



**COUNTRY  
COMPARATIVE  
GUIDES 2023**

# **The Legal 500 Country Comparative Guides**

## **United States**

# **ADVERTISING & MARKETING**

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This country-specific Q&A provides an overview of advertising & marketing laws and regulations applicable in United States.

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# UNITED STATES

## ADVERTISING & MARKETING



### 1. How is harmful and offensive advertising regulated? [For example, advertising content that may be obscene, blasphemous, offensive to public morals or decency, or offensive to protected minorities or characteristics?]

There are various federal laws governing advertising in the United States. Many of these are enforced by the U.S. Federal Trade Commission ("FTC"). There are general statutes prohibiting deceptive practices, as well as statutes governing specific marketing practices. These include, for example, the Federal Trade Commission Act (commonly known as the "FTC Act") which prohibits "*unfair or deceptive acts or practices in or affecting commerce*," and the Lanham Act, which provides redress for false advertising or misrepresentations. Clear and conspicuous disclosures are required when the average consumer is likely to misinterpret a message. According to the FTC's Policy Statement on Deception, an advertisement is deceptive if it contains a statement or omits information that is likely to mislead consumers acting reasonably under the circumstances and is important to a consumer's decision to buy or use the product or service. Other regulators may also regulate content: for example, the U.S. Federal Communications Commission ("FCC") regulates communications by radio, television, wire, satellite and cable across the United States.

There are also rules that restrict advertising for certain specific product sectors. For example, alcohol advertising cannot be targeted to anyone under 21 (the legal drinking age in the United States) and tobacco products cannot be advertised on television and many social media platforms. Disclosures may be required depending on the product considered, such as tobacco product warnings. In addition, broadcasters, publishers and media platforms have certain advertising policies and standards that identify specific products and services that may not be advertised.

Federal law prohibits the broadcast of obscene programming at any time, and the broadcast of indecent

or profane programming during certain hours. Under 18 U.S.C. Section 1464, "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." Under 18 U.S.C. Section 1468(a), "[w]hoever knowingly utters any obscene language or distributes any obscene matter by means of cable television or subscription services on television, shall be punished by imprisonment for not more than 2 years or by a fine in accordance with this title, or both." Likewise, under 47 U.S.C. Section 559, "[w]hoever transmits over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States shall be fined under Title 18 or imprisoned not more than 2 years, or both." Broadcasting obscene content is prohibited by law at all times of the day, whereas indecent and profane content are prohibited on broadcast TV and radio between 6 a.m. and 10 p.m., when there is a reasonable risk that children may be in the audience.

Determining what is obscene, indecent, or profane mean can be challenging in practice. In the Supreme Court's 1964 landmark case on obscenity and pornography (*Jacobellis v. Ohio*, 378 U.S. 184), Justice Potter Stewart famously wrote: "*I know it when I see it.*" That case still influences rulings today, and complaints from the public about broadcasting objectionable content drive the enforcement of those rules. Each type of content has a distinct definition:

- **Obscene content** does not receive protection from the First Amendment. As stated in *Roth v. United States*, 354 U. S. 476, content is deemed obscene if "*to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest.*" Specifically, it must meet a three-pronged test established by the Supreme Court: it must appeal to an average person's prurient interest; depict or describe sexual conduct in a "patently offensive" way and taken as a whole, lack serious literary,

artistic, political or scientific value.

- **Indecent content** portrays sexual or excretory organs or activities in a way that is patently offensive but does not meet the three-prong test for obscenity.
- **Profane content** includes “grossly offensive” language that is considered a public nuisance.

The FCC also takes into consideration First Amendment protections and the prohibitions on censorship and interference with broadcasters’ freedom of speech. Other factors considered by the FCC include the specific nature of the content, the time of day it was broadcast and the context in which the broadcast took place.

