPA to include adolescents would most likely inhibit adults' right to freely use the internet.⁷ Teens were not ultimately covered by the COPPA revisions.

State COPPA Expansion Efforts

COPPA is enforceable by the states and contains a floor preemption clause allowing states to enact more

stringent internet privacy laws. In 2004, Illinois passed the Children's Privacy Protection and Parental Empowerment Act (CPPPEA) creating an opt-out process for parents of children under 16 years of age whereby parents can opt-out of the sale or purchase of their child's personal information.⁸ Personal information includes any information that can be used to locate or contact a child.⁹ The CPPPEA is enforceable by the state attorney general.¹⁰

In 2009, the State of Maine enacted an Act to Prevent Predatory Marketing Practices Against Minors (hereinafter "Maine Act") that applied to children and adolescents aged 13 to 17.¹¹ The Maine Act covered all communications—not just electronic communications, and paid special attention to protection of health-related information. The law provided relief as an unfair trade practice, a private right of action, injunctive relief, actual damages and monetary fines.¹²

The Maine Act was problematic for a number of reasons, including a provision limiting its reach to "marketing or advertising [of] products, goods or, services" that could have been interpreted to provide less protection than that conferred by the federal COPPA which applies to the collection of a child's personally identifiable information for any purpose.¹³ Opponents of the law were diverse and included the Center for Democracy & Technology, the Maine Independent Colleges Association, the Motion Picture Association of America, and the Association of National Advertisers.¹⁴ They opposed the law as an unconstitutional violation of the First Amendment and the Dormant Commerce Clause, argued it was preempted by the federal COPPA,¹⁵ and that its application to all communications rather than just electronic communications made it overbroad.¹⁶ One specific concern was that the law could prohibit the marketing of colleges or SAT prep courses to adolescents under the age of 18.¹⁷ Due to these constitutional issues and other flaws, the Maine attorney general announced she would not enforce the Maine Act as written,¹⁸ and the Maine state legislature repealed it in March of 2010.¹⁹

Maryland Attorney General Doug Gansler urged lawmakers to pass legislation that would make a violation of COPPA a violation under Maryland's consumer protection laws and to confer private standing for violations. On January 24, 2013, the bill was read for the first time. A hearing was conducted on January 25, 2013, and on March 21, 2013, the bill was returned with an unfavorable recommendation.²⁰

State COPPA Enforcement Actions

Texas and New Jersey have initiated COPPA enforcement actions to protect child consumers in their states. In 2012, New Jersey Attorney General Jeffrey Chiesa brought the first state COPPA enforcement action involving mobile applications (apps) directed to children. 24x7 Digital LLC, a Los Angeles based company that develops children's apps, allegedly illegally collected, maintained and transmitted to a third party the personal information of children. The parties settled with a consent decree stipulating that 24x7 Digital would stop collecting personal data from its app users and would destroy all previously collected data that allegedly violated COPPA.²¹ 24x7 Digital was enjoined from failing to provide notice on its website or its mobile device application about the type of personal information it collects from children and from failing to provide notice to parents about the types of information collected from children and how it is used.²²

Texas Attorney General Greg Abbott was the first in the country to use state enforcement powers against three online operators for COPPA violations. All three suits were filed in December of 2007. In *Texas v. Future US, Inc.* the State alleged that the company knowingly collected personal information from children under 13 and failed to provide sufficient notice on its website, www.gamesradar.com, of the types of information collected and the uses of that information.²³ Future US allegedly failed to obtain parental consent before collecting a child's personal information; failed to notify parents of what information it collected, how it collected it, and its

disclosure practices; and conditioned a child's participation in an activity on disclosing more personal information than was reasonably necessary. No final disposition is publicly available for this enforcement action.²⁴

In *Texas v. The Doll Palace Corp.*, the state alleged that the website www.TheDollPalace.com did not sufficiently obtain parental consent prior to gathering personally identifiable information.²⁵ For example, if a child under the age of thirteen attempted to register, The Doll Palace stated that the user needed permission from a parent in order to continue and asked if the parent was present. If the child clicked "yes," then access to the site was granted. If the child clicked "no," then an email address was required to send a link to allow permission, but any email address, including the one originally used to register, was sufficient. The website allowed users to operate a host of dolls, which were tied to users' personal information, including age, gender, email address and location. This information was viewable to all members. The State asserted that the Doll Palace failed to prominently place its privacy policy in a conspicuous location and in terms easily understood by children and parents. No final disposition is publicly available for this enforcement action.²⁶

On December 18, 2007, the Texas AG and Small's Seed Company, operator of www.Santa.com, issued an Assurance of Voluntary Compliance whereby Small's Seed agreed that it would comply with all of the COPPA (and state consumer protection) provisions, including but not limited to, maintaining a link to its privacy policy on every page of its website that informs users in a clear and conspicuous way what personal information is collected and how it is used.²⁷ Small's Seed agreed to disclose the means of collecting personal information, whether actively or passively, and whether the personal information is disclosed to third parties. Small's Seed agreed that it will not collect a child's personal information without prior parental consent unless it falls within COPPA's parental consent exceptions.

Protecting Youth Privacy Under Other State Laws

While teens are not covered by COPPA, they are protected by general state privacy laws that apply to all consumers (see Appendix). In some states, these laws were patterned after COPPA. For example, California's Online Privacy Protection Act, which became effective on July 1, 2004, protects all consumers, not just children. It defines "personally identifiable information" nearly identically to the FTC's original COPPA rules, but omits the words "child" and "parent" and replaces it with "user" and requires that operators conspicuously post their privacy policy in a manner that is reasonably accessible.²⁸

Child privacy has also been the subject of general state consumer protection law actions. On September 15, 2010, New York Attorney General Andrew Cuomo announced a \$100,000 settlement with Echometrix, a company that sells parental Internet monitoring software, allowing parents to monitor their child's web surfing.²⁹ The company had been collecting and reading children's instant messages and then selling the coveted information to third parties for marketing purposes without notifying parents. In addition to a \$100,000 penalty payable to the state of New York, the company agreed to stop analyzing or disclosing children's personal information to third parties.³⁰ The company also entered into a settlement agreement with the FTC for violations of the general prohibition on deceptive trade practices.³¹

On October 15, 2007, Facebook and New York's Attorney General, Andrew Cuomo, entered into an Assurance of Discontinuance, which required Facebook to provide better procedures and mechanisms in response to complaints about pornography and sexual solicitation of minors on its website.³² The Attorney General had made an inquiry into Facebook's representations about the safety of its site and its response time for addressing complaints about pornography and sexual solicitation of minors. Facebook allegedly was in violation of N.Y.

Gen. Bus. Law §§ 349, 350 because its statements were contrary to its actions, making those statements false and misleading.³³

Multi-state efforts have also benefited young consumers. On January 14, 2008, 49 State Attorneys General (including Interim Attorney General of Washington D.C., Peter Nickles, and excluding Attorneys General from California and Texas) reached agreements with MySpace to adopt new, more expansive measures to protect minors' online privacy, including teenagers under the age of 18.³⁴ The agreement was negotiated over several months and spearheaded by Attorneys General Richard Blumenthal of Connecticut and Roy Cooper of North Carolina. Key provisions of the agreements included:

- Participating in an industry-wide Internet Safety Technical Task Force focused on developing more sophisticated online identity authentication tools
- Giving parents the opportunity to submit their child's email address to MySpace to prevent anyone using that email address to create a profile
- Making the default profile setting "private" for users between the ages of 16 and 17
- Promising to respond within 72 hours to inappropriate content complaints and committing more resources and/or staff to review and classify photographs and discussion groups.³⁵

On May 8, 2008, Facebook agreed to similar measures with the same 49 Attorneys General.³⁶

States Can Fill the Teen Privacy Gap

These enforcement actions under COPPA and other state laws illustrate the role that state AGs can take to ensure COPPA compliance and protect the privacy of the children of their states. To date, state efforts to explicitly expand COPPA have not been successful. Teens are heavy users of mobile devices and prime targets for digital food marketing. They currently are under-protected in terms of privacy protections. As the use of mobile devices and apps proliferate and marketers seek to tailor their campaigns to local groups of young consumers, the role of state AGs to monitor teen privacy under state consumer protection laws and take enforcement action when needed will be even more vital.

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FACEBOOK ADVERTISING: A GUIDE TO HOW FOOD COMPANIES USE FACEBOOK

State Law Approaches to Address Digital Food Marketing to Youth

Facebook reached 1.06 billion monthly active users in December 2012¹. With its most active users under the age of 25, Facebook provides unprecedented access to youth consumer markets.² It allows marketers to stay constantly connected with people, whether they are on their computers or mobile devices, watching TV or shopping with friends. Food and beverage companies represent some of the most powerful advertisers on Facebook. As the pioneering social media platform, an understanding of Facebook marketing is a critical foundation for any consumer protection analyses of social media marketing. As teens migrate to other social media platforms like Twitter and Tumblr, food marketers will follow using refined marketing tools based on what they've learned from Facebook. This guide describes many of Facebook's marketing tools and objectives, why food companies use Facebook, and Facebook marketing tactics targeting teens that raise consumer protection concerns.

Food Marketing on Facebook

Food and beverage marketers have moved rapidly into social media and are among the top pages on Facebook: Coca-Cola (70+ million "Likes"), Oreo (34+ million "Likes"), McDonald's (29+ million "Likes") and Skittles (25+million "Likes"). Facebook is an incredibly valuable marketing tool because every action users take on the site and on sites that integrate Facebook features, e.g., a "Like" button, is published into the user's News Feed, which is then syndicated to the News Feeds of her Facebook "Friends" and their "Friends." As described by Wendy Clark, The Coca-Cola Company's Senior Vice President for Integrated Marketing and Communications and Capabilities, teens are the "new sales force" for



major food companies and getting them to share branded content with their social networks is "the core construct of ... companies succeeding in the socially networked, digital world."³

Social media marketing tactics are used by food companies to:

- Create awareness of companies, brands and products
- Support product development and innovation
- Develop preferences and differentiation from other companies and products
- Build loyalty and establish relationships
- Amplify word of mouth
- Gain insight to develop or change business strategies

The ultimate goal remains to maintain and increase sales and consumption of foods and beverages. As Coca-Cola's Wendy Clark described in a speech: "The point of realization for our brand and our products often happens in an environment we don't control. In a restaurant, in a convenience store ...if we do all this work to move consumers through the funnel and they cross the threshold of a store and they grab a blue package [instead of a Coca-Cola product], I am not happy. It is all for nothing."⁴



FACEBOOK & TEENS AT-A-GLANCE

FACEBOOK IS THE DOMINANT SOCIAL MEDIA PLATFORM accounting for:

- 10.8% of total minutes spent online
- 83% of total time spent on social networking sites
- 23% of all time spent on mobile apps
- 50%+ of all social logins for consumer brands

LARGE PERCENTAGES OF TEENS USE FACEBOOK

- 78% of all teens aged 12-17 use social media (Facebook, Twitter, etc.)
- 94% of teen social media users use Facebook
- 81% of teen social media users say they use Facebook most often
- 42% of teen social media users use social media sites several times per day
- Teen girls 14-17 yrs. old are the heaviest teen users of social media sites

SOCIAL MEDIA IMPACTS TEEN PURCHASING DECISIONS

- 1 in 5 display ads for consumer goods are socially-enabled
- 76% of smartphone subscribers have a Facebook app
- Facebook is the most important social media network for teens (33%), followed closely by Twitter (30%)
- 53% of female and 52% of male teens responded “Yes” when asked “Does social media impact purchasing?”

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Facebook Tools for Business

In order to achieve their marketing goals, food companies have a number of Facebook tools at their disposal. This section describes some of the core components of Facebook-based, social marketing.

The Facebook Page

Facebook pages are the equivalent of personal profiles for businesses, organizations and celebrities, and are used to broadcast information to consumers. A Facebook page allows businesses to market through the largest referral network on the planet. When a Facebook user clicks the “Like” button, that user will receive communications from the page’s owner through his or her Facebook account. For example, Coca-Cola established its page on December 15, 2008 and now has received “Likes” from and can communicate with more than 72 million Facebook users.⁵ Pages can be enhanced with Facebook applications (apps) (see below) that help businesses communicate and engage with their audiences for market testing or information broadcasting. Pages capture new audiences virally through “Friends” recommendations, News Feed stories and Facebook events.

The “Timeline” (formerly known as the “Wall”) is the chronological archive of a Facebook page where a company’s messages, links, offers or other content is viewed. It serves as a place to foster general awareness about a company and to post information about special deals to reward users who have liked a company’s page. The Timeline is also the place where companies receive customer feedback in the form of user posts to the Timeline and comments on company posts. This in turn allows companies to create products and advertising campaigns to suit customer preferences. The page administrator controls what content or feedback is publicly viewable.

Facebook Apps

Facebook apps are web applications that are available on Facebook pages. They are distinct from mobile apps that allow users to access Facebook on mobile devices. Companies use Facebook apps to build customer loyalty, amplify word of mouth, increase sales and gain insights to foster innovation.⁶ Facebook apps facilitate communication between customers and a customer service team, allow people to sign up for and receive a company newsletter, and provide customers with special rewards as incentives for their loyalty. Facebook apps aid with data gathering, special events, promotions (sweepstakes and contests), coupons and quizzes. For example, the “testimonials” app allows a company to gain feedback in order to refine marketing campaigns.⁷ Facebook apps also facilitate purchases by linking users to external websites where they can purchase products.

“Likes”



Facebook marketing is different than television or print advertising in large part because of the “Like” function. When a user clicks a “Like” button on a page, in an advertisement or on a company’s off-Facebook website, a connection is made between a user and the company that allows the company to post content into a user’s News Feed or send a user Facebook messages. The connection with the company or brand is displayed in a user’s Profile, on the Timeline, and in many cases in the News Feed leading to exponential word of mouth ampli-

fication. A user’s “Likes” also reveal a wealth of information that can be used for targeting. A recent study found that accurate estimates of Facebook users’ race, age, IQ, sexuality, personality, substance use and political views could be inferred from automated analysis of just their Facebook “Likes.”⁸

The News Feed

The News Feed is a list of updates on a user’s personal homepage. It displays posts, content shares and “Likes” made by the user’s “Friends” and updates from companies a user has “liked.” The News Feed is also a place where targeted advertisements based on a user’s Profile, Facebook activity and off-Facebook activity are displayed.

User Tracking

User tracking is accomplished using information gathered on and off of Facebook. Facebook has access to users’ information provided when they set up an account such as age, gender, interests, relationship status, education and residence that can be used to generate targeted advertising. Other user information generated on Facebook includes: every click on a story or News Feed item; “Likes”; clicks on links to off-site content; and clicks on promoted stories and ads.

In order to track users off of Facebook, “cookies” as well as other technical elements like “web beacons,”⁹ JavaScript Real User Monitoring (RUM),¹⁰ and iFrames¹¹ are installed on devices used to access Facebook. These tracking devices collect information about all of the sites outside of Facebook that users visit, when they visit those sites, and what they click on when visiting them. An informal experiment by a journalist with special software to monitor and block Facebook tracking recorded over 300 information collection requests during a typical off-Facebook browsing session.¹² Some of these

requests were used to let users “Like” an external web page or to tell a user how many of her Facebook friends have “liked” a particular web page. The data collected could also be used to inform Facebook what identifiable users read on the web, which links to content they share on other social media such as Twitter, and what online purchases they make.

Location-Based Tactics

Facebook utilizes location sharing as a feature that users can opt-in to.¹³ A user with a Facebook mobile app installed on her mobile device can opt-in to the use of global positioning satellite (GPS) tracking that can map her visits to restaurants, clubs and retail stores. This feature can integrate location data into a user’s status update, and photo or content uploads. Depending on the user’s privacy settings, location information may be viewable by anyone. Location data also is triangulated with data from all of a user’s Facebook “Friends” to further refine the user’s digital demographic portrait. This valuable and sensitive user information allows Facebook to charge a premium for its targeted advertising services, and allows marketers to target users on their mobile devices in real time.

Facebook maintains a GPS-aided “Check-in” function that allows users to tell Facebook their location by clicking on a Check-in button. “Check-ins” are valuable to companies because they serve as a peer endorsement of a specific retail location that is broadcast to the user’s social network in real time. Retailers can encourage users to “check-in” by providing special deals or offers to customers who “check-in.”

Advertisements & Promoted Stories

Facebook engages in more traditional advertising on its site that appear on a user’s News Feed. Advertisers choose the audience by location, demographic infor-

mation, “Likes” and other keywords. For example, an advertiser may choose to serve ads to females aged 14-16, who live in Wisconsin and “like” Lady Gaga and Coca-Cola. Ads also can be triggered when a user “likes” something. For example, a cereal company “Like” triggers an update to the News Feeds of the “liking” user’s “friends” accompanied by a paid advertisement. News Feeds can be very lengthy with many entries that compete with a company’s update. Marketers can pay to ensure that a user’s “Friends” are sent an update designed to be as visible as possible. The more the advertiser is willing to spend, the more penetration the personalized endorsement-style ad will have. For example, if the high school cheerleading captain “liked” the page of a sports drink company, the company can pay to make sure her “Friends” are updated about the girl’s choice.



Facebook Exchange and Partner Categories

Facebook allows marketers to reach consumers by matching their off-Facebook web browsing and on-line shopping history, as well as offline retail purchase information from loyalty cards. Facebook Exchange is a real-time bidding system where advertisers buy Facebook ads based on Facebook users’ visits to third-party websites. The service allows food companies to serve real-time ads related to a user’s web browsing when they return to Facebook. For example, Facebook Exchange allows a marketer to match the email address of a user who entered her email address but did not complete a sale on its website with the user’s Facebook

profile and then retarget her on Facebook.¹⁴ Ads for the almost purchased item will persistently appear when that person visits Facebook.

Facebook Partner Categories are based on off-Facebook activity like loyalty card information. There are more than 500 consumer categories that advertisers can target, associated with things like purchase history, job role, age and lifestyle.¹⁵ This allows an advertiser to focus on consumers most likely to relate to its message. By streamlining advertising to those with the most potential to be receptive to an idea or product, Partner Categories ensure advertising is relevant, efficient and effective. Teen Facebook users and their parents likely are completely unaware that they are being targeted in such a manner.

Protecting Teens from Food Marketing on Facebook

State attorneys general have taken a leadership role in Facebook oversight and accountability.¹⁶ Facebook enables food marketers to penetrate deeply into the social relationships of adolescents, collecting and analyzing their data through a highly sophisticated and obtuse data mining process. Teens are targeted in a variety of ways, using viral marketing, peer endorsements, data-driven advertising, and mobile phone marketing. Despite growing media coverage of Facebook-related privacy concerns, teens are sharing more personal information on social networks than ever. A recent study found that teen social media use has steadily increased and teens are sharing more personal information than ever before: 82% share their birth date; 92% share their real name; 91% post a photograph of themselves; and 91% of teens reported that they are not very concerned with third-party access to their data.¹⁷ Teens growing use of social media actually has resulted in them being less privacy savvy, not more so.

As a highly complex environment designed to promote

the interests of brands, Facebook is continually expanding the tools it provides to marketers for targeting youth. The company offers a range of options for advertisers from an easy-to-use “self-service” system to more complex and multi-dimensional campaigns. Teens are a core demographic for food and beverage marketers; are highly susceptible to peer influence and social media marketing; readily provide highly personal information; and are not protected by the federal Children’s Online Privacy Protection Act (COPPA). Here we highlight some current and emerging Facebook marketing trends that pose consumer protection issues for teens.

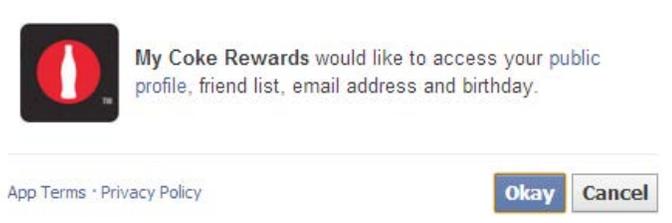
Social Login

Social login gives teens the option to register at a site or establish a loyalty program account using one of their existing social network accounts. For teens, social login reduces the number of passwords they have to remember and the amount of information they have to input. For digital marketers, “[s]ocial login shortens the registration process to a single click and gives ... instant permission-based access to rich demographic, psychographic and social graph data....”¹⁸ Mycokerewards.com, a loyalty program, currently enables teens to login using a Facebook account. Teens may not realize that they are granting access to their full Facebook profile including information related to location gathered when they use their Facebook account to “check in.” In order to protect teen privacy, individual companies that utilize social login can restrict social login use to its adult Facebook users. Facebook itself could also limit the functionality of social login to users over 18 years old.

