

Don't Take Chances With Internet Sweepstakes

Sweepstakes are subject to both federal and state laws which vary widely.

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The online sweepstakes or giveaway is a common marketing tool to drive traffic to web sites, but conducting any sweepstakes is not simply a matter of announcing a sweepstakes, collecting entries and giving away prizes. Sweepstakes are subject to both federal and state laws, which vary widely from very minimal requirements to detailed disclosure requirements relating to sweepstakes advertisements and rules. Federal law will govern all sweepstakes run anywhere in the United States. In addition, the laws of each state in which a sweepstakes is run (where eligible entrants reside) will apply to the sweepstakes, so for a nationwide sweepstakes open to all U.S. residents, 50 different laws will apply. These laws can be a minefield for the unwary sweepstakes promoter. This article briefly examines the most significant legal issues involved in conducting an online sweepstakes.

Illegal lottery?

Most importantly, the sweepstakes promoter must be sure it is not operating an illegal lottery. A lottery consists of prize, chance and consideration. The element of consideration must therefore be removed from a sweepstakes in order to avoid creating a lottery. In other words, there can be no consideration required to enter a sweepstakes. Thus, the all-important "No purchase necessary" is key.

The definition of consideration varies from state to state, but generally, the sweepstakes promoter cannot require a payment, purchase or substantial investment of time or effort by the entrant as a condition of entry. The sweepstakes promoter can allow entry with a purchase or other consideration, as long as a free method of entry also is offered (and advertised), and as long as free entries are treated the same and given an equal chance to win as purchase entries. If the number of purchase entries per entrant is unlimited, the number of free entries per entrant must be unlimited.

For the online sweepstakes, the consideration issue means that if the promoter requires a subscription fee or other fee to be paid prior to allowing use of the promoter's web site and entry into the sweepstakes, a free method of entry must be offered. It also means that the following actions, which may be deemed illegal consideration in some states, may not be required without an providing an alternate free method of entry: (1) requiring entrants to complete lengthy surveys that require substantial time and effort by the entrant, (2) requiring entrants to disclose significant amounts of personal information about themselves; and (3) requiring entrants to submit personal or contact information about friends and family (viral marketing). The alternate free method of entry may consist of mailing in an entry or calling a toll-free number. If a mail-in method of entry is offered, the deadlines for entering must be parallel to the on-line deadlines. In other words, if the deadline to enter online is October 1, then the deadline for entering by mail must state that entries must be postmarked on or before October 1. The promoter will also want

to include a deadline for when mail-in entries must be received, as well (usually 5-7 days after the postmark deadline).

The only sweepstakes or chance giveaways that can sometimes avoid the "no purchase necessary" rule and require entrants to pay for entries by purchasing tickets or entries are qualified tax-exempt organizations that run raffles in accordance with applicable state law. In those cases, the qualified tax-exempt organization sponsoring the raffle must comply with the raffle laws of the state in which the raffle is conducted (where eligible entrants reside). As with sweepstakes laws, raffle laws vary widely by state. Some states limit the number of raffles that a tax-exempt organization can run and/or require registration of each raffle. Other states, like Florida, still require that free entry be allowed but will permit a "recommended donation" to be requested by the sponsoring organization in connection with entering a sweepstakes. As a general matter, a tax-exempt organization that is running a traditional sweepstakes (not a raffle or some other kind of fundraiser) must comply with all laws generally applicable to sweepstakes.

Registration and Bonding

Both Florida and New York require that sweepstakes in which the aggregate total prize value is more than \$5,000 be registered and bonded with the state. This not only requires the expenditure of time, effort and money for the bond, but it requires planning ahead. New York law requires that the registration application and bond be filed at least 30 days prior to the commencement of the sweepstakes, and Florida law requires that the registration application and bond be filed 7 days prior to the commencement of the sweepstakes. Both states require that a copy of the official rules be filed with the registration application. Many promoters choose not to offer their sweepstakes in New York or Florida and to disqualify New York and Florida residents from the sweepstakes, in order to avoid the registration and bonding requirements.

Rhode Island requires registration for sweepstakes offered by retail establishments in which the total announced value of prizes is in excess of \$500. Arizona requires registration for intellectual skill contests that require a purchase to enter.

Florida's registration and bonding requirements do not apply to sweepstakes sponsored by qualified tax-exempt organizations, and the New York and Rhode Island laws will not apply as long as the sweepstakes is not offered in connection with the sale of goods or services to consumers.

Official Rules

Many states require that certain elements or statements be included in the official rules for the sweepstakes. Several states have Prize Notification Statutes that are intended to apply only to direct mail sweepstakes but could be extended to a non-direct mail sweepstakes by an overly aggressive regulator. Generally, the following items should be included in the official rules to comply with all 50 states' laws:

- No purchase necessary statement
- Instructions for entry
- Dates of promotion, including deadline for entry
- Name and address of Sponsor's place of business

- Number, description and retail value of each prize
- A statement of the odds, and if the odds are not calculable, a statement that the odds depend on the number of entries received
- Any further requirements to obtain a prize
- Any material restrictions
- Any limits on eligibility
- Geographic area in which the sweepstakes will be offered
- Location and date on which the determination of the winner will be made
- Manner in which winners are selected
- If the prize is a trip, the name and location of accommodations and whether transportation to and from the vacation site or point of departure is included
- Statement that taxes are the sole responsibility of the winner
- Void where prohibited statement

In addition, the promoter will likely want to include some language in the rules stating that the winner may be required to complete an affidavit of eligibility and sign a release in order to claim the prize. The promoter may also want to include a statement that by accepting the prize, the winner releases the promoter, its fulfillment agents and their respective officers, employees and agents from all liability associated with the sweepstakes and the prize (it is not clear whether such a release would be enforceable, but it commonly appears in sweepstakes rules). The promoter may also require that, as a condition of receiving the prize, the winner agrees to allow his or her name and likeness to be used by the promoter for advertising purposes, except where prohibited by law. Note that Tennessee prohibits conditioning receipt of a prize on obtaining a publicity release.

