



Social Media Promotions - 101

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Agenda

- What's New in 2019?
- Legal Framework/Putting Together the Promotion
- Social Media Platform Rules
- Endorsements and Testimonials
- Sweepstakes and Contests Directed to Children
- Privacy
- CAN-SPAM and Refer-A-Friend
- Charitable Promotions and Free Action
- International
- Practice Tips

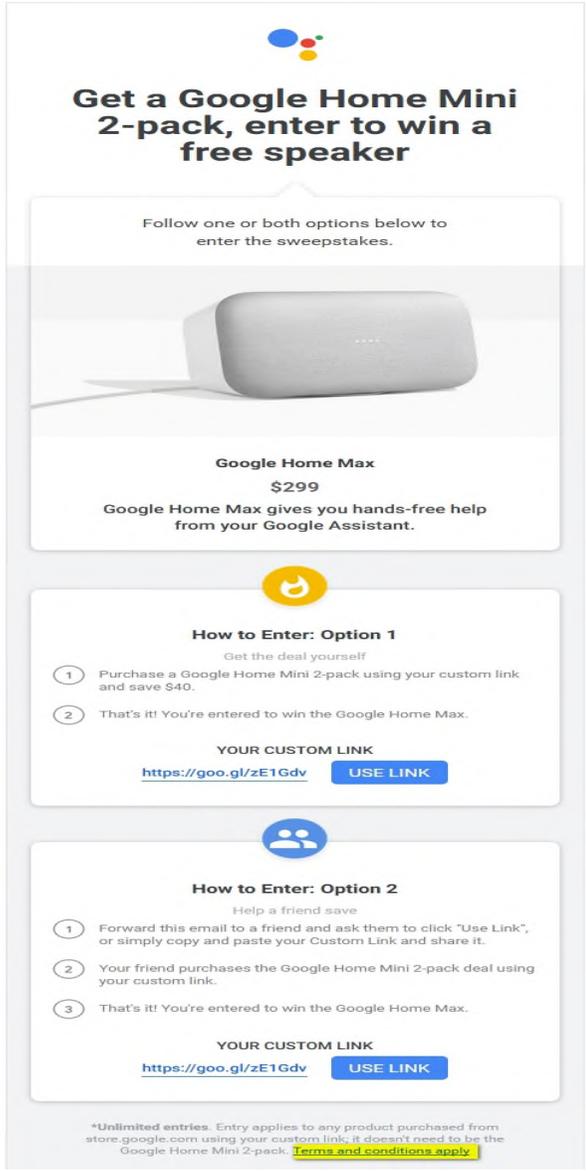
What's New in 2019?

- ***FTC v. Next-Gen, Inc.***, No. 4:18-CV-0128 (W.D. Mo., March. 2019): FTC and Missouri Attorney General settled with Next-Gen, Inc. and related defendants, which sent mailers informing consumers they had “won” but would need to pay a fee to collect a prize. Other mailers were disguised as newsletter subscriptions or games of skill that involved a fee and ultimately an unsolvable puzzle.
 - Settlement included \$21 million in cash plus personal property and liquidation of the companies; the full amount of \$114.7 million is suspended. The settlement also requires that the companies be wound down and liquidated and bans the defendants from prize promotions unless the consumers sign up in person.
- ***Indiana v. Hopkins and Raines Inc.***, No. 55C01-1904-PL-000718 (Morgan County Circuit Ct, April. 2019): Indiana AG sued a marketer that ran ads on behalf of car dealerships and sent mailers to consumers representing that they had won a large prize based on a specific combination of winning numbers and symbols, when each recipient received the same combination and the prizes were substantially smaller than what was advertised.
 - For example, cars and large flat-screen televisions were advertised, when prizes disclosed in small print included only \$5 gift cards, lottery tickets, mp3 players, and smartwatches.
 - Moreover, consumers had to pay \$19.95 in taxes for the smartwatches, and the AG alleged that they and the mp3 players were worth significantly less than claimed.
 - The promotion was not technically a sweepstakes or a contest, and that was a large part of the issue; if chance is not a factor then, it should not be presented as such.

Not Just Litigation...

