

# 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.<sup>1</sup> 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.”<sup>2</sup> Sweepstakes and contests also are of concern because they may encourage gambling-like behavior in children.<sup>3</sup> 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.<sup>4</sup> 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....”<sup>5</sup>

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,<sup>6</sup> whereas a 2009 analysis of designated children’s areas on food company websites found that 40% featured sweepstakes or contests.<sup>7</sup> 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.”<sup>8</sup>



**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 <sup>9</sup> 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 <sup>10</sup> 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 <sup>11</sup> Children told to visit <a href="http://www.fruitsnackia.com">www.fruitsnackia.com</a> 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 <sup>12</sup> Children directed to enter the UPC from the box at <a href="http://WinOneGiveOne.com">WinOneGiveOne.com</a> 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 <sup>13</sup> 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 <sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> Children may have unrealistic expectations of the chances of winning sweepstakes and contests, and inflated expectations of the prizes that can be won.<sup>18</sup> Prizes must be clearly depicted with a free means of entry clearly disclosed.<sup>19</sup> The likelihood of winning must be clearly disclosed, and the language used in the advertisement must be readily understood by a child audience.<sup>20</sup> 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).<sup>21</sup>

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-Years<sup>22</sup>**

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.”<sup>23</sup> 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,”<sup>24</sup> and for making “express or implied representation in its advertisements that a consumer must purchase a product in order to enter a sweepstakes.”<sup>25</sup>

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.”<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup>

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.<sup>29</sup> 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.<sup>30</sup> 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.”<sup>31</sup> 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.<sup>32</sup>

In 2012, General Mills ran a promotion for its Go-Gurt yogurt tubes called the “Slurp & Reveal Sweepstakes” that was open to all ages.<sup>33</sup> 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.<sup>34</sup>

As a general matter, a sweepstakes sponsor “may not directly or indirectly encourage participants to enter via the purchase-based method.”<sup>35</sup> 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.<sup>36</sup> 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*.<sup>37</sup> 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.”<sup>38</sup>

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.<sup>39</sup> 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](http://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.”<sup>40</sup> 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.”<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup>

### 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](http://www.bkcrown.com).<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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](http://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.<sup>47</sup> Moreover, points do not carry over from one contest period to the next.<sup>48</sup>

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.”<sup>49</sup> 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.<sup>50</sup>

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.<sup>51</sup> 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.”<sup>52</sup> As per the contest rules, all of the games on [www.bkcrown.com](http://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.”<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> 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.”<sup>56</sup> 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.<sup>57</sup> According to CARU Guidelines, material disclosures should be communicated in the same format as other elements of a sweepstakes.<sup>58</sup>

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

but no voiceover told children that they could enter the sweepstakes without making a purchase.<sup>61</sup> 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.<sup>62</sup> Clicking the “Enter Now” icon on the website did not directly notify children there was a free means of entry.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup> In response to these findings, Kraft agreed to include audio voiceovers stating “no purchase necessary” and “many will enter, few will win.”<sup>67</sup>

#### **Never Bored Again (2012)**

Just two years later, Kraft was again cited for its Lunchables “Never Be Bored Again” sweepstakes.<sup>68</sup> CARU questioned (1) whether the sweepstakes prizes were clearly depicted and (2) whether the odds of winning were clearly disclosed.<sup>69</sup> Upon investigation, CARU determined that the depiction of prizes were not clear and understandable to a child audience.<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup> 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.<sup>73</sup> 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

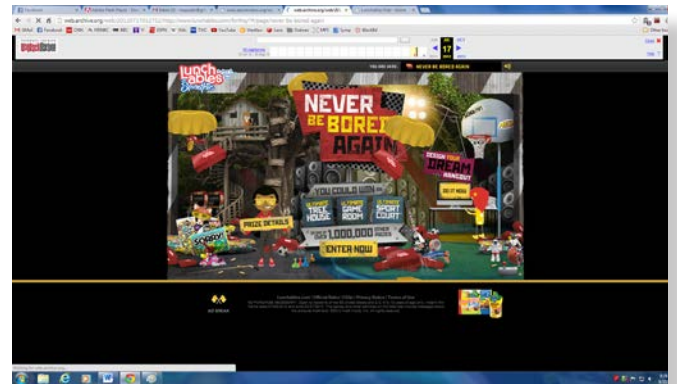
a precise description of the prize structure before they are able to enter.<sup>74</sup>

CARU also determined that the sweepstakes did not clearly disclose the chances of winning.<sup>75</sup> In this instance, the sweepstakes did not contain a disclosure of any sort about the chances of winning.<sup>76</sup> 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.”<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup>

### Access to Awesome (2013)

In summer 2013, Kraft launched the “Access to Awesome” instant win game.<sup>80</sup> Product packaging and the sweepstakes webpage state “Access to Awesome. You Could Win One of Over 1,000,000 prizes.”<sup>81</sup> 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...”<sup>82</sup> 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)**