## 2. How is unfair and misleading advertising regulated? [Briefly describe the law and regulation applying to unfair and misleading advertising in your jurisdiction. Cover any specific unfair or misleading practices that are prohibited, as well as the general category of misleading advertising]

As mentioned above, the FTC Act prohibits “*unfair or deceptive acts or practices in or affecting commerce*”, which has been given a broad interpretation by the FTC. For example, the FTC has used this authority to promulgate specific privacy-focused rules, and to bring enforcement actions against organizations following data security incidents that the FTC believes involve deceptive practices (often due to misrepresentations in an organization’s privacy policy) or unfair practices (often by failing to use reasonable measures to secure sensitive information).

What is considered “deceptive” is interpreted very broadly by the FTC. For example, in the FTC’s Advertising FAQ’s: A Guide for Small Business, the FTC indicated that *‘it would be deceptive for marketers to embed ads with subliminal messages that could affect consumer behavior. However, most consumer behavior experts have concluded that such methods aren’t effective’*. Generally speaking, when consumers see or hear an advertisement, whether it’s on the television, the Internet or anywhere else, federal law requires such ad to be truthful, not misleading, and, when appropriate, backed by scientific evidence.

The FTC enforces these truth-in-advertising laws, no matter where such ad appears. The FTC looks at advertising claims that can affect consumers’ health or their pocketbooks: for example, claims about food, over-

the-counter drugs, dietary supplements, alcohol, and tobacco and on conduct related to high-tech products and the Internet. The FTC also monitors and writes reports about ad industry practices regarding the marketing of alcohol and tobacco. During the recent COVID-19 pandemic, the FTC has been sending warning letters to companies that may be violating the FTC Act to warn them that their conduct is likely unlawful and that they can face serious legal consequences, such as a federal lawsuit, if they do not immediately stop.

When the disclosure of qualifying information is necessary to prevent an ad from being considered deceptive, the FTC requires such information be presented clearly and conspicuously so that consumers can actually take notice and understand it. A fine-print disclosure at the bottom of a print ad, a disclaimer buried in a body of text unrelated to the claim being qualified, a brief video superscript in a television ad, or a disclaimer that is easily missed on a website are unlikely to be deemed effective. Similarly, advertisers cannot use fine print to contradict other statements in an ad or to clear up misimpressions that the ad would leave otherwise.

For example, if an ad for a diet product claims that the advertised product would make the user “lose 10 pounds in one week without dieting,” the fine-print statement “Diet and exercise required” is insufficient to remedy the deceptive claim in the ad. For disclosures to be deemed effective, advertisers should use clear and unambiguous language, place any qualifying information close to the claim being qualified, and avoid using small type or any distracting elements that could undercut the disclosure. Although there is no explicit rule about the size of type in a print ad or the length of time a disclosure must appear on TV, the FTC regularly takes action when a disclaimer or disclosure is too small, flashes across the screen too quickly, is buried in other information, or is otherwise hard for consumers to understand.

Simply put, the requirements can be summarized as follows:

- (i) Advertising must be truthful and not misleading; and
- (ii) Advertisers must be able to adequately substantiate all objective product claims conveyed in an ad, whether such claims are made expressly or by implication.

Each state also regulates advertising, through with general consumer protection statutes (often modelled on the FTC Act) and statutes regulating specific practices (such as the administration of sweepstakes and contests). Some counties and municipalities may also have specific consumer protection laws in place.

By way of example, Business and Professions Code Section 17200, also known as California's Unfair Competition Law ("UCL"), prohibits any unfair or fraudulent business act or practice, as well as unfair, deceptive, untrue or misleading advertising. This has been interpreted broadly to not only cover advertising that is false, but also advertising which although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.