In May 2019, Google amended its Google Assistant Refer a Friend Sweepstakes after a consumer group, Mouse Print, notified them that it unlawfully required a purchase without offering a free alternative method of entry.

- The sweepstakes as originally promoted required either a purchase or a purchase made through a specific referral link.
- After consumer complaints, Google amended the sweepstakes to include a free alternative method of entry and provided notice of the change through an email to its customers.



The image shows a promotional email from Google Assistant. At the top, it says "Get a Google Home Mini 2-pack, enter to win a free speaker". Below this, it instructs the user to "Follow one or both options below to enter the sweepstakes." There is a photo of a Google Home Max speaker. Below the photo, it says "Google Home Max \$299" and "Google Home Max gives you hands-free help from your Google Assistant." There are two options for how to enter: Option 1 is "Get the deal yourself" and Option 2 is "Help a friend save". Both options include a list of steps and a "YOUR CUSTOM LINK" with a "USE LINK" button. At the bottom, there is a disclaimer: "*Unlimited entries. Entry applies to any product purchased from store.google.com using your custom link; it doesn't need to be the Google Home Mini 2-pack. Terms and conditions apply."

Get a Google Home Mini 2-pack, enter to win a free speaker

Follow one or both options below to enter the sweepstakes.

Google Home Max
\$299
Google Home Max gives you hands-free help from your Google Assistant.

How to Enter: Option 1
Get the deal yourself

- 1 Purchase a Google Home Mini 2-pack using your custom link and save \$40.
- 2 That's it! You're entered to win the Google Home Max.

YOUR CUSTOM LINK
<https://goo.gl/zE1Gdv> **USE LINK**

How to Enter: Option 2
Help a friend save

- 1 Forward this email to a friend and ask them to click "Use Link", or simply copy and paste your Custom Link and share it.
- 2 Your friend purchases the Google Home Mini 2-pack deal using your custom link.
- 3 That's it! You're entered to win the Google Home Max.

YOUR CUSTOM LINK
<https://goo.gl/zE1Gdv> **USE LINK**

*Unlimited entries. Entry applies to any product purchased from store.google.com using your custom link; it doesn't need to be the Google Home Mini 2-pack. [Terms and conditions apply](#)

How Do We Review Prize Promotions?

- **First step** in evaluating any promotion is ensuring that it is not an illegal **lottery** (which is gambling, i.e., a criminal offense).
- **Lottery** = three elements:
 - A **prize** is awarded.
 - Winners are determined on basis of **chance**.
 - Participants must submit **consideration** to enter.
 - **Consideration** (something of value that must be given to participate)
 - **Monetary** (i.e., a payment or purchase)
 - **Non-monetary** (e.g., an expenditure of substantial time and/or effort)
- **Note:** Free alternative method of entry may solve a consideration problem, provided there is **equal dignity** and it is **clearly disclosed**.

General Requirements

1. Rules/Advertising Disclosures

- Rules are required under state and federal law; should be readily available to all participants and clearly set forth details such as eligibility, prize details, how to enter, start and end dates, odds, etc.
- Required disclosures in advertising: odds, eligibility, deadlines, prize details/ARV
 - Florida game promotion regulation provides good rules of thumb for material terms disclosures (FL Adm. Code Sec. 5J-14.0001), but other states may have different requirements.
- Some social media sites have their own rules, requiring special disclosures and releases.
- Generally a good idea to include publicity and liability disclaimers/releases; right to modify rules; link to privacy policy.

2. Registration and/or Bonding

- Sweepstakes over \$5,000—NY and FL (\$500 for RI)
- “Amusement contests” in AZ
- Other countries? E.g., Quebec/Canada, Brazil

3. Posting

- Some states require posting rules (e.g., NY, RI); some states require posting or provision of winners’ lists on request (NY, FL, TN).

What Should Be in Rules?

