The ABCs of Ads

*A Primer on Advertising and Marketing to Children*

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There is no escaping advertising; it’s everywhere—on phones, apps, streaming services, podcasts, video games, television and radio shows, billboards, and even live events. In our highly technological age, the lines between entertainment and advertising continue to blur. And while advertising generally is heavily regulated, advertising directed toward children, especially children under the age of 13, receives even greater scrutiny due to children’s inherent vulnerability. Mindful of children’s lack of sophistication, ability to be easily manipulated, and inability to understand nuance, federal and state regulators have enacted guardrails – including heightened regulation or outright prohibition for certain categories of products[[1]](#footnote-2) – in an effort to protect children from misleading, false, and potentially harmful advertising. Therefore, before a brand decides to market its products to children or create “child-friendly” advertising, it is essential to understand the landscape of regulation surrounding children’s advertising. This article provides a brief overview of the various stakeholders, legislation, and recent enforcement actions for in house counsel to help guide brands both entering and already in the arena of children’s advertising.

# The Regulatory Stakeholders

In the United States, oversight and regulation of children’s advertising fall under the auspices of three major stakeholder groups: (a) federal agencies, such as the Federal Trade Commission (“FTC”) and the Federal Communications Commission (“FCC”); (b) state legislatures and Attorneys General (“AG”); and (c) self-regulatory organizations, such as the Children’s Advertising Review Unit (“CARU”), the Children’s Food and Beverage Advertising Initiative (“CFBAI”) and the Children’s Confection Advertising Initiative (“CCAI”). While all regulate advertising directed at children, the focus of each is unique.

Federal agencies and state AGs tend to focus on the macro, requiring that brands follow general “truth in advertising” principles, while state legislatures and self-regulatory organizations tend to focus more on the micro, crafting legislation and guidelines aimed at addressing and preventing specific harms to children.

# Federal Stakeholders: FTC and FCC

## The FTC

### FTC Act Section 5: Unfair & Deceptive Practices

Section 5 of the FTC Act (15 U.S.C. §45) prohibits unfair and deceptive acts or practices in advertising. Under the FTC Act, advertising is deemed unfair (i) if it causes or is likely to cause substantial injury, (ii) which is not reasonably avoidable, and (iii) is not outweighed by countervailing benefits to consumers or to competition.[[2]](#footnote-3) Advertising is deemed deceptive if , when (a) considered from the perspective of the reasonable consumer, (b) it contains a representation, omission, or practice likely to mislead the consumer; and (c) the representation, omission, or practice is material (e.g., likely to affect a consumer’s choice or conduct, thereby leading to injury).[[3]](#footnote-4) These rules apply to all advertising, not simply advertising directed at children.

However, in policy and other public statements, the FTC has explained how it applies Section 5’s prohibitions to advertising directed at children: “When representations or sales practices are targeted to a specific audience, such as children…, the Commission determines the effect of the practice on a **reasonable member of that group**.”[[4]](#footnote-5) Such examination of children’s advertising takes into account “the limited ability of children to detect exaggerated or untrue statements.”[[5]](#footnote-6)  And, when assessing whether an injury to the consumer is avoidable, the FTC looks to see “how susceptible the affected audience may be to the act or practice in question.” Accordingly, advertising directed to children will be evaluated from the perspective of an ordinary child – one who is highly impressionable and lacks the ability to foresee and avoid danger.[[6]](#footnote-7)

The FTC has successfully brought actions against companies for deceptive performance claims made in toy ads,[[7]](#footnote-8) deceptive nutritional claims in food ads,[[8]](#footnote-9) and even unfair claims depicted in food, toy, and cigarette ads.[[9]](#footnote-10)

### Children’s Online Privacy Protection Act (COPPA)

In addition to actions brought under the FTC Act, the FTC has jurisdiction to bring actions under COPPA (15 U.S.C. § 6501, *et seq*.), which prohibits unfair or deceptive acts or practices in connection with the collection, use, and/or disclosure of personal information from and about children online. Pursuant to COPPA, the FTC promulgated a rule (“COPPA Rule”) that requires commercial websites and online services to obtain verifiable parental consent before collecting personal information from children under the age of 13 if the sites/services (a) are directed to individuals under the age of 13 or (b) have actual knowledge that visitors to the site are under the age of 13.[[10]](#footnote-11)

