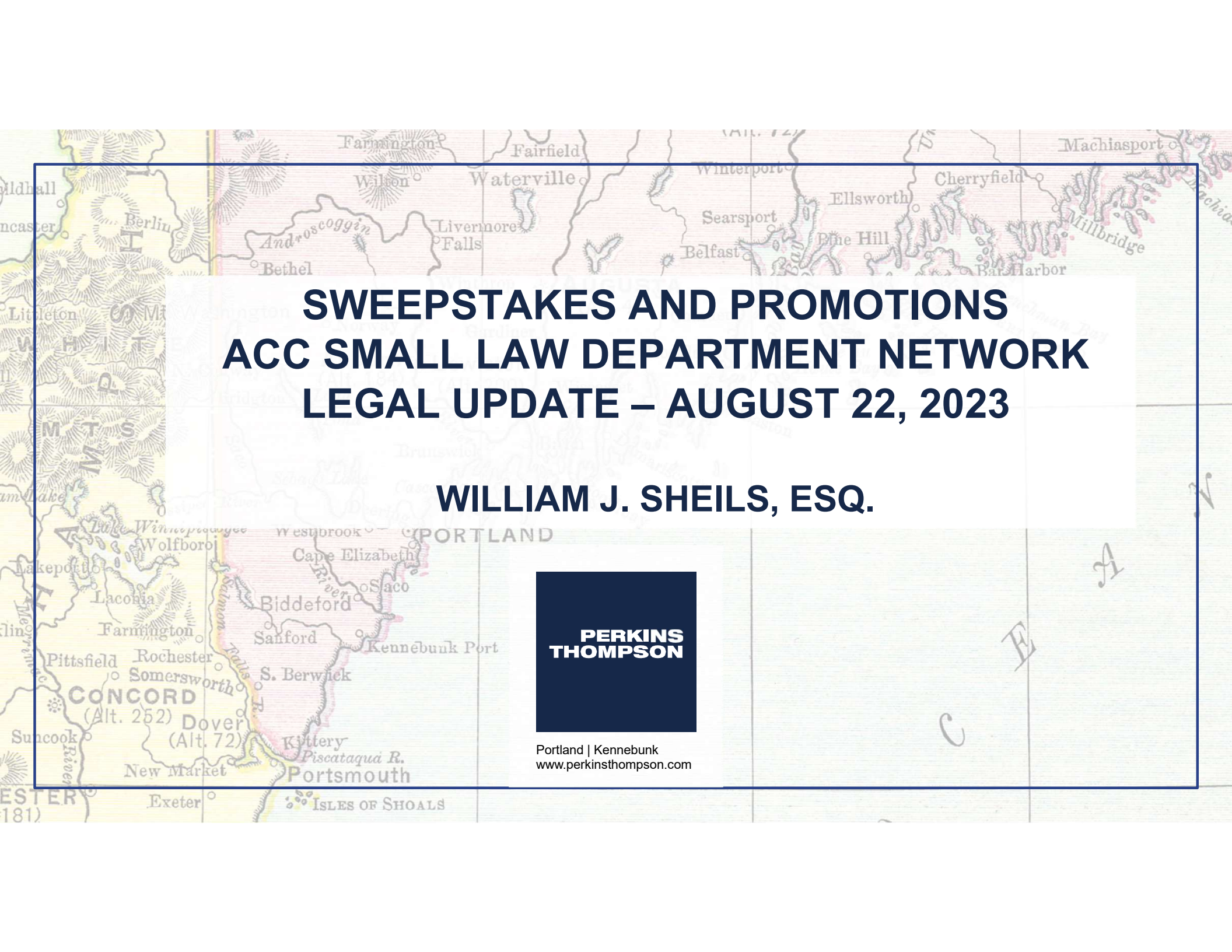


A historical map of New England, showing parts of Maine, New Hampshire, and Massachusetts. The map is detailed with various towns, rivers, and geographical features. The text is overlaid on a white rectangular background.

SWEEPSTAKES AND PROMOTIONS ACC SMALL LAW DEPARTMENT NETWORK LEGAL UPDATE – AUGUST 22, 2023

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Starting Principles and Definitions

Lottery and Gambling Laws

Lotteries, except those that are conducted by the state or operated under a specific statutory exception, are *illegal* under federal law and the laws of all 50 states.