For the online sweepstakes, some special language addressing potential technical problems should be included in the official rules. In particular, the promoter should include the following language, or similar language:

- Include times and time zones with dates of promotion and deadline for entry
- Disclaim responsibility for entries that are corrupted or otherwise not received correctly or for any problems or technical malfunction of any telephone network or lines, computer on-line systems, servers or providers, computer equipment, software, failure of email, or on account of technical problems or traffic congestion on the Internet or at any Web site or combination thereof, including injury or damage to participants or to any other person's computer related to or resulting from participating or downloading materials in the sweepstakes
- Disclaim responsibility for lost, late or misdirected entries
- Reserve the right to cancel, terminate, modify or suspend the sweepstakes in the event that the sweepstakes is not capable of running as planned, including infection by computer virus, bugs, tampering, unauthorized intervention, fraud, technical failures, or any other causes beyond the control of promoter which corrupt or affect the administration, security, fairness, integrity or proper conduct of the sweepstakes

- Be sure the sweepstakes is consistent with the terms of the promoter's privacy policy, and include a link to the privacy policy and a statement that entries to the sweepstakes are subject to the privacy policy
- Include a provision specifying that in the event of a dispute as to the winner's identity, entries will be deemed made by the holder of the e-mail account associated with the entry

For the online sweepstakes, the placement of the official rules is also critical. The Federal Trade Commission has been increasingly vocal in its campaign against hiding advertising disclosures and official rules in mouse print, or worse, through a mouse print link. The safest course for the online sweepstakes promoter would be to structure the rules like a click-wrap license that requires the sweepstakes entrant to review the official rules and click "Yes" or "I accept" to accept the rules before the online sweepstakes entry could be completed or submitted. Of course, any potential entrant who did not click "Yes" or "I accept" would be prohibited from entering the sweepstakes. At a minimum, to avoid any issues about the clarity or conspicuousness of the official rules, the Promoter should include the official rules on the same page as the entry form (and not in mouse print) and should include the disclosures described in the "Advertising" section below at the point of entry, as well as in the official rules.

Above All, Limit Eligibility

Because of the worldwide scope of the Internet, the online sweepstakes has the potential to subject the sweepstakes not only to the laws of all 50 states but to the laws of every country in which the web site appears. Therefore, it is crucial that the promoter be careful to limit eligibility. At a minimum, it is recommended that the promoter limit eligibility to U.S. residents (excluding Puerto Rico). The promoter may want to further limit eligibility to particular states within the U.S. depending on the type of sweepstakes or any particular state laws the promoter wants to avoid (such as Florida). Again, this limitation should be clearly disclosed at the point of entry, and not just included in the official rules. By limiting eligibility, the promoter can limit the state laws that will apply to the sweepstakes to only those states whose residents are permitted to enter.

Advertising

Many states have detailed requirements about what must be included in advertisements for sweepstakes. New York law requires that the full rules be in all printed advertising for sweepstakes with aggregate prize values greater than \$5,000. Florida law requires that all print advertisements include the rules and regulations of the sweepstakes, but need only include the material terms of the rules and regulations if the advertising copy includes a website address, a toll-free telephone number, or a mailing address where the full rules and regulations may be viewed, heard, or obtained for the full duration of the game promotion. Abbreviated rules with certain minimum requirements may be used in radio and television advertisements in both states.

Outside of Florida, an advertisement for a sweepstakes that includes the following elements should be compliant with most state laws:

- No purchase necessary statement
- Void where prohibited statement
- Instructions for free method of entry

- Odds
- Description of prizes and retail value of prizes
- "See official rules for details."
- Dates of sweepstakes, including deadline for entries
- Sponsor's name and address
- Material restrictions, including age and geographic eligibility requirements

Some states, including Florida, New York, Michigan, Massachusetts, Rhode Island and Texas may also require that the promoter place a poster with the official rules in any retail outlets where the sweepstakes is advertised or conducted. This should not be an issue in an online only sweepstakes but may be an issue in a sweepstakes promoted both online and off-line.

Fulfillment and Post-Fulfillment Issues

It is good practice to keep all entries and particularly all winning entries for at least one year after the fulfillment of the sweepstakes. The promoter should also keep detailed records of the drawing process, including, if feasible, a videotape of the drawing, to prove that the drawing was random.

Certain states also require that winners lists of winners of prizes over a certain amount (usually \$25) be kept and made available to the state and to consumers upon request for up to one year. If the sweepstakes is required to be registered in New York or Florida, such states will also require that a winners list be sent to the state following fulfillment of the sweepstakes. The promoter should keep the following information for each winner: name, address, prize, value of prize, date the prize was won, date of receipt of prize and, if applicable, the business location that winner visited to qualify for the prize.

Penalties

The stakes for violation of sweepstakes laws are high. Penalties for violation of sweepstakes laws vary widely but can include exposure to civil liability, civil fines and criminal penalties (generally misdemeanors). The promoter may also be subject to an injunction prohibiting the promoter from conducting further sweepstakes in a state in which a violation occurred. Because of these severe penalties, a sweepstakes promoter must be diligent in complying with applicable law when conducting sweepstakes of any type.

This document is intended as an informational reminder and does not constitute legal advice. If you have any questions or would like to discuss a particular situation, please contact Womble Carlyle Sandridge & Rice, PLLC. The purpose of this article is to provide general information about significant legal developments and should not be construed as legal advice on any specific facts and circumstances.