- No purchase necessary (for games of chance) – clearly and conspicuously disclosed
- Void where prohibited (list states that must be voided/sponsor wishes to void)
- Sponsor’s name and address
- Eligibility requirements
- Start/end dates/times, deadlines for entry, prize claims, free game piece requests, etc.
- Details on how to enter, including any limits
- Odds of winning
- Description of prize (including number and approximate retail value), restrictions, taxes
- Where and when to get winners list
- Description of winner selection process
- Restrictions intended to avoid/prohibit/disqualify bulk or automated entries
- Judges’/sponsors’ decisions final (if applicable)
- Winner verification process, including affidavit of eligibility
- Taxes on prizes
- Disclose if unclaimed prizes will not be awarded; preferable to have “second chance” drawing
- Disclaimer/limitations on sponsor’s liability/disclaimer of liability for lost, late entries
- Release of publicity rights; other releases (liability, travel), Facebook/social media release

How to Disclose Rules and Other Key Claims: The FTC's Dot.Com Disclosures

Rules, including free AMOE, must be disclosed clearly and conspicuously.

- New York Attorney General has brought several large actions against retailers and brands for failure to disclose free alternative method of entry:
 - **A&P** (2013: \$102K; 2004: \$38K); **H&R Block** (2008: \$245K); **CVS** (2004: \$75K; 2006: \$152K); **Tylenol** (2004: \$52K)

How do we do that?

- **The FTC's updated Dot.Com disclosures** say take into account the devices and platforms consumers may use to view advertising and any corresponding disclosure.
- **Marketers should keep the “4 Ps” in mind:** No fixed rules about font size, color, etc., or magic words, but think about:
 - **Proximity:** Place disclosure as close as possible to the claim, call to action, entry blank, etc.
 - **Placement:** Put it where people look! FTC says: People look to the top left on websites; if you don't have enough space for the disclosure, don't make the claim!
 - **Presentation:** Hyperlinks to disclosures should be obvious, used consistently, and labeled appropriately to convey the nature, relevance, importance of info; take consumers directly to the disclosure on the click-through page (“one click good, two clicks bad”).
 - **Prominence:** Make it clear and conspicuous: “scrolling” should not be necessary in order to find a disclosure—no one sees it. Don't put it at the end of a blog/post/tweet.

Games of Skill: Contests

General Requirements

- **Consideration is generally allowed**
 - Exception: Some states prohibit/restrict consideration in skill games
 - Arizona, other than intellectual contests that are registered
 - Colorado
 - Maryland, for prize values over \$200
- **Rule/advertising disclosures:**
 - Many states impose the same rules requirements for contests that they do for sweepstakes—and rules are always a good idea!
- **Types of contests**
 - Photo Contests
 - Essay Contests
 - User-Generated Content Contests
 - Sales Contests

Sweepstakes and Contests: Additional Considerations

- **Are you targeting special audiences?**
 - Trade/employee promotions: Some states don't regulate trade or employee promotions, but other issues may be triggered.
 - Trade promotions: Consider the commercial bribery laws and obtain employer consent/exclude government employees.
 - Employee promotions: Tax/compensation issues; potential work for hire issues when soliciting UGC.
 - Discrimination and human rights.
- **Are children permitted to enter?**
 - Children's Online Privacy Protection Act requires parental notification and consent, with a few narrow exceptions.
 - CARU requires plain language disclosures.

Skill Contests and User-Generated Content Promotions

While skill contests/UGC promotions may have many of the same issues as traditional sweepstakes, they present unique issues as well:

- Absence of chance means that consideration may be required EXCEPT that some states (e.g., AZ, MD, CO, ND) prohibit a purchase or payment requirement even in skill contests
 - But is there consideration?
 - Arizona may require registration for “amusement gambling contests”
- Need for content guidelines and moderation
- Winner selection: Judging and voting present special concerns
 - Need for clear winner selection guidelines
 - Possibility of voter fraud
- Intellectual property considerations
- Compliance with third-party platform rules
- FTC Endorsements and Testimonials Guides

User-Generated Content

- **Different Types:**
 - UGC contest
 - Closed “feedback” or “advisory” community
 - Open submission program
 - Program created specifically with user participation (“crowdsourcing”)
- **Risks & Benefits:** Risks inherent in asking public for content
 - You can get really creative entries, or
 - You can end up with a baseball team named the Pizza Rats...



Third-Party Rights and Social Media

Users own anything they post on social media.