Promotions requiring teens to give up their privacy in order to participate

Facebook is a platform for administering promotions like instant win games, sweepstakes and contests.¹⁹ Conditioning access to submit a sweepstakes entry on giving up privacy protections may be unfair or deceptive. For example, Mycokerewards.com allows teens to enter

codes on its Facebook page. Prior to entering a code the following message appears:



One cannot access this means of entry without clicking “Okay.” Granting access to one’s email address, public profile, “Friends” list and birthday may be deceptive if teens simply agree without realizing what they are giving up. Promotions that induced participants into waiving their rights under the national Do-Not-Call Registry have been found to be deceptive.²⁰ Here, the breadth of information provided by a Facebook-based entry for a promotion is vastly more expansive than one’s telephone number and could be the focus of a consumer protection inquiry.

Like-Gated Promotions

A “like-gated” promotion requires a teen to “like” a company’s Facebook page in order to participate in the promotion. Like-gated promotions may be prohibited by Facebook’s own policies.²¹ The National Advertising Division (NAD), a self-regulatory program of the Council of Better Business Bureaus, found that a “like-gated” promotion used by 1-800-Contacts, Inc. was not deceptive to consumers who provided a Facebook “Like” in order to participate in the promotion, because they in fact received the promised promotional benefits after providing the “Like.”²² NAD determined that the number of “Likes” on a company’s Facebook page is a “general social endorsement,” and those generated by like-gated promotions did not need to be removed or flagged. Missing from the NAD analysis, however, was an analysis of the targeted endorsements generated by “Likes” to a Facebook user’s “Friends.”

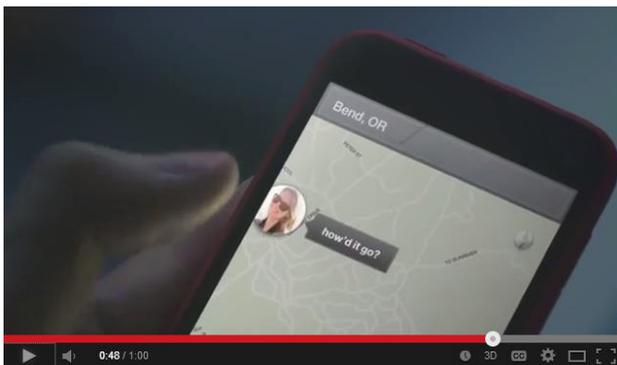
When a Facebook user “likes” a company’s Facebook page, that “Like” is then broadcast to the user’s “Friends” and specifically identifies the user who provided the “Like” in order to convey the peer endorsement. Research has repeatedly shown that teens are highly susceptible to peer influence.²³ Like-gated promotions are potentially deceptive when the “Friends” who see the “Like” are unaware that the “Like” was given in exchange for a benefit. This tactic may be particularly deceptive if the like-gated promotion’s goal is to generate interest in a new food or beverage product and there is a high likelihood that the “Like” has been provided before the consumer has even tasted the actual product. Like-gated promotions deserve further attention as potentially deceptive endorsements -- especially when they target teen consumers.

Location, location, location

Facebook has won praise from advertisers for improving its mobile phone marketing capabilities by integrating physical location, user behavior, advertiser interest and social communications in real-time. The company is partnering with leading “mobile measurement” companies that help track and analyze user data, which includes geo-location.²⁴ These advances raise serious privacy concerns for teens who are not protected by COPPA and readily share sensitive information. Marketing companies may very well have a better idea of where teens are and what they like than their parents do.

Conclusion

Facebook’s social advertising approach is designed to convey to teens that unhealthy food and beverage products are endorsed by their peers and community despite the consequences to their personal well-being. This is achieved by operating a sophisticated data gathering and targeting system largely out of public view. Young people and their parents are not given meaningful tools to control how their personal information, including location, can be used by marketers. The personal information Facebook harvests from its users is of tremendous monetary value. Without intervention to protect teen privacy and to limit exposure to marketing for harmful food products there is little incentive for Facebook to police itself.



Facebook Home

Endnotes

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<loads/2012/02/Facebook-Contests-for-Customer-Engagement.pdf>.

²⁰ MANATT, PHELPS & PHILLIPS, LLP, *Promo Can't Require "Do Not Call" Waiver* (May 19, 2005), http://www.martindale.com/consumer-products/article_Manatt-Phelps-Phillips-LLP_153074.htm.

²¹ FACEBOOK, *Can I Buy Likes for My Facebook Page?*, <https://www.facebook.com/help/281084665319172/> (last visited Oct. 10, 2013).

²² Review, Nat'l Adver. Div., *NAD Reviews "Like-Gated" Facebook Campaign, Recommends Coastal Contacts Modify Free Claim* (Nov. 8, 2011), available at <http://www.ascreviews.org/2011/11/nad-reviews-like-gated-facebook-campaign-recommends-coastal-contacts-modify-free-claim/>

²³ See, e.g., Tamara F Mangleburga et al., *Shopping With Friends and Teens' Susceptibility to Peer Influence*, 80 J. RE-TAILING 101 (2004).

²⁴ FACEBOOK, *Mobile Measurement Partners*, <https://developers.facebook.com/preferredmarketingdevelopers/mobile/measurement/> (last visited Sept. 24, 2013); FACEBOOK, *Mobile App Install Ads*, <https://developers.facebook.com/docs/ads-for-apps/mobile-app-ads/> (last visited Sept. 24, 2013).

Incentives-Based Interactive Food & Beverage Marketing

State Law Approaches to Address Digital Food Marketing to Youth

Sweepstakes, online contests and rewards programs are examples of incentives-based, interactive marketing. These promotions are featured on food packaging. They are interactive and digital because they are designed to drive traffic to a firm’s website, mobile site or application (app) where young consumers are exposed to additional food marketing, branded-content and can have their user-data collected for future marketing purposes. Incentives-based, interactive marketing is designed to increase sales by motivating purchases directly by children and teens or indirectly by generating child-to-parent purchase requests for foods and beverages. Sweepstakes and contests marketing unhealthy foods and beverages to youth are a common marketing technique.¹ This is likely due to the fact that “rapidly evolving Internet and mobile channels have made the interactive promotions industry more accessible to both marketers and consumers.”² Sweepstakes and contests also are of concern because they may encourage gambling-like behavior in children.³ These promotions are regulated predominantly at the state-level.

Sweepstakes and Contests Targeting Children

Sweepstakes and contests must be designed to avoid violating state lottery laws.⁴ A lottery is the chance to win a prize in exchange for something of value or consideration. Games of chance, like sweepstakes, are lawful because they remove the element of consideration. Games of skill, like drawing or video contests, are lawful because they remove the element of chance. Product packaging and digital media are key platforms for communicating sweepstakes and contests to young consumers (Table 1). The Federal Trade Commission (FTC) found that “[p]ackaging frequently promoted contests



or sweepstakes, usually entered via the website with a code provided on or in the box....”⁵

Digital platforms dominate over television for promotions marketing. A 2007 study of child-directed television advertisements for foods and beverages found that sweepstakes or contests were featured in just 6.1 percent of the commercials analyzed,⁶ whereas a 2009 analysis of designated children’s areas on food company websites found that 40% featured sweepstakes or contests.⁷ A 2011 study of sugary drink marketing to youth found that the majority of Internet banner ads for beverages targeting youth focused on promotions “in the form of a sweepstakes or giveaway and encouraged viewers to enter a competition to win prizes and money.”⁸



Table 1: Incentives-Based Food & Beverage Promotions Targeting Children

Food Product & Company	Description of Promotion	Age of Eligibility
Go-Gurt (yogurt tubes), General Mills	Slurp & Reveal Sweepstakes ⁹ Children were instructed to “Slurp, Win and Click.” Codes printed on the insides of Go-Gurt tubes visible through a clear window in the tubes. Tubes printed with “UWin” contained a code to enter online to claim a \$10 Virtual Rewards Card. (Ended 8/20/12)	All ages
Nesquik (flavored milk powder mix), Nestle	Wreck-It Ralph Movie Be a Hero Sweepstakes ¹⁰ Codes printed inside cans of cocoa powder to be entered online for a chance to win a trip to Los Angeles for a VIP-tour of Disney Animation Studios. (9/1/12 – 3/31/13)	6 years of age or older
Fruit Roll-Ups and Gushers (snacks), General Mills	Fruitsnackia Character Creator Contest ¹¹ Children told to visit www.fruitsnackia.com to create a character and then enter the character into a design contest for a chance to win prizes. (Ended 3/7/13)	6 years of age or older
Fruit Roll-Ups, General Mills	One Laptop Per Child Sweepstakes ¹² Children directed to enter the UPC from the box at WinOneGiveOne.com to help give children in Africa laptops and to enter for a chance to win a laptop for themselves. (11/15/11-7/31/12)	8 years and older
Cheetos Crunchy (cheese flavored snacks), Frito-Lay	CHEETOS brand One-in-a-Minion Family Vacation Sweepstakes ¹³ Code printed on front of bag to be entered on sweepstakes dedicated webpage for a chance to win a trip to Universal Orlando Resort or Despicable Me 2 movie tickets. (5/15/13–8/6/13)	18 years of age or older
Danimals Smoothie (bottled yogurt drink), Dannon	Ice Age Continental Drift Movie Sweepstakes ¹⁴ Code printed on inside of cardboard package with instructions for how to enter the code online to be entered to win an “Epic Pirate Adventure in Tampa, FL” and “Hundreds of Instant Prizes” like inflatable water slides, scooters, and Ice Age: Continental Drift movie tickets. (5/18/12-7/31/12)	5-15 years of age

What About the Parents?

Sweepstakes targeting very young children are designed to get children to request foods and beverages from their parents, who ultimately make the actual purchase. This is referred to as “pester power” marketing or the “nag factor.” A perceived barrier to protecting children from unfair and deceptive promotions is that parents make the ultimate decision to purchase most child-food products. For a detailed analysis of how state consumer protection law can be used to address pester power marketing please refer to PHAI’s *Pester Power Marketing Legal Issue Brief*.

Children and Teens Are Under-Protected by Current Promotions Law

The policy concern animating the regulation of sweepstakes and games of skill is the prevention of illegal lotteries. States’ interest in protecting their state lottery monopolies are a powerful incentive to police sweepstakes and contests. Self-regulatory pledges made by the food industry can also apply to promotions targeting children under thirteen years old. In 1996, the FTC repealed its sweepstakes regulations in part because the regulations were out of date and because the agency felt that state regulators were better equipped to protect the consumers of their states.¹⁵ For this report we generated legal profiles for ten states describing consumer law provisions beyond general prohibitions on unfair and/or deceptive trade practices that may be used to address digital food marketing techniques targeting youth (See Appendix). None of the states we analyzed specify a minimum age for eligibility to participate in sweepstakes or games of skill. This has led to the use of digital sweepstakes and contests with very young children (See Table 1). At present, children and teens are under-protected from promotions designed to drive sales and consumption of unhealthy foods and beverages.

Food Industry Self-Regulation of Sweepstakes & Contests Targeting Children

The Children’s Advertising Review Unit (CARU), a self-regulatory program administered by the Council of Better Business Bureaus, addresses sweepstakes and contests in its guidelines.¹⁶ CARU Guidelines state that member companies should recognize that the use of these marketing tools can enhance the appeal of their products to children and that special care should be taken to guard against exploiting children’s immaturity.¹⁷ Children may have unrealistic expectations of the chances of winning sweepstakes and contests, and inflated expectations of the prizes that can be won.¹⁸ Prizes must be clearly depicted with a free means of entry clearly disclosed.¹⁹ The likelihood of winning must be clearly disclosed, and the language used in the advertisement must be readily understood by a child audience.²⁰ Prizes should be appropriate to the child audience; online contests or sweepstakes should not require children to provide more information than is reasonably necessary, and must comply with the Children’s Online Privacy Protection Act (COPPA).²¹

Between January 2008 and June 2013, CARU publicly reported twelve actions taken to enforce its sweepstakes guidelines, half (6) involving food companies (See Table 2). Despite CARU’s efforts, games of chance and contests targeting children remain widespread.

Table 2. CARU Sweepstakes Investigations: Companies Cited in the Last 5-Years²²

Date	Advertiser	Promotion
05/16/2013	Nickelodeon	SpongeBob Splashpants Sweepstakes
05/14/2013	Campbell Soup Company	Goldfish Sweepstakes
01/16/2013	Bandai America, Inc.	Ben 10 Omniverse Touch and Atlantis Sweepstakes
12/19/2012	Kraft Foods Global, Inc.	Lunchables Never Be Bored Again Sweepstakes
09/23/2011	Paramount Pictures Corporation	Rango Sweepstakes
01/03/2011	Redan Publishing	“Don’t Drop Scooby Doo” Sweepstakes
09/16/2010	Kraft Foods, Inc.	Lunchables/Ultimate Field Trip
07/12/2010	Mattel, Inc.	Barbie Pink Ticket Party Sweepstakes
06/03/2010	ConAgra Foods, Inc.	Kid Cuisine Crazy Combo Ka\$h Sweepstakes
02/19/2009	Walt Disney Company	Disney Movie Rewards Contest
05/06/2008	The Dannon Company, Inc.	Danimals Rock Out With Miley Instant Win Game
04/11/2008	Campbell Soup Company	“Rule the Park” Sweepstakes

Games of Chance

Games of chance include sweepstakes where a child enters a pool of other contestants for the chance to win a prize in a future prize drawing and instant win games where a child receives a code that is used to determine whether or not she has won a prize. This section will discuss key consumer protection issues concerning children and games of chance.

Alternative means of entry from the child’s perspective

Sweepstakes or games of chance are lawful because they remove the element of consideration. This is done by providing an “alternative means of entry” (AMOE). A free AMOE “allows participants to enter a sweepstakes

without purchasing a product, paying money, devoting a substantial amount of time and effort, or otherwise giving anything to the sweepstakes sponsor in exchange for the opportunity to participate.”²³ An AMOE also should be of “equal dignity” as the method of entry available when one purchases a product, and consumers should be made adequately aware that no purchase is necessary to enter to win a prize. For example, the New York Attorney General has taken several actions against sweepstakes operators for failing to make an AMOE “readily available” and “set forth with equal prominence,”²⁴ and for making “express or implied representation in its advertisements that a consumer must purchase a product in order to enter a sweepstakes.”²⁵

Adult sweepstakes entrants fall into two main categories of consumers: (A) those who do not purchase a prod-

uct and use the free AMOE for a chance to win a prize; and (B) those who receive “a chance to win a prize in conjunction with the purchase of a product or service.”²⁶ For the A-group, the chance to win a prize is their only motivation. For the B-group, the chance to win a prize is incidental to the purchase of the product. If no AMOE exists or it is not adequately made known to consumers, then the A-group must purchase the product in order to enter and the product purchase is merely incidental to the desire to enter the game of chance.²⁷ If a sweepstakes operator does not offer an AMOE that is on a “level playing field for those customers who do not make purchases,” then the purchase of a product for a chance to win a prize is considered consideration, thus making the sweepstakes an illegal lottery.²⁸

Developmentally speaking, young children enticed by the chance to win a prize may all be considered A-group members because their primary motivation is to win a prize. Children differ from adult consumers, however, in two important ways: (1) they lack the sophistication to understand the concept of “no purchase necessary” or that an AMOE exists; and (2) they are in a developmental phase characterized by the need for instant gratification. A 2004 report by the American Psychological Association on advertising to children found that young children do not comprehend the intended meaning of even the simplest commonly used disclaimers. The report noted that “fewer than one in four kindergarten through second grade children could grasp the meaning of ‘some assembly required’ in a commercial,” and even the use of child-friendly language like “you have to put it together” only resulted in half of children being able to understand the disclaimer.²⁹ Legally required disclaimers for games of chance include odds of winning and value of prizes, in addition to the AMOE. Young children simply cannot be expected to understand such disclaimers.

The desire for immediate gratification is also highly relevant to the legality of sweepstakes targeting young children. A child’s desire to win a prize pictured on a box

in conjunction with a beloved licensed cartoon character can override all other considerations. The child wants the product in order to get the chance to win a prize and is unable to comprehend the concept of an AMOE. When this happens, the AMOE is not on a level playing field with the purchase-based entry method in the mind of the target audience of children, and the sweepstakes promotion is essentially converted into an illegal lottery.

**What’s old is new again:
Eat for a chance to win!**

One of the FTC’s earliest unfair competition cases involved the use of gambling-style tactics to market candy to children. The 1930s Keppel case involved “break and take” penny candy packaging.³⁰ The candymaker would place pennies inside packages of candy and children would buy the candy in the hopes that they would win the pennies. The candy was said to be of inferior quality, and if competitors wanted to compete with the candymaker who used the marketing tactic they would have to engage in immoral and unscrupulous business conduct—namely encouraging gambling in children. The Court noted that the tactic “exploit[s] consumers, children, who are unable to protect themselves.”³¹ The U.S. Supreme Court upheld the FTC’s authority to regulate interstate unfair competition and deemed the tactic an unfair trade practice. The FTC then brought a series of enforcement actions against candy companies to stamp out the practice.³²

In 2012, General Mills ran a promotion for its Go-Gurt yogurt tubes called the “Slurp & Reveal Sweepstakes” that was open to all ages.³³ Codes were placed on the insides of individual yogurt tubes and children were instructed to:

SLURP, WIN and CLICK.

SLURP: Slurp up every last drop of deliciousness from your tube.

WIN: If you find a Slurp ‘n’ Reveal code in the window you are a winner.

CLICK: Enter your winning code at GoGurtcashwinners.com to claim your \$10 e-certificate redeemable at hundreds of online retailers. (Figure 1)



Figure 1: Go-Gurt Sweepstakes

The fine print of the official rules stated that one could enter for free by sending in a hand-printed 3x5 piece of paper and a self-addressed, stamped envelope.³⁴

As a general matter, a sweepstakes sponsor “may not directly or indirectly encourage participants to enter via the purchase-based method.”³⁵ When engaging in a consumer protection analysis, marketing is to be viewed from the perspective of the target audience—in this case, young children. The use of instant win-style sweepstakes with very young children is distinguishable from their use with adults because the emphasis on the purchase-based method of entry is compounded by young children’s inability to understand the concept of an AMOE. The Go-Gurt sweepstakes was an instant win game that instructed children to eat yogurt tubes to see whether or not they had won a \$10 gift card. Just as was done in Keppel, the Go-Gurt sweepstakes directly encouraged the purchase-based method of entry by instructing children to eat the product to see whether or not they had won a cash prize.

**Sorry! You’re not eligible:
18 and over sweepstakes targeting youth**

Advertising and promotion of a sweepstakes must be truthful and non-deceptive.³⁶ Sweepstakes that employ

themes and elements with youth appeal may be deceptive when children and teens are not, in fact, eligible to enter the sweepstakes. Food companies use incentives like sweepstakes to increase product sales. A chance to win a prize can prompt a young consumer to choose one food item over another item that does not feature a promotion or because they like the theme of the sweepstakes. Youth-targeted sweepstakes that limit eligibility to “18 or older” are deceptive to the target audience of children and teens because they are likely to mislead a child or a teen into thinking she is eligible to win a prize when, in fact, she is not.

In 2011, CARU cited Paramount Pictures Corporation for a child-directed national television advertisement that deceptively promoted a sweepstakes for the PG-rated film *Rango*.³⁷ The ad contained footage of the animated film, stated “enter for a chance to win,” and included prizes with appeal to children such as a Nintendo Wii gaming system. A disclosure appeared on the screen that CARU could not discern but that Paramount stated contained the disclosure that the sweepstakes was only open to individuals aged 18 and older. Paramount also noted that the website it created for the *Rango* sweepstakes entries limited participation to 18 and older. CARU determined that the ad was deceptive because it was child-directed, included prizes that were of interest to children, and “would lead children to believe...that they would be eligible to enter the sweepstakes it depicted when in fact this was not the case.”³⁸

Even after CARU’s direct application of its guidelines to a sweepstakes that deceptively targeted children when they were not, in fact, eligible to enter, the practice remains in use by major food companies. In the summer of 2013, CARU member company Frito-Lay, Inc.³⁹ cross-promoted the release of Universal Studios’ animated, PG-rated movie *Despicable Me 2* on bags of Cheetos snacks. Cheetos bags integrated Chester Cheetah, the Cheetos spokescharacter, and *Despicable Me 2* Minion licensed cartoon

characters (Figure 2). Prizes were a trip to Universal Orlando Resort and *Despicable Me 2* movie tickets. The bag instructed potential sweepstakes entrants to:

1. GO TO cheetosoneinaminioncom;
2. ENTER the 9 DIGIT CODE from the front of the bag;
3. SEE IF YOU'VE WON movie tickets or a family trip to Universal Orlando Resort.