In today’s technological age, where children are often handier with a smart phone than their parents, COPPA enforcement has been steady. The FTC has brought actions against companies including Google, Epic Games, Microsoft, Amazon, and TikTok for failure to comply with the privacy law.[[11]](#footnote-12)

## The FCC

Although most regulation of children’s advertising falls under the domain of the FTC, certain broadcast, cable, or satellite advertising directed at children will also be monitored by the FCC pursuant to the Children’s Television Act (“CTA”).[[12]](#footnote-13) Unlike the FTC Act, which regulates the *content* of advertising, the CTA is primarily limited to the *timing* of advertising.

The CTA and its related FCC rules require that commercial television broadcast licensees limit advertising during children’s television programming to not more than 10.5 minutes per hour on weekends and not more than 12 minutes per hour on weekdays. Additionally, the CTA prohibits commercials for products related to the program currently airing (“program-length commercials”) or containing program talent or other identifiable program characteristics (“host-selling”).

Importantly, the FCC regulations apply only to programs that are originally produced for children ages twelve and under,[[13]](#footnote-14) and only to television delivered by means of broadcast, cable, and satellite television. The rules do not apply to motion pictures (even if shown on television), video games, online videos, or streaming.

# State Stakeholders and Legislation

## State Consumer Protection Statutes (“UDAP”)

Similar to Section 5 of the FTC Act, state UDAP laws follow general truth-in-advertising principles. Under these regulations, advertisements to children cannot be misleading or deceptive, and any claims made by a brand about its product or service must be truthful, based in evidence, and able to be substantiated. As with the FTC Act, state UDAP laws apply to all advertising, regardless of the intended audience. Enforcement of UDAP laws fall to state AGs, generally, with some statutes providing a private right of action for certain violations.

In recent years, however, state legislatures have shown an increasing interest in protecting children from deceptive advertising practices. While the UDAP laws themselves haven’t been amended to include child-specific provisions, other legislation has been passed – primarily in the privacy arena – to address these concerns.

## State Privacy Laws

Various states have passed laws to regulate the collection and processing of such information from children. While not advertising laws *per se*, these privacy laws impact the design of online sites, how they are marketed to children, and specifically any children’s advertising online where data collection plays a role in the placement and measurement of ads. Generally, these laws give parents and children more control over when and how their personal information can be collected, stored, and shared.

California has been at the forefront of the information privacy movement with the passage of the California Consumer Privacy Act (“CCPA”) and California Age-Appropriate Design Code (“CAADC”). The CCPA, which applies only to for-profit businesses that do business in California and (i) have a gross annual revenue of over $25M; (ii) buy, sell, or share the personal information of 100,000 or more California residents, households, or devices; or derive 50% or more of their annual revenue from selling California residents’ personal information, requires opt-in consent for the “sale” and “share” of information collected from children under the age of 16. The CAADC, which applies only to websites governed by CCPA, requires “privacy by default” design, the clear and conspicuous posting of privacy policies and terms of use and prohibits collecting, selling, or disclosing precise geolocation information, using dark patterns to encourage children to provide personal information, retaining more information than necessary, or using collected information for any other purpose than estimating age.

California’s legislation has inspired similar privacy laws aimed at regulating the collection of children’s information on social media and other online platforms in Louisiana, Massachusetts, New Jersey, North Carolina, and Oregon.[[14]](#footnote-15)

# Self-Regulatory Bodies: CARU, CFBAI, and CCAI

## CARU

Operating under the guiding principle that children have limited knowledge, experience, sophistication, and maturity, CARU has created guidelines to ensure that advertising directed toward children (i) remains truthful and not misleading, (ii) clearly represents itself as advertising, and (iii) does not depict or promote inappropriate or unsafe behavior.