Definition - Lottery:

A lottery is defined as a promotion in which *all three* of the following elements are present:

- Prize: Anything of value awarded to winners, even if the value is nominal.
- Chance: Winning depends on factors outside a person's control (e.g., random drawing).
- Consideration: The requirement that a person give something of value to enter a promotion.
 - Monetary: Purchase of the Sponsor's product or other payment.
 - Non-Monetary: The consumer expends substantial time or effort to enter, which benefits the Sponsor in some direct way (e.g., multiple store visits required).

Avoiding an Unlawful Lottery

Because a lottery is defined as a promotional scheme in which all three elements of prize, chance, and consideration are present, one of these elements must be removed before a promotion may proceed lawfully. The first step in structuring a promotion is figuring out how to kick out one of the legs of the three-legged lottery stool.

Definition – Sweepstakes:

A sweepstakes is a promotion in which winners are selected and prizes awarded on the basis of chance. Because a sweepstakes includes the elements of prize and chance, the element of consideration must be removed.

Definition – Contest:

A contest is a promotion in which winners are selected and prizes awarded on the basis of bona fide skill. With a contest, there is a prize and some level of consideration, so the element of chance must be eliminated.

Definition – Raffle:

A raffle typically includes all three elements of prize, chance, and consideration. The entrant pays money for a chance to win a prize. Raffles, therefore, are lotteries and are illegal unless they are conducted under a specific state-law exemption (e.g., charitable organization). Avoid referring to a sweepstakes as a raffle.

Definition – Giveaway:

A giveaway essentially means what it says. Consumers are given a promotional item just for showing up. Though there is a “prize,” there is no element of chance and no real consideration. Giveaways are generally safe so long as there is no deceptive advertising, there is an adequate supply of giveaway items available, and there is a clear “while supplies last” disclosure.

State Regulation

All states have adopted game of chance, lottery, and gambling statutes in some form.

Though there are many common themes, the laws governing sweepstakes and promotions are not uniform across the states. Some states require specific disclosures, some states interpret “skill,” “chance,” or “consideration” differently, some states require registration, etc.

State laws governing sweepstakes and promotions are typically found in consumer protection or deceptive trade practices statutes and are generally enforced by state attorneys general.

The patchwork of state regulation makes structuring a multi-state promotion challenging.



Federal Laws

No single federal law governs contests and sweepstakes in their entirety. Instead, a few federal laws cover aspects of contests and sweepstakes depending on the medium used to advertise them. The FTC, FCC, and USPS enforce these federal laws.

What is at Risk?

As with many consumer-facing initiatives, the risks and ramifications of misstep can be high. There is both public relations risk and legal risk if promotions are not structured and executed correctly.

Publishers Clearing House was ordered to pay \$18.5 million for misleading conduct in connection with its well-known sweepstakes. See *Federal Trade Commission v. Publishers Clearing House, LLC*, Civ. Action No. 2:23-cv-04735 (E.D.N.Y. 2023).

Sweepstakes

- A sweepstakes is a promotion that will always include the elements of chance and prize. A sweepstakes is a “game of chance.” Therefore, the element of consideration must be eliminated to render the promotion lawful.
- Most states are “monetary consideration” states meaning that only payment of some amount to participate will trigger a lottery law challenge.
- In some states, it is possible that consideration can take a non-monetary form, including time and effort that are significant. There is no bright line rule. The question of non-monetary consideration is looked at on a case-by-case basis. The greater degree of effort required, the greater the likelihood that the element of consideration may be found and, therefore, the greater risk that the “sweepstakes” may be deemed an unlawful lottery.

Sweepstakes

Removing Consideration

- “No Purchase Necessary.” Ubiquitous phrase used in sweepstakes rules. A game of chance is permissible only if no consideration is required for entry. “No Purchase Necessary” disclaimer must be included for sweepstakes, and it must mean what it says.
- Free, Alternate Method of Entry (AMOE). If a promotion provides that a consumer will be entered in the promotion with the purchase of a product or other form of consideration, a free alternate method of entry *must* also be included in order to remove the element of consideration. Under the Standard Lottery Rule followed at the federal level and in virtually all states, the availability of a free, alternate method of entry will eliminate the element of consideration, even if another entry method requires some consideration.