The abbreviated official rules, in much smaller type, stated: “NO PURCHASE NECESSARY” and that the sweepstakes was only open to legal residents of the U.S. 18 or older. Young consumers who did not read the fine print would only discover that they were not eligible to win a prize after visiting the sweepstakes entry website—an action they would presumably take after purchasing the product.



Figure 2: Cheetos *Despicable Me 2* Sweepstakes

A reasonable child or teen presented with a single-serve bag of snacks featuring cartoon characters from a PG-rated movie and a movie-themed sweepstakes with

prizes including movie passes to the PG-rated movie is likely to be misled into thinking that she is eligible to win a prize. This deception is material to the purchase of food items like snacks, candies and beverages. Industry food marketing research submitted to the FTC found that “[m]ovie passes and cash cards...generated high appeal among children and teens, as well as their parents.”⁴⁰ The high appeal reported to the FTC means that such a promotion is effective in generating sales and therefore material to the purchase of items featuring such promotions. This marketing tactic is deceptive when the target audience is children or teens. Simply increasing the age of eligibility for youth-targeted sweepstakes does not render them any more lawful. The core goal of these promotions remains the same—to generate product purchases and product requests to parents for unhealthy foods and beverages by holding out the chance to win a prize to a vulnerable audience.

Games of Skill

A game of skill is a promotional contest “in which prizes are awarded to participants based on their submission of responses to prompts, answers to questions, or solutions to problems that require ‘a substantial degree of skill’ to derive.”⁴¹ These contests are only lawful if they are adequately skill-based or sufficiently remove the element of chance, and in some states, remove the element of consideration. Games of skill used to promote food products to children include contests where children compete against each other for prizes by playing videogames or by generating branded-content for a company (Figure 3). In contests involving games players are awarded points for playing the games, whereas contests involving an artistic endeavor like drawing require that each entry be judged. Games of skill by their very nature take more time to participate in than other promotions like sweepstakes, thus extending the length of children’s exposure to food marketing for unhealthy foods.



Figure 3: Fruitsnackia Contest

Removing the elements of chance and consideration

States follow one of three tests to determine whether the element of chance has been sufficiently removed from the contest for it to be deemed a lawful game of skill (as opposed to an illegal lottery): the dominant element test, the material element test, and the any chance test.⁴² To pass the dominant element test, skill rather than chance must dominate in determining the winner of a contest; if chance dominates then it is not considered a game of skill even if there is some degree of skill involved. Under the material element test, if the element of chance is present to a material degree, despite the level of skill involved, the test is deemed one of chance. The any chance test is the most restrictive test in that if the game involves any element of chance whatsoever, the game is considered a game of chance even if skill is a dominating or material element. Of the states profiled for this report: AR, CA, CT, FL, MA, NY and OR have adopted the dominant element test (See Appendix). TX has adopted the any chance test (See Appendix). In certain states, consideration is also an issue when determining the legality of a game of skill. For example, Vermont prohibits requiring any consideration to be eligible in a game of skill.⁴³

Videogame-based games of skill

Videogame-based games of skill are contests where eligible participants compete against each other for prizes by playing videogames. Players create a username and

amass points by playing a game or a range of games during a specified time period. At the end of the time period the highest scoring player(s) are awarded prizes. The fast food chain Burger King maintains an ongoing game of skill for children under the age of 12 that it refers to as its “Leaderboard” contest via its children’s website www.bkcrown.com.⁴⁴ The contest periods are four to seven weeks long and coincide with cross-promotions and feature prizes that contain licensed characters or other children’s entertainment themes.⁴⁵ In spring 2013, children could play videogames to amass points on the “Cut the Rope Leaderboard” towards winning Cut the Rope-themed prizes (Cut the Rope is a popular mobile gaming app). In summer 2013, Burger King featured the “Jungle Book The Movie Leaderboard Contest” that awarded Jungle Book-themed prizes to the highest scoring players.

Videogame-based games of skill must not be deceptive in how they are marketed to children, must be adequately skill-based, and, in states that prohibit any consideration to compete in a game of skill, should not create the perception that a purchase is necessary to participate.

Deceptive marketing of the nature of the contest

As with all promotions, under state consumer protection laws the marketing of a game of skill must be truthful and nondeceptive. One form of deception is to advertise or promote a contest in a way that differs materially from or misrepresents the official rules of the contest.⁴⁶ Whether or not a trade practice is deceptive is determined from the perspective of the target audience. For example, the BK Leaderboard contest targets children under 12 years old. On www.bkcrown.com, children are urged to play games for a “chance to win” and are shown a series of prizes. The fine print of the official rules reveals that the promotion is a national contest and in order to win a prize a child must compete against other children by playing a variety of games and accruing points. Prize winners are limited to children who are in the top ten na-

tionally and who are number one in their states, or those that have the next highest score in each state.⁴⁷ Moreover, points do not carry over from one contest period to the next.⁴⁸

Representing to children that they may be eligible to win a prize simply by playing a game when in fact they have to compete against players nationwide over the course of weeks and amass points may be deceptive to the target audience of children under 12 years old who likely will not read the official contest rules. Misrepresenting the rules of a game of skill is material because it impacts the appeal of the game to children. Food industry market research reported to the FTC found that “[promotions] that were simple and easy to access, or offered instant gratification, such as using a code to play a game online, were appealing to kids, as were easily attainable prizes.”⁴⁹ Marketing a contest that lasts for four to seven weeks and requires repeated game play to children in a manner that misrepresents the level of effort necessary to win a prize is potentially deceptive.

The games children play must be adequately skill-based

As discussed above, standards for determining whether or not the element of chance has been adequately removed from a game of skill vary from state to state, and many states have adopted the dominant element test. Videogame machines have been the subject of state enforcement of illegal lottery laws. In *Alabama ex rel. Tyson v. Ted’s Game Enterprises et al.*, the Alabama Court of Appeals considered whether a state law authorizing coin-operated amusement machines, including videogame machines, violated the Alabama State Constitution’s prohibition on lotteries. The court analyzed the meaning of the word “skill” in the context of videogames and ruled that

the word ‘skill’ does not speak to a person’s ability to recognize that ‘a game is a game,’ or to insert a coin in a slot, or to pull a lever, or to locate a button.

Rather, the word ‘skill’ speaks to the ability, through the application of human physical or mental capacity, to actually cause a desired outcome of a game when the game is played.⁵⁰

The court held that the defendant’s videogame machines were illegal lottery devices. In upholding the lower court’s decision, the Alabama Supreme Court discussed at length the state’s adoption of the dominant element test. The Court rejected the defendant’s claim that “coin-operated amusement machines involv[ing] ‘some skill’ in their operation” were permissible.⁵¹ Thus, games requiring merely some skill did not meet the dominant element test.

For its BK Leaderboard contest, Burger King lists the “skills” that children utilize when playing different games to amass points. These “skills” include: “Confidence Building,” “Colors and Shapes,” “Creative Thinking,” “Hand-Eye Coordination,” “Math Skills,” “Memory,” “Multi-tasking,” and “Problem Solving.”⁵² As per the contest rules, all of the games on www.bkcrown.com can be played to amass points. A supplemental description of how points or “Crowns” are awarded states: “When you play the games you earn Crowns. For example, sometimes you will earn Crowns for solving a puzzle really fast, and sometimes you will earn them just for playing the game.”⁵³ Game tasks like basic hand-eye coordination that involve using the computer’s mouse (the online equivalent to pressing a button) and so-called “confidence building” are akin to the “skills” rejected by the Alabama Court of Appeals. The fact that points can be accumulated simply by playing a game regardless of how well it was played, and the inclusion of games that require no real skill as contest-eligible games for amassing points calls into question whether or not the contest is in fact truly a game of skill.

This discussion has centered on an analysis of videogame-based games of skill in states that adopt the dominant element test. It also is important to note that the inclusion of games that require no skill (where points are

awarded simply for playing regardless of the outcome) likely would not be acceptable in an any chance state like Texas.

Conclusion

Incentives-based, interactive marketing uses digital technology to deploy sweepstakes and contests to younger and younger audiences. These promotions trigger existing state consumer protection laws governing games of chance and games of skill and should be viewed from the perspective of the vulnerable audience of children that they target. These promotions are harmful to children because they are designed to maintain and increase consumption of unhealthy food products, and result in prolonged exposure to food marketing. Sweepstakes are the province of state regulators and industry self-regulation has uncovered widespread use of these tactics in ways that exploit children's inability to comprehend that an AMOE exists and the odds of winning prizes. The use of elaborate games of skill with young children is also highly suspect. Children need more robust protection at the state-level from unfair and deceptive sweepstakes and contests used to promote unhealthy foods.

CASE STUDY

Kraft Foods' Annual Lunchables Sweepstakes: A Case Study for Why State Attorney General Intervention Is Needed to Protect Children from Unfair and Deceptive Digital Promotions

CARU has cited Kraft Foods twice in a five-year period for its annual Lunchables sweepstakes: first in 2010 for its “Ultimate Field Trip” sweepstakes, and again in 2012 for its “Never Bored Again” sweepstakes. Both sweepstakes were open to children aged 6 to 13 years of age.⁵⁴ CARU was concerned that Kraft did not adequately convey that an AMOE existed and that it failed to make the odds of winning or prizes clear to children. Kraft Foods continues to operate its Lunchables sweepstakes targeting children under 13 in ways that run counter to core consumer protection principles governing games of chance, as well as CARU’s self-regulatory guidelines and standards.

Ultimate Field Trip (2010)

Kraft was first cited for its 2010 “Ultimate Field Trip” sweepstakes.⁵⁵ The grand prize included a chance to go to the Kennedy Space Center, San Diego Zoo or the Georgia Aquarium, with first place receiving \$150 dollars for “your own awesome field trip.”⁵⁶ CARU was concerned that the advertisement (1) did not adequately inform children that there was an AMOE; and (2) could mislead children about their chances of winning a prize.⁵⁷ According to CARU Guidelines, material disclosures should be communicated in the same format as other elements of a sweepstakes.⁵⁸

While general information about the sweepstakes on the Lunchables website was communicated through the use of a voiceover, disclosures like the AMOE were not.⁵⁹ The voiceover instructed children to “just find a code inside specially marked packages of Lunchables...,”⁶⁰

but no voiceover told children that they could enter the sweepstakes without making a purchase.⁶¹ The lack of a concomitant and conspicuous voiceover advising children that they could enter for free and indicating how to do so was not in compliance with CARU’s Guidelines.⁶² Clicking the “Enter Now” icon on the website did not directly notify children there was a free means of entry.⁶³ To find that information, a child would have had to click on the icon and then click through two more pages before the information appeared.⁶⁴ CARU found that requiring a child to click through to another page to find a free means of entry did not constitute a sufficient disclosure.⁶⁵ To remedy this deficiency, it recommended that the advertiser employ the use of an audible disclosure stating “no purchase necessary,” or a variation of this language, informing children how to enter for free.⁶⁶ In response to these findings, Kraft agreed to include audio voiceovers stating “no purchase necessary” and “many will enter, few will win.”⁶⁷

Never Bored Again (2012)

Just two years later, Kraft was again cited for its Lunchables “Never Be Bored Again” sweepstakes.⁶⁸ CARU questioned (1) whether the sweepstakes prizes were clearly depicted and (2) whether the odds of winning were clearly disclosed.⁶⁹ Upon investigation, CARU determined that the depiction of prizes were not clear and understandable to a child audience.⁷⁰ It was only when a child clicked on the “Learn More” sign on the landing page of the sweepstakes website that he could view the prize details.⁷¹ Without further clarification, the stacks of prizes on the landing page coupled with the phrase “Win one of millions of prizes” might reasonably lead children to believe that they had a good chance of winning one of the prizes depicted on the landing page.⁷² CARU did not believe that the prize descriptions accurately informed children of the sweepstakes prizes, and children had to click through three pages to find the prize details.⁷³ CARU stated that in order to comply with its guidelines, a sweepstakes operator must set up the online registration process in a way that children will automatically view

a precise description of the prize structure before they are able to enter.⁷⁴

CARU also determined that the sweepstakes did not clearly disclose the chances of winning.⁷⁵ In this instance, the sweepstakes did not contain a disclosure of any sort about the chances of winning.⁷⁶ After reviewing website, CARU determined that a child may have an unrealistic expectation of winning after reading the message “You could win one of over 1,000,000 prizes.”⁷⁷ Because there was no disclosure upfront stating exactly how many winners there would be of grand prizes or even of first prizes, CARU determined that the sweepstakes was not in compliance with its guidelines.⁷⁸ CARU recommended that Kraft employ a disclosure such as “many will enter, three will win a grand prize” in order to clarify the likelihood of winning.⁷⁹

Access to Awesome (2013)

In summer 2013, Kraft launched the “Access to Awesome” instant win game.⁸⁰ Product packaging and the sweepstakes webpage state “Access to Awesome. You Could Win One of Over 1,000,000 prizes.”⁸¹ In what appears to be an attempt to depict prizes more clearly, Kraft slightly enlarged and moved a pile of prizes to the middle of the webpage (Figures 4 & 5). The instant win game still emphasizes that over 1,000,000 prizes can be won and, as per CARU’s recommendation, changed the language above the pictures of the grand prizes from “You Could Win An...” to “You Could Win One of THREE GRAND PRIZES...”⁸² Kraft also made prize details available prior to entering.

The Access to Awesome registration process also asks children to pre-select their preferred first prize by selecting from a series of dropdown menus (Figure 6). Having children pre-select prizes from a list prior to entering an instant win game may misrepresent their odds of winning, as per existing consumer protection law governing games of chance. For example, Connecticut consumer protection regulations state that it is deceptive when a

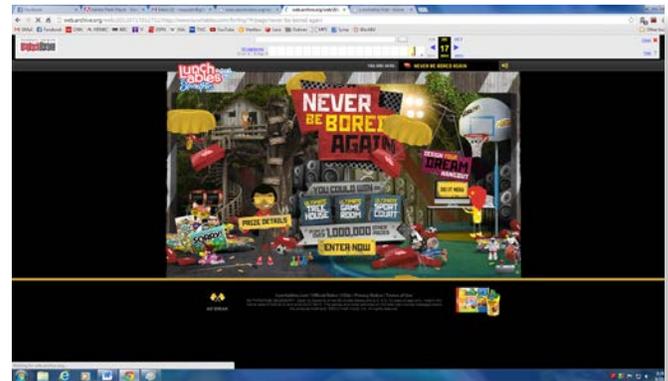


Figure 4: Lunchables Never Be Bored Again Sweepstakes (2012)



Figure 5: Lunchables Access to Awesome Instant Win Game (2013)

sweepstakes sponsor conveys to a consumer that “the sponsor has ‘reserved’ or is ‘holding’ a prize ... in the recipient’s name.”⁸³ A 2006 consent decree involving a sweepstakes scheme entered into by a number of state attorneys general (SAGs) and Newport Creative Communications, Inc. specifically ordered the company to refrain from “[m]isrepresenting directly, or by implication, that a sweepstakes prize will or may be awarded in a non-random manner.”⁸⁴ Having children pre-select prizes creates the impression that an individual child has some say over which prize he will be awarded when in fact by their very nature, games of chance must award prizes randomly. This tactic is deceptive because it creates the misimpression that the entrant has a special chance of winning as opposed to being subject to the actual odds of winning a prize. Kraft’s target audience of children is especially vulnerable to such misrepresentations

CARU’s efforts to police sweepstakes targeting children need to be supported by SAG action

CARU’s provisions relevant to sweepstakes do not set a high bar for food companies that target children, but rather mirror state consumer protection law. CARU has not shied away from taking on member companies when they run sweepstakes in violation of its guidelines. The number of cases, including many against repeat offenders like Kraft Foods, it has brought in just the past five years (Table 2) demonstrates that the self-regulatory system has uncovered a pattern of abuse in this area. Outside attention from SAGs with actual legal authority to police games of chance is needed to protect children from these unfair and deceptive promotions.

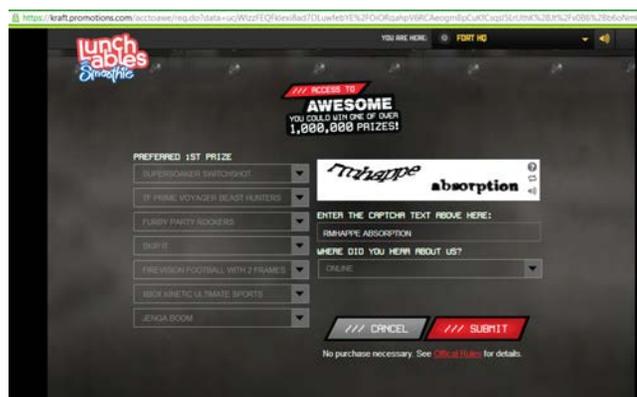


Figure 6: Lunchables Access to Awesome Prize Pre-Selection Page

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Gaming

State Law Approaches to Address Digital Food Marketing to Youth

Digital games are a popular way to market foods and beverages to children and teens. Games used to market foods fall into two main categories: (1) food and beverage company-produced advergames for children and (2) the integration of food and beverage marketing into the videogaming experience of older children and teens.

Kids: Advergames

Advergames target children and are defined by the Federal Trade Commission (FTC) as “games designed to promote a particular product...[that are] sometimes based on television commercials, using similar or expanded storylines, and tend[] to use animated depictions of the food or proprietary characters associated with particular brands.”¹ Advergames are featured on food company websites and also come in the form of mobile apps that children can play on smartphones, iPod Touch devices, and tablets. The FTC’s 2012 report of food industry marketing expenditures found that “[a]dvergames...were often a key focus on child- or teen-oriented websites.”² Companies spent an estimated \$676 million to produce advergames in 2009.³ Advergames also are promoted on retail food packaging to prompt a purchase or a purchase request to a parent.

A 2009 study of food and beverage brands that maintain designated children’s areas online found that 85% of the websites examined featured advergaming.⁴ Here we focus on the tactic of tying advergames to codes on retail food packaging to drive purchases and consumption of unhealthy food and beverage products.



What is the harm?

Child-development experts and public health experts have voiced concern that advergames “instill brand loyalty in children by inserting the brand within a form of entertainment, blurring the line between advertising and entertainment.”⁵ Advergames have been found to increase child preference for featured branded products and increase children’s brand memory.⁶ This is likely because advergames use fun and engagement to increase brand exposure and to instill brand loyalty through repetitious exposure to company products, logos and spokescharacters. A 2011 study found that food company websites with advergames resulted in youth visiting 77% more pages; spending 88% more time per visit on sites with advergames; and visiting such sites 17% more often than other sites.⁷ Food-related advergames most heavily advertise candy, cereals and fast food.⁸

The effect of playing advergames on child eating behavior also has been found to be harmful. A 2011 study of the impact of playing advergames on child snacking behavior found that after playing a junk food-themed advergence, children’s consumption of unhealthy snack food increased by 56% as compared to playing a fruit-themed game, and 16% more than playing a game featuring no food.⁹ This translated to an additional 77 kcal of snacking after playing the junk food advergence and 25 kcal after playing the fruit game. Playing advergames featuring unhealthy food also decreased children’s fruit and vegetable snacking.¹⁰

A 2013 study conducted in the Netherlands tested the impact of playing advergames on the caloric

intake of children.¹¹ The study found that playing advergames featuring food, including games featuring fruit, cued children to eat. While marketers design their advergames to promote consumption of one particular food product, the study found that the actual effect of food-themed advergames was that children ate not only brand-specific food but also whatever other energy dense products were available to them in greater quantities than they did after playing non-food themed games.¹² The study findings were consistent with prior research into the impact of television commercials on eating behavior. Researchers noted, however, that when children play advergames the marketing exposure to the food brand is longer than watching a 30-second television ad and that this likely is part of the reason why the study found such strong effects on food intake from advergames.¹³ The health harm of increased food consumption after playing advergames is compounded by the fact that the actual act of playing an advergame is a sedentary behavior.