### **3. Do any specific rules restrict advertising for the following product sectors? If so, how? a. Alcohol b. Tobacco and related products, such as vapes and nicotine pouches c. Medicines, medical devices and surgical or medical procedures d. High fat, salt and sugar foods e. Gaming and gambling services f. Adult and sex-related services**

#### **a. Alcohol**

Yes, various rules apply to alcohol products, which go beyond the scope of this guide. By way of example, alcohol products cannot be targeted to anyone under 21, the legal drinking age in the United States. Alcohol ads must also comply with the voluntary codes of relevant industry trade associations, such as the Beer Institute, the Distilled Spirits Council and the Wine Institute, which set standards for responsible advertising and marketing practices.

#### **b. Tobacco and related products, such as vapes and nicotine pouches**

Yes, various rules apply to tobacco and related products, which go beyond the scope of this guide. By way of example, tobacco products cannot be advertised on television. Many other restrictions on tobacco ads also apply, such as mandatory health warnings and limits on sponsorship and promotion.

#### **c. Medicines, medical devices and surgical or medical procedures**

Yes, various rules apply to medicines and medical-related products, which go beyond the scope of this guide. The FTC and the Food and Drug Administration (FDA) share jurisdiction over the marketing of dietary supplements, foods, drugs, devices, and other health-related products. The FDA has primary responsibility for claims that appear in labelling, including the package, product inserts, and other promotional materials available at point of sale. The FTC has primary responsibility for claims in all forms of advertising.

#### **d. High fat, salt and sugar foods**

Yes, various rules apply to foods, which go beyond the scope of this guide. As mentioned above, the FTC and the FDA share jurisdiction over the marketing of foods.

#### **e. Gaming and gambling services**

Yes, various rules apply to gaming and gambling services, which go beyond the scope of this guide. In particular, each state has its own rules relating to gambling (or gambling advertising restrictions) and the applicable advertising regulations are based on what is legal within the state.

#### **f. Adult and sex-related services**

Yes, various rules apply to gaming and gambling services, which go beyond the scope of this guide. In particular, the FTC has issued a rule under the CAN-SPAM Act that governs sexually explicit marketing email. Messages with sexually oriented material must include the warning "SEXUALLY-EXPLICIT" at the beginning of the subject line. In addition, the rule requires the electronic equivalent of a "brown paper wrapper" in the body of the message. When a recipient opens the message, the only things that may be viewable on the recipient's screen are the words "SEXUALLY-EXPLICIT" and the same information required in any other commercial email: a disclosure that the message is an ad, the sender's physical postal address, and the procedure for how recipients can opt out of receiving messages from this sender in the future. In addition, advertising for adult products should not be directed at minors.

### **4. Do any specific rules apply to advertising featuring prices?**

The FTC has issued guides based on its power to take action against "*unfair or deceptive acts or practices in or affecting commerce*". Such guides do not have the force of a law, however failure to comply with the guides may result in corrective action by the FTC. The purpose of these guides is to ensure that advertising is "truthful and non-deceptive."

For example, the FTC has issued its Guides against deceptive pricing (codified at 16 CFR 251), which generally require that a seller offer an item at a price for a reasonable, substantial period of time in good faith, and in the regular course of business, before advertising that price as the former or regular price. The guides specifically address several forms of pricing claims, including (1) "former price comparisons," i.e., claimed discounts from an advertiser's own normal price (16 CFR

233.1); (2) "retail price" or "comparable value" comparisons, i.e., claimed discounts from what others in the locale are selling the same or similar product, (16 CFR 233.2), and (3) claimed discounts from a list price or MSRP, (16 CFR 233.3). The guides note, however, that the practices covered in the provisions represent only frequently employed forms of advertising" and warn that *"there are many variations which appear from time to time, and which are, in the main, controlled by the same general principles."* (16 CFR 233.5).