- Platform rules typically make content available to advertisers to use in apps, on websites, etc. (including text, photos, other materials posted by platform users).
- BUT questionable whether advertisers can reuse for commercial purposes on different platforms without first getting the consent of the owner, due to intellectual property protections/third-party rights:
 - **Copyright:** Videos and images, such as drawings and photographs, are protected by copyright law.
 - **Trademark:** Many company names and most company logos and slogans are protected by trademark law.
 - Consider also whether to trademark sweepstakes names, hashtags.
 - Also need to be aware of “False Association or Sponsorship” claims.
 - **Right of Publicity:** A person’s name, voice, likeness, and image are generally protected by that person’s right of publicity.

UGC Best Practices

- **Social media platform rules** do not necessarily grant the rights you need.
- **Terms and conditions:** Need clear delineation of IP rights:
 - Participants should ideally “accept” terms
 - Clear submission guidelines
 - Moderate/screen entries
 - Reference the requirement for signing winner agreement in the rules
 - IP reps and IP license
 - Publicity rights
 - Prizes or gifts given are subject to all applicable laws
- **Third-party clearance:** Do not rely on participant reps/warranties
- **Submitter/Winner agreement**
- **Consider a background check for winners**

Taxes

- If the value of the prize awarded in connection with a promotion that does not require payment to enter is **\$600 or greater**, the sponsor will have to report the prize value to the IRS by filing a 1099-Misc. (If the promotion does involve the payment of entry fees, the sponsor should consult with tax counsel.)
 - If the prize has no readily available retail value, value may be calculated using any good-faith reasonable method.
- To file a 1099-MISC, the sponsor will need to acquire the winner's social security number or tax identification number. You can ask for this information by providing the winner with a W-9 form.
 - The 1099-MISC must be postmarked by January 31 of the year following the year in which the winner receives the prize.
 - For example, if a person won a prize in May 2013, the 1099 should be mailed by January 31, 2014, though it can be mailed earlier.

Social Media Promotions: Understanding the Social Landscape

- Each social network has its own set of advertising rules and usage guidelines—strictest for sweepstakes and contests.
- IP rights grant does not necessarily give you the right to use for commercial purposes.
- You don't always get the right to contact users.
- Consequences of violation? **Your page/promotion may be pulled down!**



Facebook Rules for Promotions



You MUST include specific releases: Facebook not affiliated with or a sponsor of promotion

You CANNOT:

- “Likegate” a promotion.
- Conduct prize promotions on personal pages/timelines.
- Require people to post content on their personal timeline, share content, or tag themselves in content where they do not appear—no “share on your timeline to enter” or “share on a friend’s timeline for additional entries.”

You CAN:

- Collect entries by having users comment on a picture or post to be entered or message a page.
- Use Facebook functionality as automatic entry mechanism (except for posting content on personal timelines).
- Use Facebook features to vote.
- Announce winner on non-personal page/ask entrants to return to see who won.
- Tag in entrants.

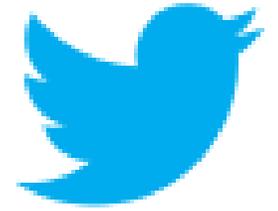
Instagram Rules for Promotions



- **MUST** include specific releases/disclosures re: Instagram - whether Instagram is used to run the promotion or simply to advertise the promotion.
- **MUST** request permission to re-use user photos in rules - **according to Instagram's terms of use, users retain ownership rights of their photos.**
- **MUST** say in the official rules that having a public profile on Instagram is an eligibility requirement for the contest (otherwise won't be able to see entries!).
- **MUST** require word like "promotion" or "sweepstakes" or separate hashtag along the same lines in post-to-enter promotions (per FTC).

- **CAN** tag in content (like photos), but you **CANNOT** tag content inaccurately or encourage others to tag content inaccurately.
- **CAN** post the official rules via a static link in the picture, a reference to a link in bio, or a "track-back" reply to any commenters.
- **CAN** structure entry and winner selection by having an entrant comment on a picture that includes an explanation of the basics of the sweepstakes/contest.