Advergames are material to the purchase of unhealthy foods

Beyond creating opportunities for brand exposure to build brand loyalty online or via an app, the integration of advergames into food product packaging makes advergames directly material to product purchases. A study examining the content of 77 major child-directed food marketing websites in 2005 found that 39% of the websites integrated direct inducements to purchase food and beverage products into their advergaming marketing strategy. In exchange for a purchase or series of purchases, “[c]hildren were offered special rewards on the Web sites, such as access to ‘secret’ site locations, the chance to play special games, or the opportunity to obtain product-related merchandise.”¹⁴



Figure 1: Description of McDonald’s Happy Meal mCodes

Another approach taken by 20% of the websites analyzed was to induce a purchase by tying a product purchase “directly to the quality of the Web site experience.”¹⁵ This is typically done by placing codes or virtual tokens on retail food product packaging to be entered on the food marketing website in order to “unlock” exclusive content or to access additional levels of game play. Food companies reported to the FTC that they offer “codes found in or on food packages—enabling [players] to advance to higher levels.”¹⁶ For example, each McDonald’s Happy Meal package contains an “mCode” to enter on www.McWorld.com to gain access to special features.¹⁷ Children are prompted to visit McWorld on the product packaging and prompted to enter mCodes on the website (Figure 1). Food industry market research submitted to the FTC also revealed that “[promotions] that were simple and easy to access, or offered instant gratification, such as using a code to play a game online, were appealing to kids....”¹⁸ Thus, advergames are an effective marketing tool to drive purchases of unhealthy food products.

Despite self-regulatory action, advergames remain commonplace

Children perceive advergames as a form of entertainment as opposed to marketing. Since 2010, food-related advergames produced by four different food companies have been cited by the Children’s Advertising Review Unit (CARU), a self-regulatory body of the Council of Better Business Bureaus, for running afoul of its guideline against blurring the line between advertising and content.¹⁹ The practice, however, remains ubiquitous and relatively unchanged. CARU enforcement action

involving advergames centers on the websites where advergames are accessible to children as opposed to the retail packages directing children to the advergames. The remedy for a CARU violation involving an advergame under the CARU self-regulatory framework has been to include the language “this is advertising” on the website. The disclaimer itself may be above the reading level of many young children and/or beyond their comprehension. The Kellogg Company’s frootloops.com website was cited by CARU for failing to adequately disclose that its advergames were in fact advertising.²⁰ The company added a grey rectangle stating “This is advertising from Kellogg’s” to satisfy CARU’s guidelines (Figure 2). The disclaimer was placed in the lower right hand corner outside of the main viewing area of the advergame and the use of grey stands in sharp contrast to the electric color scheme of the rest of the content on the website. Moreover, the actual substance of the game appears to remain unchanged.



Figure 2: Frootloops.com after it was cited by CARU.

Advergames are an unfair and deceptive marketing practice

Direct inducements to purchase unhealthy foods and beverages tied to advergames are unfair when used to market to children. Unfairness standards vary from state to state, and the federal standard adopted by many states defines an unfair act as a trade practice that “causes or is likely to cause substantial injury

to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”²¹ When determining whether an act or practice is unfair, courts “may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.”²²

Advergames present a health risk to children because playing advergames cues children to eat more unhealthy food than they would otherwise. Research with actual children found that junk-food themed games resulted in an average increase of 77 kcal from snacking. Even what may seem like small increases in calorie consumption by children can have a major impact on their health. Researchers calculate that a reduction in 64 kcal per day is needed to reduce elementary school-aged children to obesity levels of the year 2000.²³ Moreover, the very act of playing an advergame is a sedentary behavior linked to an unhealthy weight status.²⁴

Advergames are material to the purchase of unhealthy food products because they include direct inducements on retail food packaging and/or on food company websites to purchase products in exchange for some perceived benefit to the target child consumer. Direct inducements to purchase linked to advergames are not reasonably avoided by children because they do not recognize the inducement as marketing but rather an opportunity to play an entertaining game or to access something special on a website or a mobile app. The health harm caused by playing advergames—the powerful cuing effect on eating behavior—cannot be avoided by children because it is deeply subconscious. Advergames present no countervailing benefit to consumers or competitors. Advergames also offend the established consumer protection law principle prohibiting deceptive marketing to consumers under the guise of entertainment or news—in other words marketing in ways that a reasonable member of the target audience

likely will not recognize as marketing.²⁵ Advergaming violates this established consumer protection principle because children perceive advergaming as entertainment and not as marketing. Direct inducements to make food product purchases tied to advergaming also are deceptive because children do not recognize advergaming as a form of marketing. This means that they are likely to be misled into wanting to purchase products in order to play games.

A perceived barrier to protecting children from unfair and deceptive marketing like the tying advergaming to direct inducements to purchase unhealthy foods and beverages is that parents make the ultimate purchase decision for many child-oriented food products. Marketing tactics that are designed to get children to nag their parents to purchase products are commonly referred to as pester power marketing. For a detailed analysis of how state consumer protection law can be used to address pester power marketing please refer to [PHAI's Pester Power Marketing Legal Issue Brief](#).

Food-themed advergaming has been repeatedly cited by CARU, yet remain commonplace and relatively unchanged. Advergaming's detrimental impact on child health is supported by sound research. The FTC's review of food marketing expenditures found extensive use of advergaming by food marketers. State action to address this unfair and deceptive practice is warranted.

Teens: Food Marketing Integrated Into the Videogaming Experience

Gaming presents a particularly lucrative opportunity for marketers to reach the teen market. Gaming takes place on multiple platforms such as computers, mobile devices (smartphone, iPod Touch, tablet, etc.), handheld game consoles (Nintendo 3DS) and internet-enabled game consoles like Nintendo's Wii, Sony's PlayStation, and Microsoft's Xbox. The games themselves come in the form of apps, downloads, online streaming or physical media for gaming systems such as portable game

cartridges or discs. Two-thirds of U.S. households play computer or video games,²⁶ and in 2011, U.S. sales of games, hardware, and other accessories topped \$24 billion.²⁷ In 2013, global sales are projected to reach \$66 billion.²⁸ More than 82% of teens consider themselves "gamers,"²⁹ and nearly one-third of all players are under 18,³⁰ up from one-quarter in 2010.³¹ Among 13-24-year-olds, gaming is the most popular content accessed online.³² In the U.S., 40% of all time spent using mobile apps is spent playing games.³³ Food and beverage companies can establish multi-faceted relationships between their products, the games themselves, and the sub-culture of gaming enthusiasts known as "gamers." These relationships benefit all the industries involved, driving young gamers' engagement not only with food and beverage products, but also with the games and related accessories.

What is the harm?

Recent research into the impact of gaming on child and adolescent health demonstrates a connection between electronic games, being overweight and obesity.³⁴ A 2004 Swiss study found a nearly two-fold increase in the risk of obesity for every hour children in grades 1-3 spent playing electronic games daily.³⁵ A 2011 study conducted in Denmark, found preliminary evidence that playing a video game for one hour is accompanied by a greater caloric intake in adolescent males when compared to relaxing in a comfortable chair for an hour.³⁶ Interestingly, subjects who had played electronic games ate more without feeling increased sensations of hunger and appetite.³⁷ Given the large percentage of teens that play online games, there is great potential for unhealthy food and beverage marketing exposure while gaming. Food marketing integrated into the gaming experience may have an even greater impact on caloric intake--prompting more purchases and consumption of foods high in calories and low in nutritional value.

Techniques employed to target young game players

Innovative cross-promotions immerse junk food products & brands into gaming culture

Food and beverage companies maximize their appeal to the young gamer demographic by investing in key aspects of gaming culture. PepsiCo’s Mountain Dew has long marketed itself as “game fuel.” In 2011, the company released “Game Fuel: Citrus Cherry” to cross-promote the release of the popular first-person shooter game “Call of Duty: Modern Warfare 3.”³⁸ Dr. Pepper sponsors Major League Gaming, a professional gaming organization, and an Internet-based reality series about gamers who have their home gaming systems replaced with the newest gaming consoles and large flat-screen TVs.³⁹ Energy drink companies and brands also market to gamers. Coca-Cola’s NOS energy drink sponsors Major League Gaming,⁴⁰ and devotes an entire section of its website to gamers.⁴¹ Using the tagline, “NOS Fuels Gamers,” the webpage includes news on upcoming games and player events and tips on how players can maximize their performance in various games.

In 2012, Frito Lay leveraged the popularity of the Xbox gaming console and the Super Bowl to market Doritos through its “Crash the Super Bowl” campaign. The “Crash” campaign is a yearly event in which fans use a website to vote for their favorite, fan-created Doritos commercials, and the winning commercial airs during the Super Bowl. The brand developed a platform that allowed gamers to readily engage with the campaign by voting for commercials using their Xbox systems.⁴²



Figure 3: In-game Soda Advertising

In-game advertising

In-game advertising incorporates food and beverage brands and products into game content, including product placement, branding, billboards and other signage within the universe of the game.⁴³ Dr. Pepper inserted promotional posters and billboards prominently into terrain used in the “Skate 2” game for the Xbox 360 (Figure 3).⁴⁴ The Dr. Pepper promotional content was meant to highlight the brand’s sponsorship of Major League Gaming, a professional gaming organization.⁴⁵

Promotional games and game spaces

Some brands have gone beyond in-game branding to develop their own promotional games. Red Bull produces its own heavily branded games like the mobile app “Red Bull Kart Fighter III”⁴⁶ (Figure 4), and the Xbox game “Red Bull Crashed Ice Kinect.”⁴⁷ In 2013, Red Bull exploited consumers’ desire to “actively interact and engage with brands on their television”⁴⁸ through a part of its the “World of Red Bull” promotion for Xbox Live. Users of the site were greeted with video banners promoting Red Bull when they entered the Xbox Live “online marketplace” area.⁴⁹ The banners led players who clicked them to a heavily branded online content hub featuring streaming videos starring Red Bull-sponsored athletes. Click-throughs on the video banners resulted in an average of nearly 15 minutes in the hub, prompting industry press to laud the company for its “brilliant engagement.”⁵⁰



Figure 4: Red Bull Kart Fighter 3 App

Product purchases to unlock game content

Food and beverage companies incentivize gamers' purchase of their products by offering codes, keys, or access to online portals that unlock game content. Mountain Dew and Doritos, brands that "pair perfectly"⁵¹ with gaming culture, used this strategy in 2011, as part of a multi-platform "Rank up your game" promotion. Packaging for both products included codes that consumers could redeem for "double experience points . . . for perks like more powerful weapons" in the popular "Call of Duty: Modern Warfare 3" game.⁵² Other brands that target gamers by offering access to extra content include Burger King, which sponsored an extra level in Electronic Arts's (EA) "Fight Night Round 3,"⁵³ and Slim Jim, which⁵⁴ used a multi-platform campaign that included packaging with codes unlocking extra content embedded in three popular EA games. For example, in the racing game "Need for Speed Most Wanted," players could enter a code from a Slim Jim package to obtain an extra car model to drive.⁵⁵ Slim Jim representatives described the campaign as evidence of the company's "insight into what interests [young snackers]," which ensures that these snackers remain "loyal to the brand."⁵⁶ A marketing professor commented that Slim Jim's recent promotion is "good for the game and good for the brand and good for the consumer."⁵⁷

Sweepstakes for hardware giveaways

Gaming-themed sweepstakes are another food marketing tactic. Taco Bell's "Unlock the Box" promotion, for example, gave customers a chance to win a "PlayStation Vita" handheld game system⁵⁸ by purchasing a "\$5 Buck Box," a high-fat, high-calorie meal offering combinations of 3 to 4 different Taco Bell entrees, as well as a soft drink.⁵⁹ The sweepstakes inspired considerable engagement among gamers, including discussion threads on the popular GameSpot site titled "I've been eating nothing but Taco Bell 5 Buck Boxes every day."⁶⁰

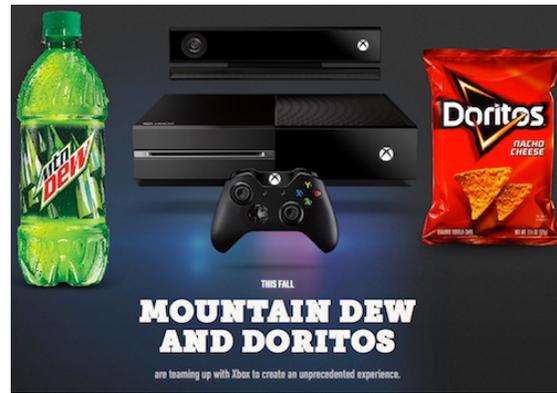


Figure 5: Mountain Dew, Doritos, Xbox Promotion

In the Fall of 2013, PepsiCo's Mountain Dew and Doritos brands will cross-promote the release of the latest version of the Xbox gaming system in what is being billed as one of "the biggest gaming [promotions] in brand history."⁶¹ Doritos and Mountain Dew have partnered with Xbox - forming what one reviewer jokingly called "the holy trinity of gaming piety"⁶² - for a campaign that offers gamers a chance to win a branded Xbox One console, as well as special edition Doritos and Mountain Dew products (Figure 5).⁶³

Retail Displays



Figure 6: PepsiCo Retail Display for Release of Call of Duty

Gaming-themed retail displays for snacks and beverages typically coincide with the release of a new version of a game. A common pairing is the game, a salty snack and a caffeinated beverage. For example, PepsiCo cross-promoted Mountain Dew, Doritos and the release

of a version of Call of Duty using retail displays in Target stores (Figure 6). Retail displays allow food companies to directly link gaming to the point of purchase in a very powerful way. A retailing specialist described the genius of these in-store displays as follows: “When a new video game...comes out, gamers often lock themselves down and spend long periods of time tackling the new game. They need munchies and caffeine and this display of PepsiCo. products gives...gamers a one-stop shop for all their gaming needs.”⁶⁴

Gaming Represents an Under-Examined Segment of the Food-Marketing World

Gaming is a huge segment of youth entertainment that has been infiltrated by food and beverage marketing for items of poor nutritional quality. The number of games, gaming apps and gaming platforms makes monitoring of food marketing in the gaming world a real challenge for state regulators. Future efforts to monitor food marketing and to protect young consumers from harmful food marketing should take care to include gaming.

Endnotes

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Appendix: State Law Profiles

The following legal summaries summarize state law provisions beyond general prohibitions on unfair and/or deceptive trade practices that may be used to address digital food marketing techniques targeting children and teens. Ten states were selected based on the percentage of the child population residing in the state, prior SAG action to address food marketing, prior SAG action to address digital marketing in general, scope of consumer protection authority granted under state law, and geographic diversity. They are Arkansas, California, Connecticut, Florida, Illinois, Massachusetts, New York, Oregon, Texas and Virginia.



Arkansas

Digital Food Marketing Legal Profile

The following legal summary covers state law provisions beyond general prohibitions on unfair and/or deceptive trade practices that may be used to address digital food marketing techniques targeting children and teens.

Sweepstakes

Arkansas law allows sweepstakes and other promotional activities “where no payment of money or other thing of value is required of participants in the awards.” Ark. Code Ann. § 4-70-102. Sweepstakes and other games of chance in which a participant makes a purchase or otherwise pays for the chance to win a prize may violate Arkansas’s strict prohibition on lotteries. Ark. Const. Art. 19, § 14; *Scott v. Dunaway*, 311 S.W. 2d. 305, 306 (Ark. 1958); Ark. Code Ann. §§ 5-66-101—106. The State Attorney General (SAG) has statutory power to prosecute illegal lotteries. Ark. Code Ann. § 5-66-119(b)(1).

Arkansas’s Prize Promotion Act mandates specific disclosures to consumers involved in prize promotions, including sweepstakes, and forbids the use of misleading advertisements and notices in sweepstakes. Ark. Code Ann. § 4-102-105. Sweepstakes procedures, disclosures and advertising also may violate the Arkansas Deceptive Trade Practices Act (ADTPA)’s general prohibition on unconscionable, false and deceptive trade practices. Ark. Code Ann. § 4-88-107. The SAG has enforcement power of the ADTPA. Ark. Code Ann. §§ 4-88-104, 4-88-105, 4-88-111, 4-88-113.

Games of Skill, Instant Win Games, and Loyalty Programs

Arkansas’s Prize Promotion Act applies to all contests and prize-giveaways which have “any opportunity for any payment by the person to the sponsor for any reason.” Ark. Code Ann. § 4-102-104(b)(3). The Act’s prohibitions against misleading advertising notices in prize promotions and the collection of personal and financial data and selling of financial data collected during promotions in violation of the Act will apply to any such contests. Ark. Code Ann. § 4-102-105.

When determining whether or not a game of skill constitutes an illegal lottery, Arkansas courts apply the “dominant element test.” In *Christian Civic Action Committee v. McCuen*, the Arkansas Supreme Court held: “A lottery is defined as a game that is determined entirely by lot, or mere luck, and in which judgment, practice, or skill are to no avail. To constitute a lottery it is essential not only that the element of chance is present, but also that it controls and determines the award of the prize, whatever it may be.” *Christian Civic Action Committee v. McCuen*, 318 Ark. 241, 254 (1994); see also *Shuffield v. Raney*, 226 Ark.3, 297 S.W.2d 588 (1956); *Longstreth v. Cook*, 2115 Ark. 72, 80 (1949).

Coupons

The ADTPA includes coupons in its definition of “goods” covered by the ADTPA’s consumer protections. Ark. Code Ann. §§ 4-88-102(4), 4-88-107.

Unsolicited Commercial Email

Arkansas law on unsolicited commercial or sexually explicit electronic mail and the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM) forbid unsolicited commercial e-mail with falsified transmission or routing information, and that uses another’s Internet domain name without his or her consent. Ark. Code Ann. § 4-88-603(c); 15 U.S.C. § 7704. Arkansas’s anti-spam law and CAN-SPAM also require senders of commercial e-mail to provide a mechanism for recipients of commercial e-mail to opt-out of receipt of future e-mail, and that senders honor consumers’ requests to do so. Ark. Code Ann. § 4-88-603(a)(3), (d)(1); 15 U.S.C. § 7704(a)(3),(4). CAN-SPAM generally forbids the use of false, deceptive or misleading information in commercial

e-mail subject lines. 15 U.S.C. § 7704(a)(2). The SAG has enforcement power over both the state anti-spam law and the sections of CAN-SPAM dealing with unsolicited commercial e-mail sent directly to users' inboxes. Ark. Code Ann. § 607(a)(12); 15 U.S.C. § 7706(f)(1).

Arkansas's Consumer Protection Against Computer Spyware Act forbids the unauthorized use of users' computers in order to send commercial e-mail. Ark. Code Ann. § 4-111-103(b)(2). The Act also forbids the unauthorized opening of multiple, stand-alone advertisements in a user's e-mail browser that a user cannot close without closing his or her e-mail browser. Ark. Code Ann. § 4-111-103(b)(1)(D). The SAG is empowered to enforce the Act. Ark. Code Ann. § 4-111-104.

Mobile Marketing

Mobile marketing is a digital marketing technique in which advertisers communicate with existing or potential customers via their mobile devices. Mobile marketing is particularly powerful because, within legal limits, marketers can utilize consumers' location data to time and deliver tailored ads and promotions. Consumers can use mobile devices to enter sweepstakes and contests, receive and/or redeem a coupon, play a branded game, download a branded app, and disseminate marketing messages to their friends. Where state laws define telemarketing practices to include or be read to include the sending of commercial texts, those laws may be applied to certain mobile marketing techniques.

The Arkansas Mail and Telephone Consumer Product Promotion Fair Practices Act governs product promoters who offer gifts, prizes or awards with the intent to sell a product, if the promotion is conducted by means of written notice through the mail or by telephone. Ark. Code Ann. § 4-95-102(6)(A). The statute does not provide a specific definition of which acts "by telephone" it includes; the statute may apply to text and/or multi-media messages. The Act prohibits incomplete disclosures and the demanding of payment in return for a prize without full disclosure. Ark. Code Ann. § 4-95-105. The Act also mandates that certain information be recorded in writing and signed by the consumer in order for a consumer agreement with a product promoter to be enforceable, and invalidates contracts made in violation of the Act. Ark. Code Ann. §§ 4-95-106, 4-95-108. The SAG has power to enforce the Act. Ark. Code Ann. § 4-95-104.

Arkansas's law regulating telephonic sellers applies to telephonic sellers "initiating telephonic contact" with consumers in order to sell them products or services. Ark. Code Ann. § 4-99-103(9). "Telephonic contact" may apply to commercial text and multi-media messages sent by mobile marketers. The law requires telephonic sellers to register and post bond with the state, and requires sellers offering gifts or prizes to make specific disclosures to consumers. Ark. Code Ann. §§ 4-99-104-4-99-107, 4-99-108(a). The law also forbids the use of false or fictitious names on recipients' caller identification displays. Ark. Code Ann. § 4-99-108(b). The SAG may enforce this law. Ark. Code Ann. § 4-99-111(b).

Arkansas's Consumer Telephone Privacy Act defines "telephone solicitation" as "the initiation of a call *or message* for the purpose of encouraging the purchase [of goods or services]." Ark. Code Ann. § 4-99-403(6)(A) (emphasis added). The Act prohibits calls and messages made to numbers on state and federal do-not-call lists, and is enforceable by the SAG. Ark. Code Ann. §§ 4-99-405, 4-99-407.