Sweepstakes

- AMOE is typically “mail in a 3x5 card,” toll-free call, fill out online form, etc.
- AMOE must have “equal dignity” with the purchase method of entry. Advantage cannot be given to consumers who enter through the purchase method.
- The AMOE must be clearly and conspicuously disclosed in all advertising. A Sponsor cannot bury details on how consumers can enter free. (CVS, Publishers Clearing House and others have gotten in trouble for this)
- Because some states define “consideration” broadly and construe exceptions narrowly (*e.g.*, Wisconsin), it may be prudent to include an AMOE if the question of consideration is arguable.

Contests

A “skill contest” is not a lottery if it is designed so that neither the winner nor the size of the prize is dependent upon chance.

Is it Skill or Chance?

Predominance Test. Most states apply a predominant factor test. If the dominant factor in determining the outcome is skill, then the promotion is deemed skill-based. If chance is deemed the dominant factor, the scheme could be considered a lottery.

Contests

Structuring a Contest

Key components of a skill contest:

- (i) Participants must have a distinct opportunity to exercise skill and must have sufficient data upon which to make an informed judgment;
- (ii) the general class of participants must possess the skill necessary to participate;
- (iii) skill, or the entrants' efforts, must sufficiently govern the result; and
- (iv) the standard of skill must be known to the participants, and the stated standard must govern the result.

Contests

A compliant contest must:

- Establish objective judging criteria
- Communicate the criteria to entrants before they enter
- Use judges who are qualified to apply the stated criteria
- Break ties on the basis of skill. A coin flip or drawing to break a tie introduces chance as an element.

Contests

Consideration

Technically, because the element of chance is eliminated in a properly structured skill contest, an entry fee for a contest would be allowed in most states. *Note*, however, that many states have specific restrictions on entry fees and may have certain disclosure requirements. Proceed with caution.

User-Generated Content

Promotional contests often invite consumers to produce and submit original creative content, such as videos, photos, or music. Such user-generated content comes with the risk that the submissions may violate a third-party's intellectual property or publicity rights and could potentially expose the contest Sponsor to an action by the party claiming the violation.

Contests

Special considerations in preparing Official Rules and other documents for a contest requiring user-generated content include:

- express language that entrants' submissions must be original;
- requirement that any individual depicted in a submission has granted permission and released rights;
- express representations from the entrants that they have complied with the Official Rules, that their content does not infringe any third-party rights, and that their content does not violate any law; and
- requirement that the winner grant the sponsor a license to use the work.

Contests

Popular Vote Promotions

- Promotions that involve popular voting to select winners are risky.
- Some states may consider these types of promotion to include an element of chance (so the Sponsor would need to be careful to eliminate any element of consideration).
- More importantly, ceding control to the entrants may produce undesirable results. (For instance, a popular vote promotion to name a new product or name a new team may invite some random outcomes). If running a popular vote promotion, make the popular vote only one element of the total scoring scheme.

See “*Boaty McBoatface: What You Get When You Let the Internet Decide*,” New York Times (March 21, 2016).

Official Rules

- Be sure to prepare a set of Official Rules for your sweepstakes and contest promotions.
- Official Rules serve as the contract between the Sponsor and the consumer and are critical from a risk mitigation and compliance perspective.
- When publishing the terms, conditions, and rules of a contest or sweepstakes, a Sponsor is making an offer to potential entrants.
- When the entrant performs the requirements of the offer pursuant to the published rules, they accept the offer, thereby creating a binding contract. Use this to your advantage by having a complete and clear set of Official Rules.



Official Rules

- Do not change the Rules once the promotion begins.
- Clarity is at a premium. Ambiguity in the rules can cause legal complications and consumer disappointment.
- Remember that the source of most sweepstakes and promotions law is state consumer protection or deceptive trade practices statutes.
- Be guided by consumer protection and truth-in-advertising principles of “clear and conspicuous” disclosures, no deceptive or confusing terms and conditions, etc.



Official Rules

Common Key Components for Official Rules

Certain states have specific disclosure requirements, but for virtually all promotions, the following provisions should be included in the Official Rules:

ELIGIBILITY.

- Geographic: e.g., “Open only to legal residents of the 50 United States and D.C.” (or wherever you want to limit participation). Consider including “You must be physically present in [the 50 United States or D.C.] when entering” as a way to ensure that U.S. law will apply to any disputes. Consider excluding entries from residents of states with challenging regulatory requirements (e.g., “Promotion is void in and not available to residents of FL, NY, and RI”).