The [CARU Guidelines](https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/caru/caru_advertisingguidelines.pdf) apply to advertising directed toward children under 13. Whether advertising is primarily directed to children requires an analysis that weighs various factors, including the subject matter; audio/visual content; use of child-oriented characters, activities, or incentives; age of models; and evidence regarding the intended audience.

Among other things, the CARU Guidelines require that:

* Advertising, **as viewed from the POV of a child**, must not be misleading or deceptive;
* All material disclosures must be **clear and conspicuous** andpresented in a manner **easily understandable by children**;
* Advertisements must be **clearly labeled and easily identifiable** as advertising:
	+ Advertisements should not be presented in a manner that blurs the distinction between advertising and organic content;
	+ Program personalities, live or animated, should not be used to advertise products, premiums, or services in or adjacent to a television program primarily directed to children, in which the same personality or character appears; and
	+ Products derived from or associated with a television program primarily directed to children should not be advertised during or adjacent to that program.
* Online offers to purchase products should **contain safeguards** and r**equire parental consent** prior to purchase;
* Advertisements must **not encourage practices that are unsafe or detrimental to children’s health**, or portray or encourage negative social stereotyping, prejudice, or discrimination.

CARU is active in its enforcement, and, where practical, encourages companies to voluntarily work in tandem with them to effect change. They operate a COPPA [Safe Harbor program](https://bbbprograms.org/programs/all-programs/children%27s-advertising-review-unit/COPPA-Safe-Harbor-Services), under which partner companies, after undergoing a privacy audit, can receive certification to demonstrate compliance with children’s privacy policies.

## CFBAI

Another self-regulatory program run by the Better Business Bureau (“BBB”), CFBAI was created to oversee and improve the landscape of food advertising to children. Under CFBAI’s [Core Principles](https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/cfbai/cfbai-coreprinciples.pdf), participating food, beverage, and quick-serve restaurant companies commit that all advertising primarily directed to children under age 13 in covered media will be for foods that meet CFBAI’s [Category-Specific Uniform Nutrition Criteria](https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/cfbai/cfbai-revised_criteria_chart_1-28-2019.pdf)[[15]](#footnote-16) or that they will not engage in child-directed advertising in covered media. Covered media includes TV, print, radio, digital media, product placements and integrations, and mobile media.

## CCAI

Created in 2016 as a partnership between BBB and the National Confectioners Association, CCAI provides self-regulation of food and beverage advertising to children for small-to-medium sized confectionery companies. As with CFBAI, CCAI participants adhere to certain [Core Principles](https://bbbnp-bbbp-stf-use1-01.s3.amazonaws.com/docs/default-source/ccai/ccai-core-principles-final.pdf), under which they pledge to not advertise to children under age 13 in covered media or in elementary schools.

# Recent Trends in Enforcement Actions

Recent FTC enforcement actions have shown us that scrutiny of advertising directed toward children continues to be a hot-button topic for the Commission. Over the past year the agency has pursued companies for unfair practices related to COPPA violations in online communications, and the monetization of children’s data,[[16]](#footnote-17) and it continues to hold public events and solicit comments on protecting children from stealth advertising in digital media.[[17]](#footnote-18)

Similarly, CARU continues to be focused on ads that blur the lines between entertainment and advertising, unsafe product demonstrations, and inappropriate messaging to children.[[18]](#footnote-19) Finding the line between entertainment and advertising can be especially complex in the context of digital media, AR/VR, and video games and will continue to be a sensitive topic in the near future.

# Conclusion

Special care must be taken when advertising to or for children. In addition to general truth in advertising rules, children’s advertising must consider the inherent vulnerability of the audience. Accordingly, when considering advertising to children (or advertising that will be predominantly viewed by children) in-house lawyers should build more time into the review process to properly evaluate these special concerns.