The Prize Promotion Act specifically regulates "prize offers made by way of telephone communication." Ark. Code Ann. § 4-102-108(a). "Telephone communication" likely includes text messages.

The SAG is authorized to enforce the Telephone Consumer Protection Act (TCPA), a federal law which restricts the use of automatic telephone dialing systems and pre-recorded messages to make any call to a consumer's cell phone for which the consumer is charged. 47 U.S.C.A. § 227(b)(1)(A)(iii), 47 C.F.R. § 1200(a)(1)(iii). The Federal Communication Commission's (FCC) rules under the TCPA forbid telemarketers from calling wireless numbers on the national Do-Not-Call registry and mandate hours at which calls can be made. 47 C.F.R. § 1200(c). The regulations also require companies to establish and honor business-specific do-not-call lists. 47 C.F.R. § 1200(c). Several cases and the FCC's TCPA Order indicate that these rules apply to commercial text messages. *See, e.g., Satterfield v. Simon & Schuster, Inc.*; 569 F.3d 946, 954 (2009); 2003 TCPA Order, Rules and Regs. Implementing the Tel. Consumer Prot. Act. of 1991, *Rpt. and Order*, 18 F.C.C.R. 14014 (2003).

If a mobile marketer uses an automatic telephone dialing system to send commercial messages directly to recipients' wireless phones through use of an Internet domain name on the FCC's list, the SAG may prosecute for dual violations of the TCPA and CAN-SPAM. *Joffe v. Acacia Mortgage Corp.*, 121 P. 3d 831, 841 (Ariz. Ct. App. 2005).

Mobile marketing techniques or advertisements may also violate the Arkansas Deceptive Trade Practices Act (ADTPA)'s general prohibition on unconscionable, false, and deceptive trade practices. Ark. Code Ann. § 4-88-107. The SAG has enforcement power of the ADTPA. Ark. Code Ann. §§ 4-88-104, 4-88-105, 4-88-111, 4-88-113.

Privacy

The SAG shares enforcement power of the federal Children's Online Privacy Protection Act (COPPA) with the Federal Trade Commission. 15 U.S.C. § 6504(a). COPPA requires operators of websites directed towards children under the age of 13 to post their privacy policies and to obtain parental consent before collecting children's personal information. 15 U.S.C. §§ 6501-6506 (1998).

Adolescents are not protected by COPPA, but other state privacy laws may be invoked to protect adolescents. The Arkansas Personal Information Protection Act requires persons and businesses acquiring consumers' personal information such as social security numbers and credit card information to implement and maintain reasonable measures to protect the personal information from unauthorized use, access and disclosure. Ark. Code Ann. § 4-110-104(b). The SAG is empowered to enforce the Act. Ark. Code Ann. § 4-110-108.

The Arkansas Consumer Protection Against Computer Spyware Act forbids the deceptive or unauthorized copying of software onto consumers' computers or the modification of users' computer settings in order to collect personally identifiable information such as web browsing history. Ark. Code Ann. § 4-111-103. The SAG is empowered to enforce the Act. Ark. Code Ann. § 4-111-104.



California

Digital Food Marketing Legal Profile

The following legal summary covers state law provisions beyond general prohibitions on unfair and/or deceptive trade practices that may be used to address digital food marketing techniques targeting children and teens.

Sweepstakes

Digital sweepstakes solicitations may violate the general prohibition on false and misleading advertisements found in California's Unfair Competition Law (UCL). Ca. Bus. & Prof. Code §§ 17200, 17500. If an advertisement is aimed at a specific audience, such as children, the question is whether the targeted audience is likely to be deceived by the representation. *Committee on Children's Television v. General Foods Corp.*, 35 Cal. 3d 197, 219 (1983). The State Attorney General (SAG) may require proof of advertising claims. Ca. Bus. & Prof. Code § 17208. Sweepstakes also are subject to the UCL's specific requirements for sweepstakes entry and solicitation materials, and mandatory disclosures about the odds of winning. Ca. Bus. & Prof. Code §§ 17539.15, 17539.5(e).

California criminal law defines a lottery as a game which includes the elements of prize, chance, and consideration. Ca. Penal Code § 319; *California Gasoline Retailers v. Regal Petroleum Corp.*, 50 Cal. 2d 844, 851 (1958). Games of chance in which a participant must provide some kind of valuable consideration for the chance to win a prize are likely illegal lotteries. While the SAG is not empowered to enforce criminal statutes, she is empowered to seek injunctive relief against unlawful business acts under the UCL. Ca. Bus. & Prof. Code §§ 17200, 17204.

Games of Skill, Instant Win Games, and Loyalty Programs

The UCL regulates "any game, contest, puzzle, scheme, or plan" that offers participants the opportunity to receive or compete for gifts, prizes, or gratuities "as determined by skill or any combination of chance and skill" and which is conditioned upon the payment of consideration. Ca. Bus. & Prof. Code § 17539.3(e). The law prohibits various unfair and misleading practices, mandates specific disclosures and refund procedures, and prohibits the conditioning of winning a prize on a minimum number of entries. Ca. Bus. & Prof. Code §§ 17539.1, 17539.2, 17359.35. The UCL also prohibits using the term "prize" or "gift" in a misleading way and the conditioning of receipt of gift on payment or purchase as part of an advertising scheme. Ca. Bus. & Prof. Code § 17537.

When determining whether or not a game of skill constitutes an illegal lottery, California courts apply the "dominant element test." In *Hotel Employees and Restaurant Employees Intern. Union v. Davis*, the California Supreme Court held: "A lottery is defined by three elements, namely, a prize, distribution by chance, and consideration.... 'chance' means that winning and losing depend on luck and fortune rather than, or at least more than, judgment and skill." 21 Cal.4th 585, 592 (Cal. 1999). See also *People v. Shira*, 62 Cal. App. 3d 442 (Cal. Ct. App. 1976); *Finster v. Keller*, 18 Cal.App.3d 836, 844 (Cal. Ct. App. 1971).

California law does not include any specific provisions governing loyalty programs, but does regulate the use of incentives, defining false implications that such incentives have a greater market value than they actually do and the conditioning of receipt of the incentive on payment as deceptive and unfair trade practices. Ca. Bus. & Prof. Code § 17537.2.

Advertisements for contests, prizes, and loyalty programs may violate the UCL's general prohibition on false and misleading advertising. Ca. Bus. & Prof. Code §§ 17200, 17500.

Coupons

California law provides a broad definition of coupons to include “wrappers, can covers, bottle caps, or other similar devices” which entitle the person holding them to receive goods or services at a discount. Ca. Bus. & Prof. Code § 17700. The law requires specific disclosures regarding coupon redemption information. Ca. Bus. & Prof. Code § 17701.5. The UCL prohibits the offer of unfair or misleading coupons, and limits the use of the word “free” in conjunction with any coupon, gift, or prize. Ca. Bus. & Prof. Code § 17537.11.

Unsolicited Commercial Email

The SAG is authorized to enforce the parts of the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM) addressing non-wireless spam. 15 U.S.C. § 7706(f)(1). CAN-SPAM requires senders of unsolicited commercial e-mail to children and adults to 1) clearly identify messages as advertisements; 2) provide a way to reject future messages; 3) include senders’ functioning return e-mail and postal addresses; and 4) use accurate subject lines that do not deceive kids into opening messages. 15 U.S.C. §§ 7701 – 7713.

Mobile Marketing

Mobile marketing is a digital marketing technique in which advertisers communicate with existing or potential customers via their mobile devices. Mobile marketing is particularly powerful because, within legal limits, marketers can utilize consumers’ location data to time and deliver tailored ads and promotions. Consumers can use mobile devices to enter sweepstakes and contests, receive and/or redeem a coupon, play a branded game, download a branded app, and disseminate marketing messages to their friends. Where state laws define telemarketing practices to include or be read to include the sending of commercial texts, those laws may be applied to certain mobile marketing techniques.

California state law broadly regulates the sales behavior of sellers making “telephonic contact” with consumers who make solicitations involving discounts, gifts or prizes. Ca. Bus. & Prof. Code §§ 17511-17514. Such sellers are required to register with the SAG and to provide substantial disclosures to consumers. The SAG also has enforcement power of California state law regulating telemarketing solicitations to wireless phone numbers on state and national do-not-call lists. Ca. Bus. & Prof. Code §§ 17590-17595. Telephone solicitations covered by this law include acts defined as “telephonic contact” made by sellers. Ca. Bus. & Prof. Code § 17592(a)(1)(E). “Telephonic contact” may include commercial text messages, thus making the laws applicable to certain mobile marketing techniques.

The SAG is authorized to enforce the Telephone Consumer Protection Act (TCPA), a federal law which restricts the use of automatic telephone dialing systems and pre-recorded messages to make any call to a consumer’s cell phone for which the consumer is charged. 47 U.S.C.A. § 227(b)(1)(A)(iii), 47 C.F.R. § 1200(a)(1)(iii). The FCC’s rules under the TCPA forbid telemarketers from calling wireless numbers on the National Do-Not-Call Registry and mandate hours at which calls can be made. 47 C.F.R. § 1200(c). The regulations also require companies to establish and honor business-specific do-not call lists. 47 C.F.R. § 1200(c). Several cases and the Federal Communication Commission’s (FCC) TCPA Order indicate that these rules apply to commercial text messages. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (2009); 2003 TCPA Order, Rules and Regs. Implementing the Tel. Consumer Prot. Act. of 1991, *Rpt. and Order*, 18 F.C.C.R. 14014 (2003).

California state law prohibits the transmission of unsolicited text message advertisements to mobile phones of California residents, live or autodialed, with limited exceptions. Ca. Bus. & Prof. Code § 17538.41. A text message advertisement is broadly defined as a message with a principal purpose of promoting the sales of goods or services. Ca. Bus. & Prof. Code § 17538.41(a)(1). The pre-emption of this provision by CAN-SPAM or the Telephone Consumer Protection Act has not been litigated.

If a mobile marketer uses an automatic telephone dialing system to send commercial messages directly to recipients’ wireless phones through use of an Internet domain name on the FCC’s list, the SAG may prosecute for dual violations of the TCPA and CAN-SPAM. *Joffe v. Acacia Mortgage Corp.*, 121 P. 3d 831, 841 (Ariz. Ct. App. 2005).

Mobile marketing tactics may also implicate the UCL's general prohibition on false and misleading advertising. Ca. Bus. & Prof. Code §§ 17200, 1705.

Privacy

The SAG shares enforcement power of the Children's Online Privacy Protection Act (COPPA) with the Federal Trade Commission (FTC). 15 U.S.C. § 6504(a). COPPA requires operators of websites directed towards children under the age of 13 to post their privacy policies and to obtain parental consent before collecting children's personal information. 15 U.S.C. §§ 6501-6506. California state law contains a privacy protection law covering both adult and child consumers. Ca. Bus. & Prof. Code §§ 22575, 22577. The SAG may enforce the state privacy protection law through the enforcement provision of the UCL. Ca. Bus. & Prof. Code §§ 17200, 17204.



Connecticut

Digital Food Marketing Legal Profile

The following legal summary covers state law provisions beyond general prohibitions on unfair and/or deceptive trade practices that may be used to address digital food marketing techniques targeting children and teens.

Sweepstakes

Connecticut law has special prohibitions on the advertisement of sweepstakes and promotional games. Sweepstakes advertising is defined to include “the use of...computer or telephone...to offer a specifically named person the opportunity to participate in a sweepstakes,” while representing that the person either will be awarded or has a strong likelihood of being awarded a prize. Conn. Gen. Stat. § 42-295(1). The Department of Consumer Services’ regulations detail which representations are considered to indicate that a person has a ‘strong likelihood’ of being awarded a prize, including failure to conspicuously disclose conditions related to winning a prize and representing that a person is a finalist to win a prize. Conn. Agencies Regs. § 42-295-1.

Connecticut law also mandates specific disclosures required on sweepstakes advertisements. Among other things, the law requires disclosure of the retail value of the prize, the odds of winning the prize, and any restrictions or qualifications on the receipt of the prize. Such disclosures must be displayed in close proximity to the description of the prize and in font at least as large as the font of the text describing the prizes. Conn. Gen. Stat. § 42-297(a).

The Department of Consumer Services’ game promotion regulation specifies that requiring any type of purchase or entry fee for sweepstakes is an unfair or deceptive trade practice. The regulation also forbids engaging in sweepstakes that are misleading or deceptive as to the chance of winning, the number of winners, the prizes and the availability of prizes. Conn. Agencies Regs. § 42-110b-23(a). The regulation forbids sweepstakes operators from representing that someone is a winner or has otherwise been specially selected if such statement is untrue. Conn. Agencies Regs. § 42-110b-23(c).

Violation of the laws and regulations governing sweepstakes are unfair or deceptive trade practices, prosecutable by the State Attorney General (SAG). Conn. Gen. Stat. § 42-300; Conn. Agencies Regs. § 42-110b-23; Conn. Gen. Stat. §§ 42-110b(a), 42-110m(b), 42-110o(b).

Connecticut’s criminal law prohibits gambling, defined as “risking any money, credit, deposit or other thing of value for gain contingent in whole or in part upon lot, chance or the operation of a gambling device.” Conn. Gen. Stat. §§ 53-278a(2), 53-278b. Sweepstakes and other games of chance in which a participant makes a purchase or otherwise pays for the chance to win a prize may qualify as illegal lotteries. While the SAG is not empowered to enforce criminal statutes, she may be able to prosecute an illegal gambling scheme as an unfair or deceptive act or practice in the conduct of trade or commerce. Conn. Gen. Stat. §§ 42-110b(a), 42-110m(b), 42-110o(b).

Games of Skill, Instant Win Games, and Loyalty Programs

Connecticut law has special prohibitions on the advertisement of games of skill. When determining whether or not a game of skill constitutes an illegal lottery, Connecticut courts apply the “dominant element test.” In *Herald Pub. Co. v. Bill*, the Connecticut Supreme Court held: “Our statute prohibits not merely lotteries in the strict sense of the term, but certainly covers enterprises of the general nature of

lotteries wherein chance is the predominating element, even though those who participate directly risk no money or property of their own.” 142 Conn. 53, 60 (1955). The advertising of games of skill is defined to include the use of a computer or telephone to offer games of skill where the offer represents either that a participant will be awarded or has a strong likelihood of being awarded a prize. Conn. Gen. Stat. § 42-295(1). The Department of Consumer Services’ regulations detail which representations are considered to indicate that a person has a “strong likelihood” of being awarded a prize, including failure to conspicuously disclose conditions related to winning a prize and representing that a person is a finalist to win a prize. Conn. Agencies Regs. § 42-295-1. Such advertising is specifically forbidden for contests offering prizes valued more than \$200 if participants are required to pay an entry fee or solicited to purchase a good or service in order to assist in winning; however, such games of skill that are designed primarily to advertise a good or service are permitted to require participants to purchase consumer products. Conn. Gen. Stat. § 42-298.

The Department of Consumer Services’ game promotion regulation forbids contests operators from representing that someone is a winner or has otherwise been specially selected if such statement is untrue. Conn. Agencies Regs. § 42-110b-23(c). For games of skill conditioned on payment or purchase, failure to disclose rules, terms, conditions of participation, the date on which games will terminate, prizes that will be awarded, and the number, nature and value of prizes awarded is an unfair or deceptive act. Conn. Agencies Regs. § 42-110b-23(b).

Violation of the laws and regulations governing contests and giveaways are unfair trade practices, prosecutable by the SAG. Conn. Gen. Stat. § 42-300, Conn. Agencies Regs. § 42-110b-23; Conn. Gen. Stat. §§ 42-110b(a), 42-110m(b), 42-110o(b).

Coupons

Connecticut law contains no specific provisions governing coupons.

Unsolicited Commercial Email

Connecticut law forbids the falsification or forging of transmission and routing information in connection with unsolicited bulk e-mail “through or into the computer network of an e-mail service provider or its subscribers.” Conn. Gen. Stat. § 53-451(b)(7). The state law also forbids the sale or distribution of software designed to facilitate such falsification. Conn. Gen. Stat. § 53-451(c). While violation of the law is punishable as a crime, the SAG has power to bring a civil action for its violation. Conn. Gen. Stat. §§ 53-451(d), 53-453.

The SAG is authorized to enforce the parts of the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM) addressing non-wireless spam. 15 U.S.C. § 7706(f)(1). CAN-SPAM requires senders of unsolicited commercial e-mail to children and adults to 1) clearly identify messages as advertisements; 2) provide a way to reject future messages; 3) include senders’ functioning return e-mail and postal addresses; and 4) use accurate subject lines that do not deceive kids into opening messages. 15 U.S.C. §§ 7701–7713. Representations made and practices involved in the sending of spam may generally violate CUTPA’s general prohibition on unfair or deceptive acts or practices in the conduct of trade or commerce. Conn. Gen. Stat. § 42-110b(a).

Mobile Marketing

Mobile marketing is a digital marketing technique in which advertisers communicate with existing or potential customers via their mobile devices. Mobile marketing is particularly powerful because, within legal limits, marketers can utilize consumers’ location data to time and deliver tailored ads and

promotions. Consumers can use mobile devices to enter sweepstakes and contests, receive and/or redeem a coupon, play a branded game, download a branded app and disseminate marketing messages to their friends. Where state laws define telemarketing practices to include or be read to include the sending of commercial texts, those laws may be applied to certain mobile marketing techniques.

Connecticut's telemarketing law defines a telemarketer as a person initiating the sale or lease of good or services by "telephonic means" or by use of a "written notice with requests that the consumer contact the seller by telephone" to inquire about the goods being advertised, without revealing a description or the price of the goods advertised. Conn. Gen. Stat. § 42-284(3). "Telephonic means" could include commercial text messages, and commercial texts asking kids to text a certain number in order to obtain a product or service may be governed by the statute. The statute forbids telemarketers from accepting payment or charging customers' credit cards before a written contract is signed for goods or services advertised initially through telemarketing. Conn. Gen. Stat. § 42-286. Violation of the telemarketing law is an unfair or deceptive act or practice prosecutable by the SAG. Conn. Gen. Stat. §§ 42-288(b), 42-110b(a), 42-110m(b), 42-110o(b).

Connecticut's law establishing a "no sales solicitations call" listing defines "marketing or sales solicitations" as "the initiation of a call or message" to encourage the purchase of goods or services, and a "telephonic sales call" as a call made by a telephone solicitor "for the purpose of engaging in a marketing or sales solicitation." Conn. Gen. Stat. §§ 42-288a(a)(6), (7), 42-288a(b). Such solicitations may include commercial text messages. Telephone solicitors are forbidden from calling numbers on the "no sales solicitation call" listing, as well as from calling any number outside of specified hours and from messages using a recorded message device. Conn. Gen. Stat. § 42-288a(c).

Connecticut law prohibits the use of a "device that automatically transmits a recorded telephone message to transmit unsolicited advertising material or an unsolicited telephone message which offers to sell goods or services." Conn. Gen. Stat. § 52-570c(a). The law grants "any person aggrieved by a violation" of the law the right to bring a civil action against the violator; Connecticut's Attorney General may be able to enforce the law as a person so aggrieved. Conn. Gen. Stat. § 52-570c(d). In addition, the federal Telephone Consumer Protection Act (TCPA) restricts the use of automatic telephone dialing systems and pre-recorded messages to make any call to a consumer's cell phone for which the consumer is charged. 47 U.S.C.A. § 227(b)(1)(A)(iii), 47 C.F.R. § 64.1200(a)(1)(iii). The Federal Communication Commission's (FCC) rules under the TCPA forbid telemarketers from calling wireless numbers on the national Do-Not-Call registry and mandate hours at which calls can be made. 47 C.F.R. § 64.1200(c). The regulations also require companies to establish and honor business-specific do-not call lists. 47 C.F.R. § 64.1200(c). Several cases and the FCC's TCPA Order indicate that these rules apply to commercial text messages. See, e.g., *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (2009); 2003 TCPA Order, Rules and Regs. Implementing the Tel. Consumer Prot. Act. of 1991, *Rpt. and Order*, 18 F.C.C.R. 14014 (2003). Connecticut's Attorney General is authorized to enforce the TCPA. 47 U.S.C.A. § 227(e)(6)(A).

If a mobile marketer uses an automatic telephone dialing system to send commercial messages directly to recipients' wireless phones through use of an Internet domain name on the FCC's list, the SAG may prosecute for dual violations of the TCPA and CAN-SPAM, as well as of the state law forbidding the automated sending of unsolicited commercial telephone messages. *Joffe v. Acacia Mortgage Corp.*, 121 P. 3d 831, 841 (Ariz. Ct. App. 2005); Conn. Gen. Stat. § 52-570c(a).