Official Rules

- Age: e.g., “Entrants must be 18 or older.” Official Rules form a binding contract and the age of majority for contract consent in most states is 18. (Mississippi - 21; Alabama and Nebraska - 19).

“Entrants must be 13 or older.” If the type of promotion is suitable for participants under 18, restricting an online promotion to entrants 13 or older will avoid having to comply with the Children’s Online Privacy protection Act (COPPA).

Eligibility Exclusions: It is important to specify who is *not* eligible to participate. e.g., “Employees of Sponsor and anyone associated with this promotion, as well as their family and household members are not eligible to enter or win.” This type of language helps avoid the appearance of impropriety in the administration of a promotion and selection of winners.

Official Rules

- **Timing and Duration.** Specify the start and end dates of the entry period, as well as the winner selection date.
- **Entry instructions. Sweepstakes:** Include clear entry instructions for each method of entry. The more complicated the methods of entry are, the more detailed this section will have to be. Include any limits on entries (e.g., “one entry per household”). Include “No Purchase Necessary” disclaimer. If element of consideration for entry is even potentially present, include conspicuous free alternate method of entry (AMOE).
- **Entry instructions. Contests:** Specify exactly what a person must submit, as well as whether a specific format is required. For example, if entrants have to submit a video or specify any length or size limits. Be clear on submission criteria.

Official Rules

- **Prize description.** Include a detailed description of the prizes, the number available, and include the approximate retail value of each prize.
- **Odds.** State the odds of winning. In an instant win promotion, the odds will be a fixed number, such as 1:100. In a random drawing, the odds depend on the number of eligible entries received.
- **Judging criteria** (For Contests). Specify the criteria against which entries will be judged. The criteria must be clear and objective so that entrants can understand what is expected. Judges' decisions final.
- **Intellectual Property.** (For Contests). Representations from entrant as to originality of work and no infringement. Clear grant of rights/license to use, modify, publish, and sub-license submitted works.

Official Rules

- **Taxes and Costs.** Include language specifying that taxes on the prize value are the responsibility of the winner and that costs and expenses relating to use of the prize are the responsibility of the winner unless expressly included as an aspect of the prize award.

Additional Considerations for High Value Prizes

- High value prizes may mean a high tax bill for the winner. Will there be an additional cash payment intended to defray taxes? Clarity is key to avoid consumer confusion and disappointment.
- Vehicles. Include language making clear that the winner is responsible for all license, registration, and insurance requirements.
- Trips. Include a detailed description of what is and what is not included as part of the prize. (*E.g.*, what class of travel and type of accommodations, ground transportation, incidentals, etc.)



Official Rules

- **Right to cancel or modify.** Reserve the right to cancel, suspend, or modify a promotion if any problem prevents the promotion from running as planned.
- **Voiding Clause.** “Void where prohibited.”
- **Release.** State that entrants agree to release and hold the Sponsor harmless from and against any claim associated with the promotion.
- **Limitation of liability.** State that the Sponsor is not responsible and cannot be held liable for technical errors or other things that may prevent the promotion from running as planned.
- **Right to substitute.** Reserve the right to substitute any prize with another prize of equal or greater value if the advertised prize is not available.

Official Rules

- **Affidavit of Eligibility; Winner's Release; Grant of Rights.** Include language that states that the winners will need to complete an affidavit of eligibility and release documents as a condition of prize award. Get releases (publicity and liability) from winners as part of fulfillment and get license to use any submissions.
- **Sponsor Name and Address; Winner List.** Include the Sponsor's name and contact information for consumers to request a copy of the Rules and a list of winners.



Official Rules

➤ **Additional Considerations for Online and Mobile Promotions**

- **Time Periods.** Time restrictions should be narrowly and specifically defined. (e.g., “Entries must be received no later than 11:59:59 ET on August 22, 2023”). Specify that the Sponsor’s/Administrator’s computer clock controls.
- **Identity of Entrants.** Internet promotions may lead to conflicting claims as to who actually submitted the winning entry. Include language that states that in the event of a conflict, the entry will be deemed to have been submitted by the holder of the email account from which the entry was submitted (as determined by the issuer of the email account address).
- **Eligibility Restrictions and Choice of Law.** Same issue as noted above. Where worldwide participation is possible with online promotions, it is important to include language to help ensure that US law will apply and that the venue for resolution of disputes will be in the US.