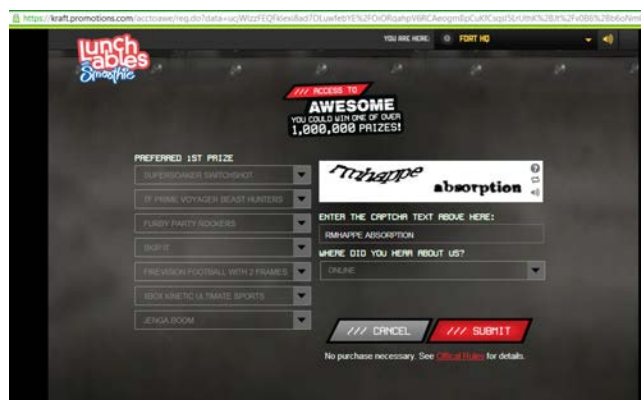


**Figure 5: Lunchables Access to Awesome Instant Win Game (2013)**

sweepstakes sponsor conveys to a consumer that “the sponsor has ‘reserved’ or is ‘holding’ a prize ... in the recipient’s name.”<sup>83</sup> 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.”<sup>84</sup> 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**

## Endnotes

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<sup>2</sup> Gabriel Karp, *Navigating the Law of Interactive Promotions*, 28 THE COMPUTER & INTERNET 1, 1 (April 2011).

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<sup>5</sup> FED. TRADE COMM'N, A REVIEW OF FOOD MARKETING TO CHILDREN AND ADOLESCENTS: FOLLOW-UP REPORT 75 (December 2012), <http://www.ftc.gov/os/2012/12/121221foodmarketingreport.pdf>.

<sup>6</sup> Randy M. Page & Aaron Brewster, *Frequency of Promotional Strategies and Attention Elements in Children's Food Commercials During Children's Programming Blocks on US Broadcast Networks*, 8 YOUNG CONSUMERS 184, 190 (2007).

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<sup>11</sup> GENERAL MILLS, INC., *Fruit Roll-Ups and Gushers Fruitsnackia Character Creator Contest Official Rules*, [http://www.fruitsnackia.com/snackulator\\_official\\_rules.aspx](http://www.fruitsnackia.com/snackulator_official_rules.aspx) (last accessed Oct. 21, 2013).

<sup>12</sup> GENERAL MILLS, INC., *Fruit Roll-Ups One Laptop Per Child Sweepstakes Official Rules*, <http://web.archive.org/web/20120624223348/http://generalmills.promo.eprize.com/winandgive/rules.html> (last accessed Oct. 21, 2013).

<sup>13</sup> FRITO LAY, INC., *Cheetos One in a Minion Family Vacation Sweepstakes*, <http://cheetosoneinaminion.com/rules> (last accessed Oct. 21, 2013).

<sup>14</sup> THE DANNON COMPANY, INC., *Danimals Ice Age Continental Drift Movie Sweepstakes Official Rules*, <http://web.archive.org/web/20120701185904/http://danimals.com/ice-age-movie/OfficialRules.aspx> (last accessed Oct. 21, 2013).

<sup>15</sup> Trade Regulation Rule Concerning Games of Chance in the Food Retailing and Gasoline Industries, 61 Fed. Reg. 250, 68143, 250, 68144 (Dec. 27, 1996) (to be codified 16 CFR pt. 419).

<sup>16</sup> CHILDREN'S ADVERTISING REVIEW UNIT, *General Guidelines, Part I (f)(1), (f)(2), (f)(2)(iii)(a)-(f)* (Apr. 2012), <http://www.ascreviews.org/wp-content/uploads/2012/04/CARU-GUIDELINES-Revised-ASRC-4-3-122.pdf>.

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<sup>20</sup> CHILDREN'S ADVERTISING REVIEW UNIT, *General Guidelines, Part I (f)(2)(iii)(d)* (Apr. 2012), <http://www.ascreviews.org/wp-content/uploads/2012/04/CARU-GUIDELINES-Revised-ASRC-4-3-122.pdf>.

<sup>21</sup> CHILDREN'S ADVERTISING REVIEW UNIT, *General Guidelines, Part I (f)(2)(e)-(f)* (Apr. 2012), <http://www.ascreviews.org/wp-content/uploads/2012/04/CARU-GUIDELINES-Revised-ASRC-4-3-122.pdf>.

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<sup>32</sup> See e.g., *Walter H. Johnson Candy Co. v. Federal Trade Comm'n*, 78 F.2d 717 (7<sup>th</sup> Cir. 1935); *Fed. Trade Comm'n v. A. McLean & Son et al.*, 84 F.2d 910 (7<sup>th</sup> Cir. 1936); *Hofeller v. Fed. Trade Comm'n*, 82 F.2d 647 (7<sup>th</sup> Cir. 1936).

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<sup>70</sup> *Id.* at 7.

<sup>71</sup> *Id.* at 5.

<sup>72</sup> *Id.* at 5-6.

<sup>73</sup> *Id.* at 6.

<sup>74</sup> *Id.*

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