Twitter Promotions



- Twitter Terms and Conditions discourage creation of multiple accounts and other “spammy” activities such as automation.
 - New automation rules as of 11/2017.
 - Limit number of tweets/entries to one per day.
 - Don’t encourage retweets to win.
- Make sure the rules require entrants to set their Twitter account to “public” so you can see entries!
- Recommend including @usernameMention in tweet entries so it will be visible in user timeline.
- FTC: Any tweet-to-enter promotion must require a word like “promotion” or “sweepstakes” or separate hashtag along the same lines.
- Distinctive hashtag also minimizes possibility of including photos from random users using the tag.

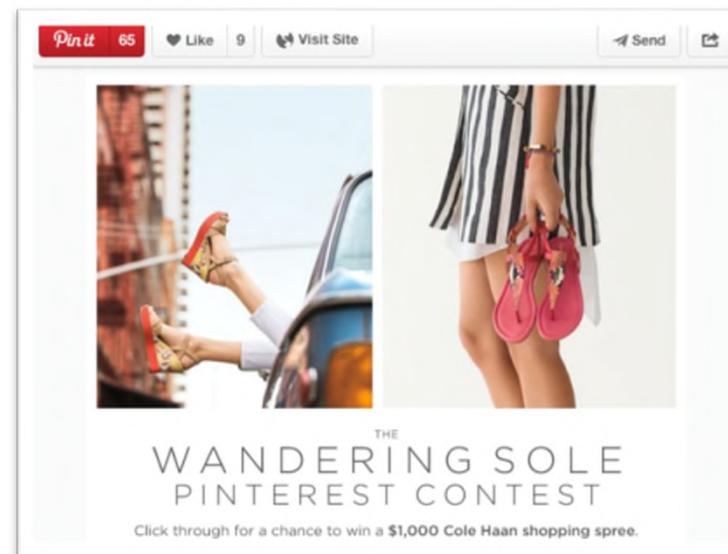
YouTube Guidelines



- Must have official rules which:
 - Include links to YouTube’s Community Guidelines,
 - State all disclosures required by federal, state, and local laws, and
 - Are compliant with the YouTube Terms of Service.
- Must include a privacy policy.
- Must state YouTube is not a sponsor and give releases.
- May not associate with YouTube without express consent.
- May not manipulate metrics on YouTube (including likes, dislikes, etc.)—no using likes for voting, etc.
- Contest must be free to enter.
- Must not ask users to give all rights for, or transfer the ownership of, their entry to the sponsor, and cannot infringe upon or encourage infringement of third-party rights or participation in unlawful activity.

FTC Endorsements Rule Disclosure Requirements

- **Basic rule:** Under FTC's Endorsements and Testimonials Rules, if an endorser (e.g., influencer) has received material consideration in return for talking about a product on social media, it should be disclosed
- **Sweepstakes/Contests corollary:** *Must require sweepstakes entrants to include disclosure indicating their entry (tweet, post, etc.) has been incentivized.*
- **Acceptable disclosures/hashtags include, but are not limited to:**
 - #[company]Sweepstakes
 - #contestentry
 - NOT #sweeps or other abbreviations
- **What about sweepstakes and contests run by influencer?**



Sweepstakes and Product Reviews

- **Incentivized product reviews are an area of top sensitivity at FTC, States, and NAD.**
- **Recent cases like *Sunday Riley*, *Creaxion*, etc.**
- ***Includes circumstances where reviews incentivized by sweepstakes.***
 - NAD: Advertiser awarded \$25 gift cards to some individuals who posted online reviews of company's products in promotion where rules required entrants to include a disclosure in reviews that they were part of a sweepstakes entry, but requirement was not clear in email sent to consumers and did not appear in sample review.
 - Response: When it became aware of problem, advertiser:
 - Tagged each review as a “sweepstakes entry” and ensured tag traveled with reviews to other sites when reposted;
 - Enhanced discussion of necessary disclosures in later emails about promotion; and
 - Added disclosure on review portion of promotion website.
 - **NAD:** Remedial actions were sufficient, ***but*** expressed concern about such programs because they call into question reliability of consumer reviews.