Official Rules

➤ Additional Considerations for Online and Mobile Promotions

- **Privacy.** If Sponsor is collecting data about participants, include a link to the Sponsor's Privacy Policy. If email or other contact information may be used by the Sponsor in the future, appropriate disclosures should be made to the entrants.
- **Mobile Promotion - Text Message Entry.** Remember that any fees incurred by a participant in using a mobile device to text an entry would be considered "consideration." Be sure to include a free, alternate method of entry. Include a disclosure similar to "Standard mobile carrier text/data rates may apply." You may need to shorthand some disclosures in a mobile promotion. Be sure to include a link to the complete set of disclosures and Official Rules. Consult Mobile Marketing Association (MMA) Sweepstakes and Promotion Guide for best practices.



Advertising

Advertisements for sweepstakes and contests are subject to the traditional rules of truthfulness and clarity. Like all sales promotions, sweepstakes and contests must comply with the FTC's general advertising guidelines. In general, an advertisement for a promotion must disclose the material terms of the promotion, such as:

- A statement that no purchase is necessary.
- The eligibility requirements/restrictions.
- The start and end dates.
- The name of the sponsor.
- Instructions on how to obtain the complete Official Rules.

Advertising

Many state statutes prohibit Sponsors from representing or implying that:

- A person's chances of winning will be improved by purchasing a product.
- A person is a winner, finalist, or has been specially selected, unless that is true.
- A solicitation is urgent or time-sensitive, unless that is true.

Advertising

Direct Mail

The federal Deceptive Mail Prevention and Enforcement Act ([39 U.S.C. § 3001](#)) imposes a number of requirements if a sweepstakes or contest is promoted through direct mail, such as:

- Any Sponsor that mails sweepstakes or contest materials must provide recipients with a free mechanism through which they can request the removal of their names from the Sponsor's mailing list for future sweepstakes and contests. Sponsors have 60 days to comply with removal requests.

Advertising

Direct Mail

- Mailings *that include entry materials* must also include the following disclosures:
 - a disclosure that no purchase is necessary;
 - a disclosure that a purchase will not improve a person's chances of winning; and
 - the complete Official Rules (with quantity and value of prizes; odds of winning).



Advertising

Direct Mail

- For skill contests, the DMPEA requires some additional disclosures, such as:
 - The number of rounds or levels of the contest and the cost to enter each round or level.
 - The maximum cost to enter all rounds or levels.
 - The identity or description of the qualifications of the judges if the contest is judged by other than the Sponsor.
 - The method used in judging.



Social Media Promotion Considerations

Same Legal Requirements Apply:

- A promotion run on social media is subject to the same sweepstakes and promotions laws as a promotion conducted in a more “traditional” method.
- Sponsors do not get a pass on required disclosures.
- Sponsors should still have Official Rules for social media promotions and should provide a link in promotion posts.

Social Media Promotion Considerations

Additional Laws May Be Implicated:

- A social media promotion can trigger application of the FTC Endorsement Guides. The FTC considers receipt of a promotion entry in exchange for a promotional post as a “material connection.”
- If a Sponsor asks consumers to promote its products or brand on social media in exchange for the chance to win a prize, the Official Rules and call-to-action should require entrants to disclose the fact that the entrant’s post is an entry into a contest or sweepstakes.

Social Media Promotion Considerations

Social Media Platforms Have Their Own Requirements:

- If a Sponsor is planning to run a promotion on social media, it needs to comply with the platform's requirements. Sponsors should review and follow the promotion guidelines of every social media platform on which the promotion is running.



Social Media Promotion Considerations

Platforms typically require that the promotion's Official Rules:

- include a statement making clear that the platform is not a sponsor or endorser of the promotion (unless otherwise agreed with platform);
- clear language that each participant releases the social media platform from liability for the promotion; and
- avoid language implying that the platform is associated or affiliated with the promotion (without the platform's consent).

Social Media Promotion Considerations

User-Generated Content in Social Media Promotions

Social media promotions often invite consumers to submit creative content as part of a contest, such as photos or videos. It can be difficult to ensure that user-generated content complies with applicable law. Sponsors can face legal actions for what consumers post in response to a Sponsor's social media call to action when that content allegedly:

- Violates a third party's copyright.
- Includes false claims.
- Includes defamatory statements.
- Violates a third party's publicity right.
- Invades a third party's privacy right.

The first line of defense is a good set of Official Rules.