Mobile marketing practices may violate CUTPA's general prohibition on unfair or deceptive acts or practices in the conduct of trade or commerce. Conn. Gen. Stat. § 42-110b(a).

Privacy

The SAG shares enforcement power of the Children’s Online Privacy Protection Act (COPPA) with the Federal Trade Commission. 15 U.S.C. § 6504(a). COPPA requires operators of websites directed towards children under the age of 13 to post their privacy policies and to obtain parental consent before collecting children’s personal information. 15 U.S.C. §§ 6501-6506.

Adolescents are not protected by COPPA, but other state privacy laws may be invoked to protect adolescents. The state penal law on computer crimes states that a person “is guilty of the computer crime of misuse of computer system information” when he or she makes unauthorized use or disclosure of “data residing in, communicated by or produced by a computer system.” Conn. Gen. Stat. § 53a-251(e). A “computer system” is defined broadly as a computer, its software, and its communications facilities, and “data” is defined as “information of any kind in any form.” Conn. Gen. Stat. § 53a-250(7), (8). Hence, a marketer’s unauthorized use of a child or teen’s personal data gathered online may be deemed to be in violation of this law. While the SAG is not empowered to enforce criminal statutes, she may be able to prosecute the misuse of a computer system in order to market to minors as an unfair or deceptive act or practice in the conduct of trade or commerce. Conn. Gen. Stat. §§ 42-110b(a), 42-110m(b), 42-110o(b).



Florida

Digital Food Marketing Legal Profile

The following legal summary covers state law provisions beyond general prohibitions on unfair and/or deceptive trade practices that may be used to address digital food marketing techniques targeting children and teens.

Sweepstakes

Florida’s constitution and criminal code forbid lotteries not specifically authorized by law, the advertising of such lotteries, and gambling. Fla. Const. Art.10 §§ 7, 15; Fla. Stat. Ann. §§ 849.01-849.46. Florida’s criminal law expressly penalizes permitting minors to gamble. Fla. Stat. Ann. § 849.04.

A lottery is defined as having three elements: a prize, an award by chance, and the payment of consideration. *Little River Theatre Corp. v. State ex rel. Hodge*, 185 So. 855, 868 (Fla. 1939). If a contest for a prize contains both an element of chance and the element in which one person risks money or another thing of value with “no prospect of return except to get for nothing the money or goods of another,” it is gambling. *Creash v. State*, 179 So. 149, 152 (Fla. 1938). While the anti-lottery and gambling laws are criminal in nature, the Attorney General of Florida may be able to prosecute their violation as unconscionable, unfair or deceptive act or practice. Fla. Stat. Ann. § 501.204(1).

Florida criminal gambling law contains explicit provisions governing game promotion in connection with the sale of goods and services to consumers, including games of chance. Fla. Stat. Ann. § 849.094. The law explicitly forbids the publication of any false, deceptive or misleading advertising material or literature in connection with game promotions. Fla. Stat. Ann. § 849.094(2)(d). The Department of Agriculture and Consumer Services, empowered by statute to promulgate rules governing the operation of game promotion and to bring actions against violators, has specific rules about the disclosure of material terms of games and filing requirements for persons intending to conduct game promotions, including those intending to conduct electronic game promotions. Fla. Stat. Ann. § 849.094(8); Fla. Admin. Code r.5J-14.001-5J-14.003.

Games of Skill, Instant Win Games, and Loyalty Programs

Florida’s gambling statute governs games of skill. Fla. Stat. Ann. § 849.08. When determining whether or not a game of skill constitutes an illegal lottery, the Florida State Attorney General’s Office issued an advisory legal opinion applying the “dominant element test.” In this legal opinion, the Attorney General stated that “contests in which the skill of the contestant predominates over the element of chance do not constitute lotteries.” Advisory Legal Opinion, AGO 90-58.

Contests in which a prize is given to a successful player who has paid money for the opportunity to play may violate the gambling statute’s prohibition on betting on the result of a contest of skill. Fla. Stat. Ann. § 849.14. The operator of such contest may also violate the prohibition on the keeping of gambling houses. Fla. Stat. Ann. § 849.01; *Wilson v. State*, 177 So. 216, 217 (Fla. 1937).

Florida criminal law governing game promotion in connection with the sale of goods and services to consumers applies to contests and gift enterprises. Fla. Stat. Ann. § 849.094. All of the prohibitions and requirements discussed *supra* will apply to contests and prize promotions. The Department of Legal Affairs may bring civil actions for the violation of the statute or the regulations promulgated by the

Department of Agriculture and Consumer Services. Fla. Stat. Ann. § 849.094(9)(b); Fla. Admin. Code r.5J-14.001-5J-14.003.

Coupons

Florida law does not specifically regulate coupons.

Unsolicited Commercial Email

Florida law regulating commercial e-mail largely mirrors the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM). Fla. Stat. Ann. § 668.60-668.610; 15 U.S.C. §§ 7701 – 7713. The State Attorney General (SAG) is authorized to enforce the parts of CAN-SPAM addressing non-wireless spam as well as the Florida anti-spam law. Fla. Stat. Ann. § 668.606; 15 U.S.C. § 7706(f)(1).

Both Florida and federal law forbid unsolicited commercial e-mail with falsified transmission or routing information, as well as any commercial e-mail with false, deceptive or misleading information in its subject line or transmission path or that that uses another’s Internet domain name without his or her consent. Fla. Stat. Ann. § 668.603(1)(a), (b), (c); 15 U.S.C. §§ 7703-7704. Florida law also prohibits “false or deceptive information in the body of the message which is designed and intended to cause damage to the receiving device” and the distribution of software designed to falsify routing information. Fla. Stat. Ann. § 668.603(1)(d), (2).

CAN-SPAM further requires that unsolicited commercial e-mail include a functioning return e-mail address at which a recipient may request removal from the sender’s e-mail list, and that the recipient be removed upon request. 15 U.S.C. §§ 7704. CAN-SPAM also prohibits the selling of an e-mail address of person who has requested his or her address removed from sender’s list to another person or entity. 15 U.S.C. § 7704.

Mobile Marketing

Mobile marketing is a digital marketing technique in which advertisers communicate with existing or potential customers via their mobile devices. Mobile marketing is particularly powerful because, within legal limits, marketers can utilize consumers’ location data to time and deliver tailored ads and promotions. Consumers can use mobile devices to enter sweepstakes and contests, receive and/or redeem a coupon, play a branded game, download a branded app and disseminate marketing messages to their friends. Where state laws define telemarketing practices to include or be read to include the sending of commercial texts, those laws may be applied to certain mobile marketing techniques.

Florida’s Telemarketing Act defines commercial telephone solicitations as not only phone calls intended to solicit the sale of goods or services, but also as “other communications” including written advertisement “transmitted through any means.” Fla. Stat. Ann. § 501.603(1)(c). Telephone sellers are defined as individuals engaged in commercial telephone solicitation. Fla. Stat. Ann. § 501.603(2). Hence, senders of commercial text messages are telephone sellers governed by the Act.

The Act imposes specific requirements on sellers who offer gifts, awards or prizes and who intend to complete a sale during the communication. Fla. Stat. Ann. § 501.603(1)(b). Telephone sellers offering gifts, prizes and awards must give consumers specified disclosures about the value of the items and the odds of getting each item. Fla. Stat. Ann. §§ 501.614, 501.615(g). The Act also requires all telephone sellers to be licensed and to make specified disclosures to consumers. Fla. Stat. Ann. §§ 501.605, 501.613. Purchases completed through such solicitations must be followed by signed written contracts,

before which completion a consumer cannot be charged, and contracts that are not in compliance with the Act are invalid. Fla. Stat. Ann. §§ 501.615(1)(h), 501.616(5). The Act also imposes restrictions on the times of day solicitations may be made. Fla. Stat. Ann. § 501.616(6).

Local state attorneys have enforcement authority if a violation of the Act occurs in or affects the jurisdiction under the office of the state attorney. Fla. Stat. Ann. § 501.603(5). The Department of Agriculture and Consumer Services has concurrent enforcement power and rulemaking authority. Fla. Stat. Ann. §§ 501.603(5), 501.618, 501.626; Fl. Admin. Code r.5J-6.005-r.5J-6.014.

A provision of Florida's consumer protection law also governs telephone solicitations. Fla. Stat. Ann. § 501.059. The provision defines such communications in terms of "calls;" thus, the law will only apply to commercial text messages if a text is deemed to be a call. Fla. Stat. Ann. § 501.059(1). The statute requires callers to make immediate disclosures about their identities and the identity of the business on whose behalf they are calling. Fla. Stat. Ann. § 501.059(2). The statute also allows mobile subscribers to request to not receive commercial calls from specific companies, to add their numbers to a do-not-call list kept by the Department of Agriculture and Consumer Services, and requires the Department of Agriculture and Consumer Services to incorporate Florida phone numbers on the national Do-Not-Call Registry onto its registry. Fla. Stat. Ann. § 501.059(3). The law contains similar provisions governing contracts made during telephone solicitation transactions as the Telemarketing Act, and grants enforcement power to the Department of Legal Services. Fla. Stat. Ann. § 501.059(5), (8)(a).

Florida's Telemarketing Act and consumer law telephone solicitation provision also apply to autodialed and pre-recorded solicitation calls. Fla. Stat. Ann. §§ 501.603(1)(a), 501.059(1)(d). The consumer protection law allows autodialed calls leaving live messages if the telephone numbers automatically dialed have been screened to exclude numbers on the do-not-call list or that are unlisted. Fla. Stat. Ann. § 501.059(7)(b). However, the federal Telephone Consumer Protection Act (TCPA) restricts the use of automatic telephone dialing systems or pre-recorded messages to make *any* call to a consumer's cell phone for which the consumer is charged. 47 U.S.C.A. § 227(b)(1)(A)(iii); 47 C.F.R. § 1200(a)(1)(iii). This law may pre-empt Florida's provision allowed screened autodialed calls to mobile numbers. The SAG is authorized to enforce the Telephone Consumer Protection Act (TCPA).

The Federal Communication Commission's (FCC) rules under the TCPA forbid telemarketers from calling wireless numbers on the national Do-Not-Call registry and specify hours at which calls can be made. 47 C.F.R. § 1200(c). The regulations also require companies to establish and honor business-specific do-not call lists. 47 C.F.R. § 1200(c). Several cases and the FCC's TCPA Order indicate that these rules apply to commercial text messages. *See, e.g., Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (2009); 2003 TCPA Order, Rules and Regs. Implementing the Tel. Consumer Prot. Act. of 1991, *Rpt. and Order*, 18 F.C.C.R. 14014 (2003).

If a mobile marketer uses an automatic telephone dialing system to send commercial messages directly to recipients' wireless phones through use of an Internet domain name on the FCC's list, the SAG may prosecute for dual violations of the TCPA and CAN-SPAM. *Joffe v. Acacia Mortgage Corp.*, 121 P. 3d 831, 841 (Ariz. Ct. App. 2005).

Mobile marketing techniques may violate the FDUPTA's general prohibition on unconscionable, unfair, and deceptive acts and practices. Fla. Stat. Ann. § 501.204(1).

The Department of Legal Affairs has reached Assurances of Voluntary Compliance (AVC) with five parties in the third-party wireless content industry, requiring that prices of cell phone content services be clearly and conspicuously disclosed, among other terms, and has created a "zone system" dictating how and where material terms should be disclosed in advertisements sent to mobile devices. *See State of Florida*

Office of Attorney General, Assurance of Voluntary Compliance, In the Matter of: Mobile Funster, Inc. d/b/a Funmobile, Case No. L08-3-1116, 2008. It has further reached AVCs with four wireless voice and data service providers to ensure that they demand compliance with the developed standards by third-party content providers with whom they contract. State of Florida Office of Attorney General, Assurance of Voluntary Compliance, In the matter of: Verizon Wireless Services LLC & Alltel Communications, LLC, Case Nos. L08-3-1035 & L08-3-1034, June 16, 2009.

Privacy

Florida has no specific laws addressing children's online privacy. However, Florida's anti-phishing law prohibits the act of sending consumers e-mails under the pretense of being someone else, or with links or referrals to a webpage that collects personal information, with the intention of fraudulently learning consumers' identifying information. Fla. Stat. Ann. § 668.703(2).

The law also forbids a person fraudulently intending to gain consumers' identifying information from using another's webpage or domain name to induce consumers to provide identifying information. Fla. Stat. Ann. § 668.703(1). This prohibition applies to mobile marketers who fraudulently use another's domain name to send a mobile service commercial message directly to a wireless phone. The statute grants the Department of Legal Affairs enforcement power and rulemaking authority. Fla. Stat. Ann. § 668.704(1)(d), (12).

The SAG shares enforcement power of the Children's Online Privacy Protection Act (COPPA) with the Federal Trade Commission. 15 U.S.C. § 6504(a). COPPA requires operators of websites directed towards children under the age of 13 to post their privacy policies and to obtain parental consent before collecting children's personal information. 15 U.S.C. §§ 6501-6506.



Illinois

Digital Food Marketing Legal Profile

The following legal summary covers state law provisions beyond general prohibitions on unfair and/or deceptive trade practices that may be used to address digital food marketing techniques targeting children and teens.

Sweepstakes

Illinois’s Prizes and Gifts Act governs prizes offered or given in a sweepstakes or other game in which chance is an element and in which a written promotion is used. 815 Ill. Comp. Stat. Ann. §§ 525/10, 525/15. The Act requires clear and conspicuous disclosures and governs the awarding of prizes. 815 Ill. Comp. Stat. Ann. §§ 525/25, 525/30. It prohibits sweepstakes sponsors from requiring participants to pay to participate in a sweepstakes, to obtain information about a promotion or prize or to receive a prize. 815 Ill. Comp. Stat. § 525/20. The State Attorney General (SAG) is empowered to enforce the Prizes and Gifts Act. 815 Ill. Comp. Stat. § 525/40.

Illinois criminal law forbids gambling and lotteries, allowing only certain games organized by the state or by charities and “games of skill or chance where money or things of value can be won but no payment or purchase is required to participate.” 815 Ill. Comp. Stat. §§ 5/28-1(a), 5/28-2(b), 5/28-1(b)(13). A sweepstakes in which a participant makes a purchase or otherwise pays for the chance to win a prize may thus violate the criminal gambling statute as well as the Prizes and Gifts Act.

Sweepstake promotions featuring images that appear to be a negotiable instrument, such as representations of gift cards or checks, may violate the Illinois consumer protection law provision prohibiting the use of simulated checks and other negotiable instruments. 815 Ill. Comp. Stat. § 505/2X.

Advertisements for sweepstakes may otherwise violate Illinois consumer protection law’s general prohibition on deceptive or fraudulent advertising and deceptive trade practices. 815 Ill. Comp. Stat. §§ 505/2, 510/2; *People ex. Rel. Devine v. Time Consumer Marketing, Inc.*, 782 N.E.2d 761, 763 (2002).

Games of Skill, Instant Win Games, and Loyalty Programs

Illinois consumer protection law requires marketers to provide clear disclosure of all material terms and conditions when they offer free prizes, gifts or gratuities. 815 Ill. Comp. Stat. § 505/2P.

Games of skill in which participants do not pay to participate are legal, contests in which participants must pay or purchase something in order to play constitute illegal gambling. 815 Ill. Comp. Stat. §§ 5/28-1(b)(13), 5/28(a)(1). When determining whether or not a game of skill constitutes an illegal lottery, Illinois courts apply the “dominant element test.” In *United States v. Rich*, the Eastern District of Illinois held: “It has been said concerning chance that as one of the essential elements of a lottery, the word has reference to the attempt to attain certain ends, not by skill or any known or fixed rules, but by the happening of a subsequent event, incapable of ascertainment or accomplishment by means of human foresight of ingenuity.” 90 F.Supp. 624, 627 (E.D. Ill. 1950). If a game of skill involves an element of chance, the Prizes and Gifts Act will apply to the contest, mandating that sponsors give certain disclosures and requiring sponsors to not demand payment from or purchases by participants. 815 Ill. Comp. Stat. §§ 525/10, 510/25.

Illinois consumer protection law also governs expiration dates and post-purchase fees associated with gift certificates. 815 Ill. Comp. Stat. Ann. § 505/2SS. However, the mandates do not apply to gift certificates distributed in associated with loyalty or promotional programs in which the consumer does not give consideration, or to gift certificates for food products. 815 Ill. Comp. Stat. Ann. § 505/2SS(e)(i),(iii).

Coupons

Illinois's consumer protection law regulates the use of coupons, requiring them to clearly state the discount given or that the price offered is a sale price. 815 Ill. Comp. Stat. § 505/2J.1.

Unsolicited Commercial Email

Both Illinois and the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM) forbid unsolicited commercial e-mail with falsified transmission or routing information, as well as commercial e-mail with false, deceptive or misleading information in its subject line or that that uses another's Internet domain name without his or her consent. 815 Ill. Comp. Stat. § 511/10(a), 15 U.S.C. §§ 7703-7704. Illinois and CAN-SPAM also require that unsolicited commercial e-mail include a functioning return e-mail address to which a recipient may address requests for removal from the sender's e-mail list, and that recipients who do so be removed from the list. 815 Ill. Comp. Stat. §§ 511/10(a-5); 15 U.S.C. §§ 7704. Finally, both Illinois and federal law prohibits the selling of an e-mail address of person who has requested his or her address removed from a sender's list to another person or entity. 815 Ill. Comp. Stat. § 511/10(a-10); 15 U.S.C. § 7704.

Advertisements found in spam may otherwise violate Illinois consumer protection law's general prohibition on deceptive or fraudulent advertising and deceptive trade practices. 815 Ill. Comp. Stat. §§ 505/2, 510/2.

Mobile Marketing

Mobile marketing is a digital marketing technique in which advertisers communicate with existing or potential customers via their mobile devices. Mobile marketing is particularly powerful because, within legal limits, marketers can utilize consumers' location data to time and deliver tailored ads and promotions. Consumers can use mobile devices to enter sweepstakes and contests, receive and/or redeem a coupon, play a branded game, download a branded app and disseminate marketing messages to their friends. Where state laws define telemarketing practices to include or be read to include the sending of commercial texts, those laws may be applied to certain mobile marketing techniques.

The Illinois Consumer Fraud and Deceptive Practices Act regulates disclosures in conjunction with telemarketers' offers of free trial periods for products or services; the statute does not define the word "call." 815 Ill. Comp. Stat. § 505/2P.1(a). Similarly, the Automatic Telephone Dialers Act governs the use of autodialers and pre-recorded messages, and leaves the term "call" undefined. 815 Ill. Comp. Stat. §§ 305/1, 305/5. Both statutes define their violation as a violation of the Consumer Fraud and Deceptive Practices Act, prosecutable by the SAG. 815 Ill. Comp. Stat. § 505/2P.1(c), 815 Ill. Comp. Stat. § 305/30(d), 815 Ill. Comp. Stat. § 505/7. Illinois's Telephone Solicitation Act, which requires callers to remove consumers from their call lists upon request and regulates at which hours telephone solicitations can be made, defines telephone solicitation as "any communication through use of a telephone by use of live operators." 815 Ill. Comp. Stat. §§ 413/1 et. al., 413/5. "Any communication" may include commercial text messages sent by live operators. The Act is enforceable by the SAG. 815 Ill. Comp. Stat. § 413/25(e).

The SAG is authorized to enforce the Telephone Consumer Protection Act (TCPA), a federal law which restricts the use of automatic telephone dialing systems and pre-recorded messages to make any call to a consumer's cell phone for which the consumer is charged. 47 U.S.C.A. § 227(b)(1)(A)(iii); 47 C.F.R. § 1200(a)(1)(iii). The Federal Communications Commission's (FCC) rules under the TCPA forbid telemarketers from calling wireless numbers on the national Do-Not-Call registry and mandate hours at which calls can be made. 47 C.F.R. § 1200(c). The regulations also require companies to establish and honor business-specific do-not call lists. 47 C.F.R. § 1200(c). Several cases and the FCC's TCPA Order indicate that these rules apply to commercial text messages. *See, e.g., Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (2009); 2003 TCPA Order, Rules and Regs. Implementing the Tel. Consumer Prot. Act. of 1991, *Rpt. and Order*, 18 F.C.C.R. 14014 (2003).

If a mobile marketer uses an automatic telephone dialing system to send commercial messages directly to recipients' wireless phones through use of an Internet domain name on the FCC's list, the SAG may prosecute for dual violations of the TCPA and CAN-SPAM. *Joffe v. Acacia Mortgage Corp.*, 121 P. 3d 831, 841 (Ariz. Ct. App. 2005).

