



State Law Approaches to Curtail Digital Food Marketing Tactics Targeting Young Children

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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. While the world of food marketing is dynamic, there are several specific, digital marketing tactics

being deployed with children under 12 years old that raise clearly articulable state consumer protection law issues. These generally involve the integration of digital marketing prompts into food packaging, advergames, and digital sweepstakes. Responsible food and beverage marketers should take steps to ensure that marketing campaigns do not violate state consumer protection law provisions and state attorneys general (SAGs) could play a more robust and proactive role to protect child consumers from harmful digital marketing under their existing legal authority.

Digital Marketing is Harder for Children 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



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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.² 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.³

What Is the Harm?

Just as with any other consumer product, unfair and deceptive food marketing harms children and their families economically through the purchases of food items they would not otherwise have purchased. Food and beverages are unique, however, because they also pose long-term health harms from the

excess calories, sodium, sugar, caffeine, etc. consumed as the result of unfair or deceptive marketing.

The public health consequences of overconsumption of unhealthy foods and beverages are stark. The Centers for Disease Control projects that by 2050, 1 in 3 U.S. adults could have diabetes.⁴ 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.⁵ Medical costs associated with diet-related disease are projected to increase between \$22 and \$48 billion per year by 2030 with a substantial portion paid for by Medicare and Medicaid.⁶

This chronic disease burden begins in childhood when eating preferences and food culture are ingrained and food marketing plays a major role in the foods children desire, perceive as tasting good, request their parents to buy for them and ultimately purchase for themselves. State governments are at a critical juncture with respect to ensuring the future health of their residents. Taking steps to address unfair and deceptive marketing of unhealthy food and beverage products to children is a logical step to address this mounting public health crisis.

The State Consumer Protection Approach

State consumer protection laws grant SAGs broad authority to protect consumers from deceptive and, in many states, unfair marketing. The Federal Trade Commission (FTC) through its enforcement of the Children's Online Privacy Protection Act and its periodic food marketing expenditure reports and the Council of Better Business Bureau through its self-regulatory Children's Advertising Review Unit (CARU) and Children's Food and Beverage Advertising

Initiative (CFBAI) have, to date, played the primary roles in oversight of food marketing to children. The limited progress made to reduce children's exposure to potentially harmful food marketing via the federal government and self-regulatory bodies, and the magnitude of the health threats posed by diet-related chronic disease and its impact on state healthcare systems are reminiscent of the nation's history with tobacco control. As occurred with tobacco marketing, intervention by SAGs may just be the game-changer that accelerates progress on harmful food marketing to children.

What About the Parents?

Parental responsibility is a common argument against legal interventions to protect child consumers. Digital marketing targeting young children is designed to get them 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." Pester power is potentially very effective at generating sales. One food company that markets to youth reported to the FTC that "75% of purchasers surveyed said they bought the product for the first time primarily because their child requested it."⁷ A number of state consumer protection laws explicitly address indirect advertising akin to pester power marketing in order to cover unfair and deceptive marketing that is designed to influence others.⁸

Digital Food Marketing Tactics Ripe for Legal Intervention

With respect to young children, digital marketing tactics on food packaging, advergames and digital sweepstakes are some of the most egregious unfair and deceptive tactics currently in use by major food and beverage companies.

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 13.⁹ 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.¹⁰ 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.

Advergaming

The FTC's 2009 report on food marketing expenditures to youth found extensive use of advergaming by food marketers.¹¹ Advergaming is digital games and apps produced by food companies that integrate products or contain food and beverage company branding. Advergaming has been repeatedly cited by CARU for blurring the line between commercial and non-commercial

content, yet they remain commonplace and relatively unchanged.¹²

The detrimental impact of advergaming on child health is supported by sound research linking them to increased overall calorie intake as the result of increased snacking after playing advergaming featuring food.¹³ 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 advergaming make the tactic highly material to the purchase of unhealthy food products.

Such direct inducements to purchase products linked to advergaming 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 advergaming—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

Incentive-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.¹⁴ 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."¹⁵

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.¹⁶ 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.

Conclusion

Digital food and beverage marketing has given rise to a range of tactics that are not only deceptive to children in a general sense, but trigger specific consumer protection law provisions and case law precedent around unfair and deceptive trade practices. Self-regulatory actions provide useful insight into tactics, like sweepstakes, that exploit child consumers and continue to be deployed in ways that run afoul of state consumer protection laws. Food and beverage marketing is of particular importance because it contributes to the public health burden of diet-related chronic disease. SAGs and responsible food and beverage marketers should take steps to address these harmful digital marketing tactics.

For more information about the legal implications of digital food and beverage marketing to children and adolescents please visit www.phaionline.org where you can access the full version of the Public Health Advocacy Institute, Berkeley Media Studies Group and the Center for Digital Democracy’s *Report on State Law Approaches to Address Digital Food Marketing Tactics Targeting Children and Adolescents*. ▲

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