Similarly, the FTC has issued guides on the use of the term "free" in the context of an offer for "free" merchandise or services (codified under 16 CFR § 251.1). In defining the term "free," the FTC places the advertiser in the shoes of the consumer. According to the guide: *"The public understands that, except in the case of introductory offers in connection with the sale of a product or service, an offer of "Free" merchandise or service is based upon a regular price for the merchandise or service which must be purchased by consumers in order to avail themselves of that which is represented to be "Free". In other words, when the purchaser is told that an article is "Free" to him if another article is purchased, the word "Free" indicates that he is paying nothing for that article and no more than the regular price for the other. Thus, a purchaser has a right to believe that the merchant will not directly and immediately recover, in whole or in part, the cost of the free merchandise or service by marking up the price of the article which must be purchased, by the substitution of inferior merchandise or service, or otherwise."*

In addition, state statutes and regulations should also be considered to assess whether advertising may be deemed deceptive.

The FTC has announced in its Statement of Regulatory Priorities that it planned to initiate a periodic review of the *Guides Against Deceptive Pricing* (16 CFR 233), the *Guides Against Bait Advertising* (16 CFR 238) and the *Guide Concerning Use of the Word "Free" and Similar Representations* (16 CFR 251).

### 5. Do any specific rules apply to the use of testimonials and endorsements in advertising?

The FTC has issued *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, based on its power to take action against *"unfair or deceptive acts or practices in or affecting commerce"*. As mentioned above, such guides do not have the force of a law, however failure to comply with the guides may result in

corrective action by the FTC.

For example, using unrepresentative testimonials may be considered a misleading practice according to these endorsement guides if they are not accompanied by information describing what consumers can generally expect from the use of the product or service. In addition, these endorsement guides specify that endorsers should not talk about their experience with a product if they have not yet tried it themselves or make claims about a product that would require proof that they do not have.

The endorsement guides also state that, if there is a connection between the endorser and the marketer of a product which would affect how people evaluate the endorsement, such connection should be disclosed. As stated above, the Guides are not regulations but where the guides are not adhered to, the FTC may decide to investigate if the practices are deemed unfair or deceptive Act and initiate an enforcement action.

The FTC revised in June 2023 the endorsement guides to keep abreast of new ways advertisers reach consumers to promote products and services, such as through social media and reviews. According to the guides, such new techniques and media are subject to the same truthful advertising requirements to which other forms of advertising are subject, such as disclosing compensation received. That means, among other things, that people who are compensated to promote or review a product should disclose it.

### 6. Do any specific rules apply to environmental or "green" advertising claims?

The FTC has issued *Guides for the Use of Environmental Marketing Claims* (16 CFR 260), based on its power to take action against *"unfair or deceptive acts or practices in or affecting commerce"*. As mentioned above, such guides do not have the force of a law, however failure to comply with the guides may result in corrective action by the FTC. The purpose of these guides is to ensure that advertising is *"truthful and non-deceptive."* The guides cover various topics such as general environmental benefit claims, carbon offsets, certifications and seals of approval, compostable, degradable, free-of, non-toxic, ozone-safe and ozone-friendly, recyclable, recycled content, refillable, renewable energy, renewable materials, and source reduction claims. The Green Guides provide examples of how consumers are likely to interpret certain claims and how marketers can substantiate these claims to avoid deceiving consumers.



## 7. What rules apply to the identification of advertising content - for example, distinguishing advertorial from editorial?

As mentioned above, the FTC Act prohibits “*unfair or deceptive acts or practices*”. As such, advertorials should not deceive or mislead consumers about the nature, quality, or benefits of the product or service being advertised. For example, advertorials should appear clearly as such and not create confusion in the mind of a reasonable reader that it is editorial content. Making false or unsubstantiated claims, omitting material information, or implying endorsements or affiliations that do not exist are also prohibited. Advertorials should provide accurate and relevant information that can be verified by reliable sources.

As mentioned above, state laws should also be considered, since certain states have also enacted laws prohibiting any unfair or fraudulent business act or practice, as well as unfair, deceptive, untrue or misleading advertising, such as California’s Unfair Competition Law (“UCL”). Other requirements may also apply – for example the American Society of Magazine Editors (ASME) provides guidelines for editors and publishers on how to maintain editorial integrity and avoid conflicts of interest when dealing with advertorials.