Mobile marketing techniques may otherwise violate Illinois consumer protection law's general prohibition on deceptive or fraudulent advertising and deceptive trade practices. 815 Ill. Comp. Stat. §§ 505/2, 510/2.

Privacy

The SAG shares enforcement power of the federal Children's Online Privacy Protection Act (COPPA) with the Federal Trade Commission. 15 U.S.C. § 6504(a). COPPA requires operators of websites directed towards children under the age of 13 to post their privacy policies and to obtain parental consent before collecting children's personal information. 15 U.S.C. §§ 6501-6506 (1998).

The Illinois Children's Privacy Protection and Parental Empowerment Act allows parents to opt-out of the sale or purchase of personal information of children under sixteen. 325 Ill. Comp. Stat. §§ 17/5, 17/10. Personal information includes any information that can be used to locate or contact a child. 325 Ill. Comp. Stat. § 17/5. A violation of the Children's Privacy Protection and Parental Empowerment Act is a violation of the Consumer Fraud and Deceptive Business Act, prosecutable by the SAG. 325 Ill. Comp. Stat. § 17/20, 815 Ill. Comp. Stat. Ann. § 505/7.



Massachusetts

Digital Food Marketing Legal Profile

The following legal summary covers state law provisions beyond general prohibitions on unfair and/or deceptive trade practices that may be used to address digital food marketing techniques targeting children and teens.

Sweepstakes

Massachusetts law defines sweepstakes as “any game, advertising scheme or plan, or other promotion, which, with or without payment of any consideration, a person may enter to win or become eligible to receive a prize, the determination of which is based upon an element of chance.” 940 Code Mass. Regs. 30.03. Massachusetts law defines an illegal lottery as “a game or activity that includes a payment for a chance to win a prize” which is not authorized by the state. Mass. Gen. Laws ch. 271; § 7, 940 Code Mass. Regs. 30.01- 30.04. When a sweepstakes offers a free-play option, the Attorney General’s (SAG) regulations require specific conditions to be met in order for a sweepstakes to avoid illegal lottery status. 940 Code Mass. Regs. 30.05(f). When a transaction involves both a chance to win a prize and the consummation of a purchase, the SAG’s regulations provide eight criteria for determining whether the gambling purpose predominates over the sales purposes of a sweepstakes promotion. 940 Code Mass. Regs. 30.05. Raffles and bazaars are also regulated by Massachusetts law. Mass. Gen. Laws ch. 271, § 7A; 940 Code Mass. Regs. Sections 12, 13. Entities conducting either must apply for permits and adhere to the proscribed regulations in order to avoid violating the illegal lottery statute.

Digital sweepstakes also may violate Massachusetts’ consumer protection law’s general prohibition on false and misleading advertisements. Mass. Gen. Laws ch. 93A, § 9. Massachusetts has several criminal statutes prohibiting false and deceptive advertising which the SAG has power to enforce. Mass. Gen. Laws ch. 266, §§ 91, 91A, 91B. The SAG’s regulations include further prohibitions on false and misleading advertising, as well as on “oppressive or unconscionable conduct” and violation of federal consumer protection laws. 940 Code Mass. Regs. 3.02-3.05, 3.16.

Games of Skill, Instant Win Games, and Loyalty Programs

The SAG’s retail advertising regulations lay out specific requirements for the giving of gifts in association with purchasing a product. 940 Code Mass. Regs. 6.05(16). The regulations govern the offer of prizes in conjunction with promotional contests and the disclosures that must be placed on a contest entry forms. 940 Code Mass. Regs. 6.08. Sellers offering gifts or prizes are required to maintain records substantiating the material representations made. 940 Code Mass. Regs. 6.14(g).

When determining whether or not a game of skill constitutes an illegal lottery, Massachusetts courts apply the “dominant element test.” In *United States v. Marder*, the First Circuit held: “The Massachusetts Law is reasonably clear that for there to be a lottery, chance must predominate over skill in the results of the game, or the element of chance must be present in such a manner as to thwart the exercise of skill or judgment in a game.” 48 F.3d 564, 569 (1st Cir. 1995). See also *Comm. v. Plissner*, 295 Mass. 457, 464 (1936).

Contests, prize promotions and loyalty programs may violate the general prohibitions on false and misleading advertisements found in Massachusetts consumer protection law, criminal law and the SAG’s general regulations and regulations on retail advertising. Mass. Gen. Laws ch. 93A, §9, ch. 266, §§ 91, 91A, 91B; 940 Code Mass. Regs. Chapters 3 and 6.

Coupons

While there is no specific consumer protection law which addresses coupons, coupons may violate the general prohibitions on false and misleading advertisements found in Massachusetts consumer protection law, criminal law and the SAG's general regulations and regulations on retail advertising. Mass. Gen. Laws ch. 93A, §9, ch. 266, §§ 91, 91A, 91B, 940 Code Mass. Regs. Chapters 3 and 6.

Unsolicited Commercial Email

Massachusetts does not have any laws which specifically address spam e-mail. The SAG is authorized to enforce the parts of the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM) addressing non-wireless spam. 15 U.S.C. § 7706(f)(1). CAN-SPAM requires senders of unsolicited commercial e-mail to children and adults to 1) clearly identify messages as advertisements; 2) provide a way to reject future messages; 3) include senders' functioning return e-mail and postal addresses; and 4) use accurate subject lines that do not deceive kids into opening messages. 15 U.S.C. §§ 7701-7713.

Mobile Marketing

Mobile marketing is a digital marketing technique in which advertisers communicate with existing or potential customers via their mobile devices. Mobile marketing is particularly powerful because, within legal limits, marketers can utilize consumers' location data to time and deliver tailored ads and promotions. Consumers can use mobile devices to enter sweepstakes and contests, receive and/or redeem a coupon, play a branded game, download a branded app and disseminate marketing messages to their friends. Where state laws define telemarketing practices to include or be read to include the sending of commercial texts, those laws may be applied to certain mobile marketing techniques.

Massachusetts laws and regulations define a marketing or sales solicitation as "the initiation of a telephone call *or message* to encourage the purchase or rental of, or investment in, property, goods or services, [] transmitted to a consumer." Mass. Gen. Laws Ch. 159C, § 1, 201 Code Mass. Regs. § 12.01 (emphasis added). Commercial text messages sent to wireless phones may thus be solicitations governed by telemarketing laws. The telemarketing laws establish a state do-not-call list, forbid marketers from contacting numbers on the list and specify hours during which telephone contacts can be made. Mass. Gen. Laws Ch. 159C, §§ 1-3. The SAG has enforcement power over the laws. Mass. Gen. Laws Ch. 159C, § 8.

Massachusetts law governing common carriers contains specific mandates for sellers using automatic telephone dialing systems. Mass. Gen. Law. ch. 159, §§ 19B-19D; 220 Code Mass. Regs. §§ 37.01-37.04. The statute allows consumers to notify their telephone carriers of not wishing to receive autodialed or prerecorded messages from telemarketers, triggering a duty on the part of the carrier to prevent such calls. Mass. Gen. Laws ch. 159, §§ 19C, 19D. The statute gives enforcement power to the Department of Telecommunications and Cable, which reports noncompliance to the SAG for action. Mass. Gen. Laws ch. 159, § 39. The SAG also oversees injunction proceedings initiated by the Department. Mass. Gen. Laws ch. 159, § 40. Because the federal Telephone Consumer Protection Act (TCPA) outlaws all autodialed calls to wireless phones where the customer is charged without prior consent, this section of state law is likely pre-empted. 47 U.S.C. § 227(b)(1)(iii). The SAG is authorized to enforce the TCPA. 47 U.S.C. § 227(g)(1). The Federal Communications Commission's (FCC) rules under the TCPA forbid telemarketers from calling wireless numbers on the national Do-Not-Call registry and mandate hours at which calls can be made. 47 C.F.R. § 1200(c). The regulations also require companies to establish and honor business-specific do-not call lists. 47 C.F.R. § 1200(c). Several cases and the FCC's TCPA Order

indicate that these rules apply to commercial text messages. See, e.g., *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (2009); 2003 TCPA Order, Rules and Regs. Implementing the Tel. Consumer Prot. Act. of 1991, *Rpt. and Order*, 18 F.C.C.R. 14014 (2003).

If a mobile marketer uses an automatic telephone dialing system to send commercial messages directly to recipients' wireless phones through use of an Internet domain name on the FCC's list, the SAG may prosecute for dual violations of the TCPA and CAN-SPAM. *Joffe v. Acacia Mortgage Corp.*, 121 P. 3d 831, 841 (Ariz. Ct. App. 2005).

Mobile marketing tactics may also implicate Massachusetts' consumer protection law's general prohibition on false and misleading advertising, as well as criminal law and the SAG's general regulations and regulations on retail advertising. Mass. Gen. Laws ch. 93A, §9, ch. 266, §§ 91, 91A, 91B; 940 Code Mass. Regs. Chapters 3 and 6.

Privacy

Massachusetts has no specific laws addressing children's privacy. The SAG shares enforcement power of the Children's Online Privacy Protection Act (COPPA) with the Federal Trade Commission. 15 U.S.C. § 6504(a). COPPA requires operators of websites directed towards children under the age of 13 to post their privacy policies and to obtain parental consent before collecting children's personal information. 15 U.S.C. §§ 6501-6506 (1998).



New York

Digital Food Marketing Legal Profile

The following legal summary covers state law provisions beyond general prohibitions on unfair and/or deceptive trade practices that may be used to address digital food marketing techniques targeting children and teens.

Sweepstakes

New York Penal Law defines a lottery as “an unlawful gambling scheme” which includes the payment of consideration, chance and the winning of something of value. N.Y. Penal Law § 225.00. Both gambling and promotion of gambling are crimes. N.Y. Penal Law §§ 225.05, 225.10. Games of chance in which a participant makes a purchase or otherwise pays for the chance to win a prize may qualify as illegal lotteries. While the State Attorney General (SAG) is not empowered to enforce criminal statutes, a business’s false representation that a game is a sweepstakes instead of a lottery may be a deceptive act, prosecutable under New York’s consumer protection law. N. Y. Gen. Bus. Law §§ 349, 350.

The SAG is also authorized to enforce New York state law requiring that any entity offering a prize to a consumer as part of a promotion or advertising scheme provide specified disclosures of material terms and conditions attached to the prize. The law applies to “promotions, solicitations, or advertisement[s]” in which the outcome depends in a material degree upon an element of chance, even though skill might also be a factor in winning. N. Y. Gen. Bus. Law § 369-ee. Sweepstakes solicitations may also violate the general prohibition on deceptive practices and false advertising found in New York’s consumer protection laws. N. Y. Gen. Bus. Law §§ 349, 350.

New York’s Fair Trade Law, enforceable by the SAG, contains special provisions for sponsors of chance-based consumer promotions with prize pools of greater than \$5000, requiring them to register with the state and post bonds. N. Y. Gen. Bus. Law § 369-e(8). New York law tightly regulates and licenses some authorized games of chance, with specified restrictions. N.Y. Gen. Municipal Law, Ch. 24, Art. 9-A.

Games of Skill, Instant Win Games, and Loyalty Programs

Contests that are games of skill do not violate the prohibition against illegal lotteries. However, if chance is the dominant element that determines the result of the game, a game that involves some skill will be deemed to be a game of chance. *People v. Li Ai Hua*, 885 N.Y.S. 2d 380, 383 (N.Y. City Crim. Ct. 2009). Such games would violate the illegal lottery statute if consideration is paid. N.Y. Penal Law § 225.00(1).

Prizes awarded in “promotions, solicitations, or advertisement[s]” in which the outcome depends in a material degree upon an element of chance, even though skill might also be a factor in winning, are subject to specific requirements regarding disclosures of material terms and conditions, enforceable by the SAG. N. Y. Gen. Bus. Law § 369-ee. Additionally, a solicitor’s use of offers for gifts and prizes without clear disclosure of an accompanying commitment to purchase goods constitutes “an unlawful selling practice” under New York law. N. Y. Gen. Bus. Law § 396. Violations of these laws may also constitute deceptive practices and/or false advertisements under the state consumer protection law. N. Y. Gen. Bus. Law §§ 349, 350.

Advertisements for contests, prizes, and loyalty programs may violate the general prohibition on deceptive practices and false advertising found in New York’s consumer protection law. N.Y. Gen. Bus. Law §§ 349, 350.

Coupons

New York law does not contain any specific provisions governing the use of coupons.

Unsolicited Commercial Email

New York does not have any laws which specifically address spam e-mail. The state has an anti-phishing law, forbidding an individual or company's deceptive self-representation as a representative of the government or a business in order to solicit or collect personally identifying information on the Internet. N. Y. Gen. Bus. Law § 390-b. Modem hijacking, a practice in which a person uses invasive software to take control of a consumer's modem in order to initiate an Internet communication, is also prohibited. N. Y. Gen. Bus. Law § 538.

The SAG is authorized to enforce the parts of the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM) addressing non-wireless spam. 15 U.S.C. § 7706(f)(1). CAN-SPAM requires senders of unsolicited commercial e-mail to children and adults to 1) clearly identify messages as advertisements; 2) provide a way to reject future messages; 3) include senders' functioning return e-mail and postal addresses; and 4) use accurate subject lines that do not deceive kids into opening messages. 15 U.S.C. §§ 7701-7713.

Mobile Marketing

Mobile marketing is a digital marketing technique in which advertisers communicate with existing or potential customers via their mobile devices. Mobile marketing is particularly powerful because, within legal limits, marketers can utilize consumers' location data to time and deliver tailored ads and promotions. Consumers can use mobile devices to enter sweepstakes and contests, receive and/or redeem a coupon, play a branded game, download a branded app and disseminate marketing messages to their friends. Where state laws define telemarketing practices to include or be read to include the sending of commercial texts, those laws may be applied to certain mobile marketing techniques.

New York's telemarketing laws regulating automatic dialing-announcing devices, fraudulent and deceptive telemarketing practices, and do-not-call registries limit the definition of telemarketing to telephone calls only, and thus likely do not apply to text and multi-media messages sent to wireless phones. N.Y. Gen. Bus. Law §§ 399-p(1)(d), 399-pp(2)(k), 399-z(1)(i).

The SAG is authorized to enforce the Telephone Consumer Protection Act (TCPA), a federal law which restricts the use of automatic telephone dialing systems and pre-recorded messages to make any call to a consumer's cell phone for which the consumer is charged. 47 U.S.C.A. § 227(b)(1)(A)(iii), 47 C.F.R. § 1200(a)(1)(iii). The Federal Communication Commission's (FCC) rules under the TCPA forbid telemarketers from calling wireless numbers on the national Do-Not-Call registry and mandate hours at which calls can be made. 47 C.F.R. § 1200(c). The regulations also require companies to establish and honor business-specific do-not call lists. 47 C.F.R. § 1200(c). Several cases and the FCC's TCPA Order indicate that these rules apply to commercial text messages. See, e.g., *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (2009), 2003 TCPA Order, Rules and Regs. Implementing the Tel. Consumer Prot. Act. of 1991, Rpt. and Order, 18 F.C.C.R. 14014 (2003).

If a mobile marketer uses an automatic telephone dialing system to send commercial messages directly to recipients' wireless phones through use of an Internet domain name on the FCC's list, the SAG may prosecute for dual violations of the TCPA and CAN-SPAM. *Joffe v. Acacia Mortgage Corp.*, 121 P. 3d 831, 841 (Ariz. Ct. App. 2005).

New York law prohibits the collection of wireless phone numbers from a wireless service provider for the purpose of creating a directory without consumers' express permission to use their wireless numbers for that purpose. N.Y. Gen. Bus. Law § 399-c.

Mobile marketing techniques may violate the general prohibition on deceptive practices and false advertising found in New York's consumer protection law. N.Y. Gen. Bus. Law §§ 349, 350.

Privacy

The SAG shares enforcement power of the Children's Online Privacy Protection Act (COPPA) with the Federal Trade Commission. 15 U.S.C. § 6504(a). COPPA requires operators of websites directed towards children under the age of 13 to post their privacy policies and to obtain parental consent before collecting children's personal information. 15 U.S.C. §§ 6501-6506 (1998).

The Attorney General of New York has used the state's consumer protection law to enter into an Assurance of Discontinuance with Facebook for false and misleading representations about its site's safety and its response time in addressing issues, after the company failed to respond quickly to complaints about pornography and sexual solicitation of minors on its website.¹

¹State of New York Office of the Attorney General, In the Matter of Facebook, Inc. d/b/a/ Facebook.com Assurance of Discontinuance (Oct. 15, 2007) <http://www.ag.ny.gov/sites/default/files/press-releases/archived/Executed%20Facebook%20AOD.pdf> (last visited June 27, 2012).



Oregon

Digital Food Marketing Legal Profile

The following legal summary covers state law provisions beyond general prohibitions on unfair and/or deceptive trade practices that may be used to address digital food marketing techniques targeting children and teens.

Sweepstakes

The Unlawful Trade Practices Act (UTPA) forbids making any false or misleading statement about a prize, contest or promotion used to advertise a product or service. Or. Rev. Stat. § 646.608(1)(p).¹ Regulations issued by the State Attorney General (SAG) define “promotion” as including sweepstakes, and define sweepstakes identically to the UTPA’s provision governing sweepstakes solicitations. OR. Admin. R. 137-020-0410(3)(f), (j); Or. Rev. Stat. § 646.651(1)(b). The SAG’s regulations require specific disclosures for sweepstakes, including disclosure of rules for entry without purchase, which must be clearly and conspicuously displayed. Or. Admin. R. 137-020-0430, 137-020-0410(5). The SAG’s rules for all promotions, including sweepstakes, contain specific prohibitions on misleading participants regarding the number of people eligible for a prize, representing that consumers are finalists or that they have an increased chance of winning if they make multiple entries or purchases unless these representations are true, and failing to disclose all fees associated with receiving prizes. Or. Admin. R. 137-020-0440(2), (3), (4), (8), (12), (14). The rule sweepingly forbids failure to conspicuously “make any other disclosure necessary to assure that the promotion is not misleading, unfair, or deceptive.” OR. Admin. R. 137-020-0440(13).

Oregon’s criminal law defines gambling as risking something of value upon the outcome of a game of chance, with the understanding that a participant will receive something of value in the event of a particular outcome. Or. Rev. Stat. § 167.117(7). Games of chance in which a participant makes a purchase or otherwise pays for the chance to win a prize may qualify as illegal lotteries. However, Oregon’s gambling law excludes games of chance where something other than money, such as a token, is used, and allows the use of tokens that are redeemable for merchandise that can be consumed on the premises. Or. Rev. Stat. § 167.117(7)(b)(D). While the SAG is not empowered to enforce criminal statutes, she may be able to prosecute an illegal gambling scheme as an unconscionable trade practice that “knowingly permits a customer to enter into a transaction from which the customer will retain no material benefit.” Or. Rev. Stat. §§ 646.607(A)(1), 646.605(9)(b).

Games of Skill, Instant Win Games, and Loyalty Programs

The UTPA forbids making any false or misleading statements about a prize, contest, or promotion used to advertise a product or service. Or. Rev. Stat. § 646.608(1)(p).² The SAG’s rules define “promotion” as including contests, and define contests identically to the UTPA’s provision governing sweepstakes solicitations. OR. Admin. R. 137-020-0410(3)(f), (d), Or. Rev. Stat. § 646.651(1)(a). The SAG’s regulations require clear and conspicuous disclosures for contests which require participants to pay or create the impression that they must pay, including disclosures of the maximum amount that contestants will have paid, and if they must pay anything to another party besides the contest sponsors. OR. Admin. R. 137-020-0420, 137-020-0410(5). The SAG’s rules for all promotions contain specific prohibitions on misleading participants regarding the number of people eligible for a prize, representing that contestants are finalists or that they have an increased chance of winning if they make multiple entries or purchases unless that is the case, and failing to disclose all fees associated with receiving a prize. OR. Admin. R. 137-020-0440(2), (3), (4), (8), (12), (14). The rule sweepingly forbids failure to conspicuously “make any

other disclosure necessary to assure that the promotion is not misleading, unfair, or deceptive.” OR. Admin. R. 137-020-0440(13).

When determining whether or not a game of skill constitutes an illegal lottery, Oregon courts apply the dominant element test. In *State v. Coats*, the Court held: “If any substantial degree of skill or judgment is involved, it is not a lottery.” 158 Ore. 122, 132 (1938). See also *State v. Schwemler*, 154 Ore. 533 (1936) (Rossmann, J., concurring); *Multnomah County Fair Ass’n v. Langley*, 140 Ore 172, 180 (1932).