1. The advertising of alcohol, cannabis, firearms, gambling, prescription drugs, sexual products/services, tobacco, and real-life violence is strictly prohibited to children. [↑](#footnote-ref-2)
2. 15 U.S.C. §45(n). *See also* Unfairness Policy Statement, appended to *International Harvester Co*., 104 F.T.C. 949, 1070-76 (1984). [↑](#footnote-ref-3)
3. Deception Policy Statement, appended to *Cliffdale Associates, Inc*., 103 F.T.C. 110, 176-83 (1984), available at <https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf>. [↑](#footnote-ref-4)
4. *Id*. at 176. [↑](#footnote-ref-5)
5. Public Statement by former FTC Commissioner, Roscoe B. Starek III, July 25, 1997, available at [https://www.ftc.gov/‌news-events/news/speeches/abcs-ftc-marketing-advertising-children#N\_5\_](https://www.ftc.gov/%E2%80%8Cnews-events/news/speeches/abcs-ftc-marketing-advertising-children%22%20%5Cl%20%22N_5_). [↑](#footnote-ref-6)
6. *See id*. [↑](#footnote-ref-7)
7. *See e.g.*, *Hasbro, Inc.*, 116 F.T.C. 657 (1993) (consent order) and *Lewis Galoob Toys, Inc*., 114 F.T.C. 187 (1991) (consent order). [↑](#footnote-ref-8)
8. *See e.g.*, *Interstate Bakeries Corp*., 2002 F.T.C. LEXIS 20 (2002) (consent order). [↑](#footnote-ref-9)
9. *See e.g.*, *Uncle Ben’s, Inc*., 89 F.T.C. 131 (1977) (consent order), *Mego International, Inc.*, 92 F.T.C. 186 (1978) (consent order), and *In the Matter of R.J. Reynolds Tobacco Co.*, Docket No. 9285 (1997). [↑](#footnote-ref-10)
10. 16 C.F.R. Part 312. [↑](#footnote-ref-11)
11. *See e.g.*, *U.S. v. Google LLC and YouTube, LLC*, 19-cv-02642 (D.D.C., 2019); *U.S. v. Epic Games, Inc.*, 22-cv-00518 (E.D.N.C., 2023); *U.S. v. Microsoft Corp.*, 23-cv-00836 (W.D. Wash, 2023); *U.S. v. Amazon.com, Inc*., 23-cv-00811 (W.D. Wash, 2023); *U.S. v. Musical.ly, Inc.*, 19-cv-1439 (C.D.Cal, 2019). [↑](#footnote-ref-12)
12. 47 U.S.C. §§ 303a, 303b, 394. [↑](#footnote-ref-13)
13. 47 C.F.R. §73.670. [↑](#footnote-ref-14)
14. *See e.g.*, Louisiana State Legislature, SB162; Massachusetts Internet Privacy Rights for Children Act, HD.2325; New Jersey Legislature, Bills A4919, S3493, A5069, and S3608; Social Media Algorithmic Control in IT Act, N. Carolina HB644; and Oregon State Legislature, SB 196. [↑](#footnote-ref-15)
15. The Uniform Nutrition Criteria sets limits on calories, saturated fat, sodium, and added sugars, and minimum requirements for important food groups and key nutrients. *See* Category-Specific Uniform Nutrition Criteria, 2nd ed. 2018 White Paper, available at <https://assets.bbbprograms.org/docs/default-source/cfbai/cfbai-white-paper_1-18-2019.pdf>. [↑](#footnote-ref-16)
16. *See e.g.*, *U.S. v. Epic Games, Inc.*, 22-cv-00518 (Feb. 7, 2023, E.D.N.C.); *In the Matter of Facebook, Inc.*, Order to Show Cause, Dkt. C-4365, available at <https://www.ftc.gov/system/files/ftc_gov/pdf/C4365-Commission-Order-to-Show-Cause-%28Redacted-Public%29.pdf>. [↑](#footnote-ref-17)
17. *See e.g.*, FTC Event, Protecting Kids from Stealth Advertising in Digital Media, held October 2022. [↑](#footnote-ref-18)
18. *See e.g.*, *Firefly Games Mobile Inc.* (LOL Surprise! Room Makeover App), Report #6442, NAD/CARU Case Reports (July 2022); *Moose Toys* (Little Live Pets Gotta Go Turdle), Report #6437, NAD/CARU Case Reports (February 2022); *Moose Toys* (Fail Fix Total Makeover Doll), Report #6443, NAD/CARU Case Reports (August 2022). [↑](#footnote-ref-19)