## 8. How is influencer/brand ambassador advertising regulated?

The FTC has issued a guide, titled “Disclosures 101 for Social Media Influencers” that provides influencers with guidance about what triggers the need for a disclosure and offers examples of both effective and ineffective disclosures. For example, the guide includes tips for when and how influencers should tell their followers about a relationship. For example, it suggests the words influencers might use, as well as where in their social posts a disclosure should appear.

## 9. Are any advertising methods prohibited or restricted? [For example, product placement and subliminal advertising]

As mentioned above, the FTC Act prohibits “*unfair or deceptive acts or practices in or affecting commerce*”, which has been broadly interpreted and enforced by the FTC.

For example, in the FTC’s Advertising FAQ’s: A Guide for Small Business, the FTC indicated that ‘*it would be deceptive for marketers to embed ads with subliminal messages that could affect consumer behavior.*

*However, most consumer behavior experts have concluded that such methods aren’t effective’.* Generally, when consumers see or hear an advertisement, whether it’s on the television, the Internet or anywhere else, federal law requires such ad to be truthful, not misleading, and, when appropriate, backed by scientific evidence.

## 10. Are there different rules for different advertising media, such as online, broadcast, non-broadcast etc?

Many of the same rules apply across different advertising media, although see the above sections in relation to advertisement of certain types of content (for example, indecent and profane content are prohibited on broadcast TV and radio between 6 a.m. and 10 p.m., when there is a reasonable risk that children may be in the audience).

## 11. Are there specific rules for direct marketing such as email, SMS and direct mail?

The CAN-SPAM Act, a law that sets the rules for commercial email, establishes requirements for commercial messages, gives recipients the right to request to no longer receive such communications, and sets out tough penalties for violations: each separate email in violation of the CAN-SPAM Act is subject to penalties of up to \$50,120, so non-compliance can be costly. The FTC enforces the CAN-SPAM Act and the accompanying CAN-SPAM Rule.

Despite its name, the CAN-SPAM Act does not apply only to bulk email. It covers all commercial messages, which the law defines as “*any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service,*” including email that promotes content on commercial websites. The law makes no exception for business-to-business email. That means all email, such as a message to former customers announcing a new product line, are required to comply with the requirements of CAN-SPAM.

Requirements laid out in CAN-SPAM include the following:

- No false or misleading header information. The “From,” “To,” “Reply-To,” and routing information – including the originating domain name and email address – must be accurate and identify the person or business who

initiated the message.

- No deceptive subject lines. The subject line must accurately reflect the content of the message.
- The message must be clearly and conspicuously identified as an ad.
- The message must include a valid physical postal address.
- The message must indicate how to opt out of receiving future marketing email, such as a return email address or an easy Internet-based way to allow people to communicate their choice.
- Recipients of emails from a sender that runs a subscription service or membership program still have the right to opt out of marketing messages.
- The opt-out mechanism must be able to process opt-out requests for at least 30 days after the message is sent.
- A recipient's opt-out request must be honored within 10 business days.
- It is not permitted to charge a fee, require the recipient to give any personally identifying information beyond an email address, or make the recipient take any step other than sending a reply email or visiting a single page on an Internet website as a condition for honoring an opt-out request.
- Monitor what others are doing on your behalf. Even if you hire another company to handle your email marketing, you can't contract away your legal responsibility to comply with the law. Both the company whose product is promoted in the message and the company that actually sends the message may be held legally responsible.

## 12. Is advertising to children and young people restricted beyond general law and regulation? If so, how?

The general rule is that advertising that is intended for children or on content set as made for kids must not be deceptive, unfair or inappropriate for its intended audience, must not make use of any third-party trackers or otherwise attempt to collect personal information without first obtaining parental consent, and must otherwise comply with all applicable laws and regulations.