Coupons

Oregon law contains no specific provisions governing coupons.

Unsolicited Commercial Email

The SAG is authorized to enforce the parts of the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM) addressing non-wireless spam. 15 U.S.C. § 7706(f)(1). CAN-SPAM requires senders of unsolicited commercial e-mail to children and adults to 1) clearly identify messages as advertisements; 2) provide a way to reject future messages; 3) include senders’ functioning return e-mail and postal addresses; and 4) use accurate subject lines that do not deceive kids into opening messages. 15 U.S.C. §§ 7701–7713.

Mobile Marketing

Mobile marketing is a digital marketing technique in which advertisers communicate with existing or potential customers via their mobile devices. Mobile marketing is particularly powerful because, within legal limits, marketers can utilize consumers’ location data to time and deliver tailored ads and promotions. Consumers can use mobile devices to enter sweepstakes and contests, receive and/or redeem a coupon, play a branded game, download a branded app and disseminate marketing messages to their friends. Where state laws define telemarketing practices to include or be read to include the sending of commercial texts, those laws may be applied to certain mobile marketing techniques.

The UTPA regulates “telephonic sellers,” requiring them to register with the Department of Justice. Or. Rev. Stat. § 646.553. Telephonic sellers are defined as persons making “telephonic contact with a prospective purchaser” in combination with the making of specific representations, including that a consumer will receive a gift or a prize if he or she makes a purchase, or that the price offered is below the price normally offered. Or. Rev. Stat. § 646.551(1). “Telephonic contact” may be interpreted to include text messages sent to mobile phones. Such sellers are required to give specific disclosures. Or. Rev. Stat. § 646.557. The SAG is empowered to issue regulations under the statute. Or. Rev. Stat. § 646.576. The regulations specify in detail the filing requirements and required disclosures for telephonic sellers. OR. Admin. R. 137-020-0200 – 137-020-0205.

Oregon law also forbids certain telephone solicitation practices. Or. Rev. Stat. §§ 646.561, 646.568, 646.569. Telephone solicitations are defined as “the solicitation by telephone of any person ... for the purpose of encouraging the party to purchase ... goods or services.” Or. Rev. Stat. § 646.561(3). Solicitation “by telephone” may include commercial text messages sent to mobile phones. The law empowers the SAG to hire an administrator to establish a state do-not-call list, or to designate a federal do-not-call list including Oregon numbers. Or. Rev. Stat. §§ 646.568(1)(d), (2), 646.572, 646.574. Solicitors are forbidden from calling consumers who are registered on the lists. Or. Rev. Stat. § 646.569(1).

The UTPA requires persons who solicit potential customers “by telephone” to make specific disclosures about their identity and purpose, as well as the total cost of the item or service being sold. Or. Rev. Stat. §§ 646.611, 646.608(n). Solicitation “by telephone” may include commercial text messages sent to mobile phones.

The Federal Communication Commission’s (FCC) rules under the TCPA forbid telemarketers from calling wireless numbers on the national Do-Not-Call registry and mandate hours at which calls can be made. 47 C.F.R. § 64.1200(c). The regulations also require companies to establish and honor business-specific do-not call lists. 47 C.F.R. § 64.1200(c). Several cases and the FCC’s TCPA Order indicate that these rules apply to commercial text messages. *See. e.g., Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (2009); 2003 TCPA Order, Rules and Regs. Implementing the Tel. Consumer Prot. Act. of 1991, *Rpt. and Order*, 18 F.C.C.R. 14014 (2003).

Oregon law forbids the making of misrepresentations during autodialed calls and prohibits callers from making autodialed calls outside certain hours; these laws would apply to automated calls made to wireless users who have given express prior consent to receive autodialed calls. Or. Rev. Stat. § 646A.374. The statute gives allows a “prosecuting attorney who has probable cause to believe that a person is engaging in ... an unlawful trade practice” to “bring suit in the name of Oregon in the appropriate court” to enjoin the practice. Or. Rev. Stat. § 646.632.

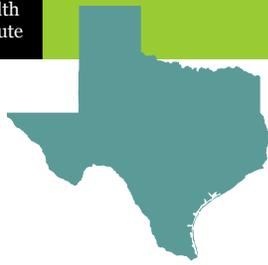
Mobile marketing practices may violate the UTPA’s general prohibition on unconscionable trade practices. Or. Rev. Stat. §§ 646.607(A)(1).

Privacy

Oregon has no specific laws addressing children’s online privacy. The SAG shares enforcement power of the Children’s Online Privacy Protection Act (COPPA) with the FTC. 15 U.S.C. § 6504(a). COPPA requires operators of websites directed towards children under the age of 13 to post their privacy policies and to obtain parental consent before collecting children’s personal information. 15 U.S.C. §§ 6501-6506.

¹ Sweepstakes solicitations sent through the U.S. mail are subject to more specific and stringent regulation under the UTPA. Or. Rev. Stat. § 646.651(1)(b), § 646.651(2)-(4).

² Solicitations for contests and games of skill sent through the U.S. mail are subject to more specific and stringent regulation under the UTPA. Or. Rev. Stat. § 646.651(1)(a), § 646.651(2)-(4).



Texas

Digital Food Marketing Legal Profile

The following legal summary covers state law provisions beyond general prohibitions on unfair and/or deceptive trade practices that may be used to address digital food marketing techniques targeting children and teens.

Sweepstakes

Texas law defines a sweepstakes as a “contest that awards one or more prizes based on chance or the random selection of entries.” Tex. Bus. & Com. Code Ann. § 622.001(4). While Texas law includes a broad range of behaviors as “acts conducting sweepstakes,” and mandates specific disclosures and prohibitions in the conduct of sweepstakes, the law’s application is limited to sweepstakes conducted through the mail and to sweepstakes which include at least one prize valued at at least \$50,000. Tex. Bus. & Com. Code Ann. § 622.002, §§ 622.101-110, §§ 622.051, 622.052. The law does not apply to sweepstakes promoting food that is regulated by the FDA or U.S. Department of Agriculture. Tex. Bus. & Com. Code Ann. § 622.059. Hence, although the State Attorney General (SAG) is empowered to enforce the sweepstakes law, the law is unlikely be a useful tool against digital marketers of unhealthy food to children. Tex. Bus. & Com. Code Ann. § 622.201.

Texas’s constitution and penal code prohibit non-state-sanctioned lotteries and gambling. Tex. Const. Art. 3; § 47, Tex. Penal Code Ann. §§ 47.01-47.06. Lotteries are defined as “any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win anything of value.” Tex. Penal Code Ann. § 47.01(7). A sweepstakes in which a participant makes a purchase or otherwise pays for the chance to win a prize, may be deemed to meet an illegal lottery’s three elements of prize, chance and consideration. *Robb & Rowley United v. State*, 127 S.W.2d 221, 222 (Tex. Civ. App. 1939). While the SAG is not empowered to enforce criminal statutes, a marketer’s disguising a lottery as a sweepstakes may violate Texas’s consumer protection law’s prohibition on “unconscionable action[s] or course[s] of action.” Tex. Bus. & Com. Code Ann. § 17.50(a)(3).

Digital sweepstakes advertisements or procedures may otherwise violate Texas’s consumer protection law’s general prohibition on false, misleading or deceptive acts or practices and unconscionable acts which take advantage of consumers’ lack of knowledge or experience. Tex. Bus. & Com. Code Ann. § 17.46(a), § 17.50(a)(3).

Games of Skill, Instant Win Games, and Loyalty Programs

When determining whether or not a game of skill constitutes an illegal lottery, Texas courts apply the any chance test. In *State v. Gambling Device*, the Court held that Tex. Penal Code § 47.01 applies “to contrivances that incorporate any element of chance, even if the exercise of skill also influences the outcome....[T]hus, the definition of a gambling device explicitly includes a device whose outcome is determined by chance, even though that outcome may also be influenced by an appreciable amount of skill.” 859 S.W.2d 519, 523 (Tex. App. 1993).

Advertisements for or procedures associated with games of chance, instant win games and loyalty programs may otherwise violate the Texas consumer protection law’s general prohibition on false, misleading or deceptive acts or practices and/or unconscionable acts which take advantage of consumers’ lack of knowledge or experience. Tex. Bus. & Com. Code Ann. § 17.46(a), § 17.50(a)(3).

Coupons

Texas law does not specifically govern the use of coupons.

Unsolicited Commercial Email

Texas law regulating commercial e-mail largely mirrors the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM). Tex. Bus. & Com. Code Ann. §§ 321.001- 321.114; 15 U.S.C. §§ 7701–7713. The SAG is authorized to enforce the parts of CAN-SPAM addressing non-wireless spam as well as the Texas anti-spam law. 15 U.S.C. § 7706(f)(1); Tex. Bus. & Com. Code Ann. §§ 321.102, 321.103. The SAG is also empowered to intervene in civil actions commenced under state law. Tex. Bus. & Com. Code Ann. § 321.108.

Both Texas and CAN-SPAM forbid unsolicited commercial e-mail with falsified transmission or routing information, as well as any commercial e-mail with false, deceptive, or misleading information in its subject line or that that uses another’s Internet domain name without his or her consent. Tex. Bus. & Com. Code Ann. § 321.051, 15 U.S.C. §§ 7703-7704. Texas and CAN-SPAM also require that unsolicited commercial e-mail include a functioning return e-mail address at which a recipient may request removal from the sender’s e-mail list, and that the recipient be removed upon request. Tex. Bus. & Com. Code Ann. § 321.052; 15 U.S.C. §§ 7704. Finally, both federal and state law prohibit the selling of an e-mail address of a person who has requested his or her address removed from sender’s list to another person or entity. 15 U.S.C. § 7704; Tex. Bus. & Com. Code Ann. § 321.053.

Texas also has an Anti-Spyware Act, which forbids the deceptive installment of software designed to steal consumers’ personally identifiable information. Tex. Bus. & Com. Code Ann. §§ 324.001- 324.055. Texas’s Anti-Phishing Act forbids an online actor posing as a legitimate business in order to collect personal information about consumers. Tex. Bus. & Com. Code Ann. §§ 325.001-325.006. The SAG is empowered to enforce these laws. Tex. Bus. & Com. Code Ann. §§ 324.102, 325.106.

Advertisements found in spam may otherwise violate the Texas consumer protection law’s general prohibition on false, misleading or deceptive acts or practices and/or unconscionable acts which take advantage of consumers’ lack of knowledge or experience. Tex. Bus. & Com. Code Ann. § 17.46(a), § 17.50(a)(3).

Mobile Marketing

Mobile marketing is a digital marketing technique in which advertisers communicate with existing or potential customers via their mobile devices. Mobile marketing is particularly powerful because, within legal limits, marketers can utilize consumers’ location data to time and deliver tailored ads and promotions. Consumers can use mobile devices to enter sweepstakes and contests, receive and/or redeem a coupon, play a branded game, download a branded app and disseminate marketing messages to their friends. Where state laws define telemarketing practices to include or be read to include the sending of commercial texts, those laws may be applied to certain mobile marketing techniques.

Texas’s Telemarketing Disclosure and Privacy Act broadly prohibits false, misleading and abusive telemarketing practices, and includes text messages in its definition of “telephone call.” Tex. Bus. & Com. Code Ann. § 304.002(10)(C), §§ 304.001-304.005. The SAG has authority to enforce the Act under the state consumer law’s grant of power to prosecute deceptive and misleading practices. Tex. Bus. & Com. Code Ann. § 17.46(a). The SAG is also empowered to enforce state law maintaining a no-call list. Tex. Bus. & Com. Code Ann. § 304.051-304.063, § 304.252. Since the law defines a “telephone call” as

including text messages, the law is relevant to mobile marketing techniques. Tex. Bus. & Com. Code Ann. § 304.002(10)(C).

A commercial mobile service provider may not publish a wireless consumer's phone number in a directory or provide a subscriber's name and number to a directory without specific disclosures and consumer consent. Tex. Util. Code Ann. § 64.202. The SAG is granted power to investigate and prosecute violations of this law. Tex. Util. Code Ann. § 64.203.

The SAG is authorized to enforce the Telephone Consumer Protection Act (TCPA), a federal law which restricts the use of automatic telephone dialing systems and pre-recorded messages to make any call to a consumer's cell phone for which the consumer is charged. 47 U.S.C.A. § 227(b)(1)(A)(iii); 47 C.F.R. § 1200(a)(1)(iii). The Federal Communications Commission's (FCC) rules under the TCPA forbid telemarketers from calling wireless numbers on the national Do-Not-Call registry and mandate hours at which calls can be made. 47 C.F.R. § 1200(c). The regulations also require companies to establish and honor business-specific do-not call lists. 47 C.F.R. § 1200(c). Several cases and the FCC's TCPA Order indicate that these rules apply to commercial text messages. See, e.g., *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (2009); 2003 TCPA Order, Rules and Regs. Implementing the Tel. Consumer Prot. Act. of 1991, *Rpt. and Order*, 18 F.C.C.R. 14014 (2003).

If a mobile marketer uses an automatic telephone dialing system to send commercial messages directly to recipients' wireless phones through use of an Internet domain name on the FCC's list, the SAG may prosecute for dual violations of the TCPA and CAN-SPAM. *Joffe v. Acacia Mortgage Corp.*, 121 P. 3d 831, 841 (Ariz. Ct. App. 2005).

Mobile marketing tactics may also implicate the Texas consumer protection law's general prohibition on false, misleading or deceptive acts or practices and/or unconscionable acts which take advantage of consumers' lack of knowledge or experience. Tex. Bus. & Com. Code Ann. § 17.46(a), § 17.50(a)(3).

Privacy

Texas has no specific laws addressing children's online privacy. The SAG shares enforcement power of the Children's Online Privacy Protection Act (COPPA) with the Federal Trade Commission. 15 U.S.C. § 6504(a). COPPA requires operators of websites directed towards children under the age of 13 to post their privacy policies and to obtain parental consent before collecting children's personal information. 15 U.S.C. §§ 6501-6506 (1998).



Virginia

Digital Food Marketing Legal Profile

The following legal summary covers state law provisions beyond general prohibitions on unfair and/or deceptive trade practices that may be used to address digital food marketing techniques targeting children and teens.

Sweepstakes

Virginia law defines “illegal gambling” as “the making, placing or receipt of any bet or wager ... of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance.” Va. Code Ann. § 18.2-325. Both the purchase of “free points” and purchase of Internet access are expressly included as acts constituting the “making, placing, or receipt of a bet or wager” if such purchase is redeemable for money and the purchase is of low value unto itself or merely incidental to the chance to win money. Va. Code Ann. § 18.2-325. Digital sweepstakes in which a participant pays money, even for a non-tangible good such as points redeemable for a chance at a prize or Internet access, may violate Virginia’s illegal gambling law. While the State Attorney General (SAG) is not empowered to enforce criminal statutes, a marketer’s disguising a lottery as a sweepstakes may violate the Virginia Consumer Protection Act’s (CPA) prohibition on using false pretenses or misrepresentation in connection with a consumer transaction. Va. Code Ann. § 59.1-200(A)(14).

While Virginia law does not contain any laws specific to sweepstakes, Virginia’s Prizes and Gifts Act governs marketers’ use of prizes and gifts in connection with soliciting sales. Va. Code Ann. §§ 59.1-415-59.1-423. The Act forbids misleading representations and mandates specific disclosures, including written disclosures of the values of gifts or prizes, and the odds of winning. Va. Code Ann. §§ 59.1-416-59.1-418. The Act also forbids misleading simulations of checks and invoices, and names conditions for which handling and shipping charges may be charged on prizes won. Va. Code Ann. §§ 59.1-419-59.1-420. The SAG is granted enforcement power over the Act. Va. Code Ann. § 59.1-422.

Advertising for and practices involved with sweepstakes may violate the Virginia CPA’s general prohibition on fraudulent acts or practices. Va. Code Ann. § 59.1-200.

Games of Skill, Instant Win Games, and Loyalty Programs

Virginia’s Prizes and Gifts Act, as described above, applies to promotions like games of skill, instant win games and loyalty programs if they use prizes and gifts. Advertising for and practices involved with contests, loyalty programs and prize promotions may violate the Virginia CPA’s general prohibition on fraudulent acts or practices. Va. Code Ann. § 59.1-200.

Coupons

Virginia law does not specifically govern coupons.

Unsolicited Commercial Email

Virginia’s anti-spam law is encoded into its criminal code; the SAG does not have enforcement power under the law. Va. Code Ann. §§ 18.2-153:1, 18.2-152.12. The SAG is authorized to enforce the parts of the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM) addressing non-wireless spam. 15 U.S.C. § 7706(f)(1). CAN-SPAM requires senders of unsolicited

commercial e-mail to children and adults to 1) clearly identify messages as advertisements; 2) provide a way to reject future messages; 3) include senders' functioning return e-mail and postal addresses; and 4) use accurate subject lines that do not deceive kids into opening messages. 15 U.S.C. §§ 7701–7713.

Mobile Marketing

Mobile marketing is a digital marketing technique in which advertisers communicate with existing or potential customers via their mobile devices. Mobile marketing is particularly powerful because, within legal limits, marketers can utilize consumers' location data to time and deliver tailored ads and promotions. Consumers can use mobile devices to enter sweepstakes and contests, receive and/or redeem a coupon, play a branded game, download a branded app and disseminate marketing messages to their friends. Where state laws define telemarketing practices to include or be read to include the sending of commercial texts, those laws may be applied to certain mobile marketing techniques.

The Virginia Telephone Privacy Protection Act specifies at which hours telemarketers may call, how they must identify themselves, and prohibits telemarketers from calling consumers who are on the national Do-Not-Call registry or who have stated that they do not wish to receive future calls. Va. Code Ann. §§ 59.1-510-59.1-514. The Act defines a “telephone solicitation call” as “any telephone call made to ... any wireless phone” and does not further define “call;” the law may be deemed to apply to text messages and thus mobile marketing techniques. The SAG has statutory power to enforce the Act. Va. Code Ann. § 59.2-517.

Virginia law governing automatic dialing-announcing devices forbids their use without prior consent of the recipient. Va. Code Ann. § 59.1-518.2. The statute defines a “caller” as “a person that attempts to contact, or contacts, a subscriber in the Commonwealth by using a telephone or telephone line,” and a “commercial telephone solicitation” as an unsolicited commercial “call.” The law may be deemed to apply to text messages and thus mobile marketing techniques. Va. Code Ann. § 59.1-518.1. The SAG has enforcement power over the law. Va. Code Ann. § 59.1-518.4.

The SAG is authorized to enforce the Telephone Consumer Protection Act (TCPA), a federal law which restricts the use of automatic telephone dialing systems and pre-recorded messages to make any call to a consumer's cell phone for which the consumer is charged. 47 U.S.C.A. § 227(b)(1)(A)(iii), 47 C.F.R. § 1200(a)(1)(iii). The Federal Communication Commission's (FCC) rules under the TCPA forbid telemarketers from calling wireless numbers on the national Do-Not-Call registry and mandate hours at which calls can be made. 47 C.F.R. § 1200(c). The regulations also require companies to establish and honor business-specific do-not call lists. 47 C.F.R. § 1200(c). Several cases and the FCC's TCPA Order indicate that these rules apply to commercial text messages. *See, e.g., Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (2009); 2003 TCPA Order, Rules and Regs. Implementing the Tel. Consumer Prot. Act. of 1991, *Rpt. and Order*, 18 F.C.C.R. 14014 (2003).

If a mobile marketer uses an automatic telephone dialing system to send commercial messages directly to recipients' wireless phones through use of an Internet domain name on the FCC's list, the SAG may prosecute for dual violations of the TCPA and CAN-SPAM. *Joffe v. Acacia Mortgage Corp.*, 121 P. 3d 831, 841 (Ariz. Ct. App. 2005).

Mobile marketing techniques may violate the Virginia CPA's general prohibition on fraudulent acts or practices. Va. Code Ann. § 59.1-200.

Privacy

Virginia has no specific laws addressing children's online privacy. The SAG shares enforcement power of the Children's Online Privacy Protection Act (COPPA) with the Federal Trade Commission. 15 U.S.C. § 6504(a). COPPA requires operators of websites directed towards children under the age of 13 to post their privacy policies and to obtain parental consent before collecting children's personal information. 15 U.S.C. §§ 6501-6506.

Virginia's criminal code also forbids the use of computers to gather identifying information through trickery or deception. Va. Code Ann. § 18.2-152.5:1. While the SAG is not empowered to enforce criminal statutes, a marketer's violation of this law may be a concurrent violation of the Virginia CPA's prohibition on using false pretenses or misrepresentations in connection with consumer transactions. Va. Code Ann. §§ 18.2-152.12, 59.1-200(A)(14)