

## **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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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**

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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

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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

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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

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Connecticut law contains no specific provisions governing coupons.

## Unsolicited Commercial Email

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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

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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

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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

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Florida law does not specifically regulate coupons.

## Unsolicited Commercial Email

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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

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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

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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

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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

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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 or 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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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

## Unsolicited Commercial Email

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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

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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

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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.<sup>1</sup>

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<sup>1</sup>State 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).<sup>1</sup> 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).<sup>2</sup> 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

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Oregon law contains no specific provisions governing coupons.

## Unsolicited Commercial Email

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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

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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

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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.

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<sup>1</sup> 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).

<sup>2</sup> 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

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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

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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

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Texas law does not specifically govern the use of coupons.

## Unsolicited Commercial Email

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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

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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

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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

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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

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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

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Virginia law does not specifically govern coupons.

### Unsolicited Commercial Email

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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

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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

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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)