COPPA and the associated COPPA Rule applies to operators of commercial websites and online services directed to children under 13 that collect, use, or disclose personal information from children, or on whose

behalf such information is collected or maintained (such as when personal information is collected by an ad network to serve targeted advertising). It also applies to operators of general audience websites or online services with "actual knowledge" that they are collecting, using, or disclosing personal information from children under 13, and to websites or online services that have actual knowledge that they are collecting personal information directly from users of another website or online service directed to children.

The circumstances under which an operator will be deemed to have acquired "actual knowledge" that personal information was collected directly from users of a child-directed site or service will depend on the circumstances. In the 2013 Statement of Basis and Purpose, the FTC indicated the following scenarios where it believes that the "actual knowledge" standard will likely be met:

1. where a child-directed content provider (which is strictly liable for any collection) directly communicates the child-directed nature of its content to an ad network; or
2. where a representative of an ad network recognizes the child-directed nature of the content.

Under the first scenario, any direct communications that the child-directed provider has indicating the child-directed nature of its content would give rise to actual knowledge. In addition, if a formal industry standard or convention is developed through which a site or service could signal its child-directed status to a website provider, that would give rise to actual knowledge. Under the second scenario, whether a particular individual can obtain actual knowledge on behalf of a business depends on the facts.

Depending on the advertising choices, the website operator may be required to notify parents in its online privacy policies and in a direct notice, and obtain verifiable parental consent, before advertising is permitted. The COPPA Rule holds a website operator liable for the collection of information that occurs on or through its sites and services, even if the website operator itself does not engage in such collection.

Certain states have also been looking into additional requirements for websites and online services. For example, the California Age-Appropriate Design Code Act would establish a high level of privacy settings for users under the age of 18 years old. Specifically, it would require a business that provides an online service, product, or feature "likely to be accessed by" individuals under the age of 18 to comply with numerous provisions.

### 13. How is comparative advertising regulated?

Companies may engage in comparative advertising, but they must be able to back up the claims that they make with facts and provide sufficient information to avoid deceiving of the consumer.

The FTC has taken the position that industry self-regulation should not limit the use of comparative advertising, including brand comparisons, where the comparisons are clearly identified, truthful and nondeceptive. Specifically, the FTC has indicated at 16 CFR 14.15 that it supports *"the use of brand comparisons where the bases of comparison are clearly identified. Comparative advertising, when truthful and nondeceptive, is a source of important information to consumers and assists them in making rational purchase decisions. Comparative advertising encourages product improvement and innovation and can lead to lower prices in the marketplace"*.

However, any advertising that contains disparaging, unfair, baseless, incomplete or false comments or comparisons of competitors' products, or any that makes false or misleading claims about a competitor (or its products or services) is likely to trigger liability.

### 14. Are consumer promotions specifically regulated as advertising (as distinct from contract law)? If so, how?

As mentioned above, unfair and deceptive advertising is prohibited. Promotions must not contain false or misleading statements, like all advertising. Clear and conspicuous disclosures are required when a consumer

acting reasonably is likely to be misled or misunderstand a message. Companies advertising promotions must also substantiate their claims before disseminating them.

Many states also regulate promotional pricing. These state laws and regulations typically define how a seller establishes a regular price, prescribe the length of time an item must be sold at regular price before advertising a promotional price, and limit how a seller may advertise price comparisons.

### 15. Are there specific rules on promotional prize draws and skill competitions? If incorrectly executed, can these be classed as illegal lotteries? If so, what are the possible consequences?

A complex web of federal and state consumer fraud and consumer protection laws governs contests and sweepstakes, depending on the medium used to advertise them. No single federal law governs contests and sweepstakes in their entirety. Both federal and state law prohibit the use of lotteries for marketing purposes. Most states also heavily regulate contests and sweepstakes, though rules vary from state to state. Contests and sweepstakes also can give rise to certain contractual issues and tax obligations.

### 16. Must promotional prize competitions be registered with a state agency or authority? [If so, briefly explain the process, typical time from application to approval, and any costs]

See above answers.

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