Social Media Promotion Considerations

Existing law may afford some protection if a promotion entrant posts a submission that violates third-party rights.

The Digital Millennium Copyright Act. The Digital Millennium Copyright Act (DMCA) provides safe harbor protection from potential liability arising from publishing content that infringes a third party's copyrights if that content was posted by another person (17 U.S.C. § 512). Sponsors need to take several steps to take advantage of the safe harbor, and they may lose their protection if they have knowledge of infringement or are aware of facts from which infringement should be apparent.

The Communications Decency Act of 1996. Section 230 of the Communications Decency Act of 1996 (CDA) may also provide protection if consumers post content that includes defamatory statements or false claims (47 U.S.C. § 230). The protections of the CDA are limited, but courts have been fairly liberal in extending protection where the Sponsor was not involved in developing the offending content.

Note that while a Sponsor may be able to avoid liability for infringing or offending content that a consumer may post, a Sponsor would be liable for any user-generated content that the Sponsor actually uses.

Registration and Bonding

A handful of states require Sponsors to register a promotion with the state before the start of the promotion. Some states also require Sponsors to post bonds before they run certain types of sweepstakes.

Sweepstakes

Florida and New York both require Sponsors of certain chance-based consumer promotions with a prize pool of more than \$5,000 to register and post a bond:

- Florida. Requires that the Sponsor register the sweepstakes with the Department of Agriculture and Consumer Services and post a bond at least seven days before the start of the sweepstakes. When the promotion ends, the Sponsor must file a list of winners with the state within 60 days of final determination of winners (Fla. Stat. § 849.094).
- New York. Requires that the Sponsor register the sweepstakes with the Secretary of State and post a bond at least 30 days before the start of the sweepstakes. The Sponsor must file a winners list with the state within 90 days of the promotion's conclusion ([N.Y. Gen. Bus. Law § 369-e](#)).

Registration and Bonding

Rhode Island requires that Sponsors of promotions offered by retail establishments with a prize pool of more than \$500 to register with the Secretary of State. No bond is required (R.I. Gen. Laws § 11-50-1).

Note: These states take a broad view of their jurisdiction. If a promotion is open to residents of their state, even if conducted in another jurisdiction and governed by another jurisdiction's laws, they may assert that registration is required as a protective measure for their citizens.

Registration and Bonding

Contests

- The Arizona statute that prohibits gambling broadly defines the term “gambling” as the act of “risking or giving something of value for the opportunity to obtain a benefit from a game or contest of chance or skill” (Ariz. Rev. Stat. § 13-3301(4)).
- The statute, however, exempts certain types of skill-based contests in which a purchase is required.
- To take advantage of the exemption, a company must register the promotion with the Arizona Attorney General (Ariz. Rev. Stat. § 13-3311). No bond is required.

Privacy

A number of states have privacy and data security laws that may apply to information gathered in connection with consumer promotions. Sponsors may receive personally identifiable information regarding entrants and winners that could come within the scope of a state's data privacy and security laws (e.g., collecting first and last name along with a social security number as part of the award fulfillment process). Because of this, Sponsors should be sure to have up-to-date privacy policies and information security programs that are compliant with applicable laws.

Privacy

Many states take an expansive view of their jurisdiction in connection with data privacy and security laws. For instance, Massachusetts's data security regulations apply to all businesses, whether located in or outside of Massachusetts, that own, license, store, or maintain personal information about Massachusetts residents, whether consumers or employees.

The FTC has not enacted generally applicable data security rules or regulations, but the FTC does have enforcement authority for failure to maintain adequate security practices for personal data.

Tax issues

- Under the Internal Revenue Code, promotional prize winners must include in their gross income:
 - all amounts received as prizes and awards (26 U.S.C. § 74(a)); and
 - the fair market value of any prize or award made in goods or services (26 C.F.R. § 1.74-1).
- For any prize awarded with a value of \$600 or more:
 - the Sponsor must file an information return for the payment with the [Internal Revenue Service](#) (26 C.F.R. § 1.6041-1); and
 - the Sponsor must issue the winner an IRS Form 1099-MISC.

Contracts with Third Parties – Administrators

There are a number of promotion agencies that provide promotion administration services.

If engaging a third-party administrator, be sure to set out responsibilities clearly and include robust representation, warranty, and indemnity provisions to transfer risk and ensure that the administrator is responsible for compliance.



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