Surprise and Delights



Surprise and Delight promotions are promotions where free gifts are given away to consumers – **but neither the free gifts nor promotion is advertised before gifts are distributed.**

- If the gifts really aren't promoted prior to distribution, advertisers should not need to disclose any terms of purchase or redemption because there is no "call to action" that consumers are asked to accept.
- The more the Surprise and Delight promotion is talked about in advance by the advertiser, the greater the risk that it triggers legal disclosure requirements.
- No consideration may be required to participate in promotion.
- Analysis may change if promotion is run on a regular basis (so people come to expect to be rewarded for certain behaviors).

Suggested Best Practices:

- Avoid pre-announcement of the promotion or complex requirements for participation.
- Consider giving recipients of prizes clear guidelines about what to post/not to post on social media when discussing the S&D promotion.
- May need to get signed releases from prize/gift recipients for use of images/content.

Sweepstakes and Contests Directed to Children

- In addition to complying with state lottery and gambling laws, promotions directed to children must also comply with the federal Children's Online Privacy Protection Act (COPPA)
 - COPPA applies to websites or portions thereof that are targeted to children, and sites that have actual knowledge that they are collecting information from children.
 - Child-directed factors include site subject matter, presence of animated characters or celebrities that appeal to children; language, music, and other audio content; and the voice of ads that promote the site.
- Operators covered under the Rule must:
 - Post a privacy policy;
 - Provide notice to parents & obtain verifiable parental consent before collecting kids' PII;
 - Give parents the opportunity to prohibit the operator from disclosing PII to third parties (unless disclosure is integral to site or service);
 - Provide parents with access to and the opportunity to review and delete their child's PII;
 - Give parents the opportunity to prevent further use or online collection of a child's PII;
 - Maintain the confidentiality, security, and integrity of kids' information; and
 - Retain PII collected online only for as long as is necessary, then delete it.

COPPA's Multiple Contact Exception

FTC COPPA FAQ 11. says sponsors may be able to use single or multiple contact exception for sweepstakes:

- If collecting child's contact information and only contact information (e.g., just first name and email) and using only to notify they have won (single contact), then delete; or
- Collecting parent's contact info and notifying the parent you have done so and giving opportunity to opt out (multiple contact)
 - Can't combine child's information with any other information, sell to third parties
- How do you get consent from a child/parent in a UGC contest? On social media?

NOTE: Child = under 13, EXCEPT CCPA requires opt-in consent to sell data from children between ages of 13 and 16 (parent must consent for children under 13).

- Europe has raised the age as well.

CARU: Children's Advertising Review Unit

- The Children's Advertising Review Unit (CARU) of the BBB's National Advertising Division is a self-regulatory program that monitors children's advertising (including data collection and privacy practices), initiates and receives complaints about advertising practices, and determines whether such practices violate the program's standards.
- Applies to children 12 and younger.
- CARU has rules specifically pertaining to sweepstakes and contests targeting children, and has brought numerous cases.
 - **Disclosures:** Should take into account limited vocabulary/language skills of child, e.g., "you have to put it together"; should be conspicuous (clear and proximate on web, audio on TV); must disclose sponsorship of website; other required disclosures:
 - Odds statement: "Many will enter, few will win."
 - "Ask your parents to enter."
 - **Inappropriate ads:** Only age-appropriate videos and games should be shown (i.e., not PG-13), should not display or link website pages with inappropriate behaviors, applies to sweepstakes as well.
 - Cannot solicit entries on a social media platform that does not permit children under 13 to participate.

Privacy and the CCPA



- Do you want more PII than you need to execute/fulfill the promotion?
- Promotions are frequently about collecting personal information like emails, phone numbers, addresses—important to consider privacy implications.
- What do your contracts with third parties say?
- California Consumer Privacy Act significantly changes the landscape.
 - Effective as of Jan 1, 2020; enforcement expected July 1, 2020.
 - Creates new consumer rights, including access, deletion, opt out from sale and others.
 - Creates new implementation requirements involving privacy policies, on-site and in-store disclosures, and contracts.

Refer a Friend and UGC Promotions/ CAN-SPAM

- *Facebook, Inc. v. MAXBOUNTY, Inc.* (2011): Facebook message is an email message under CAN-SPAM.
- All prize promotions with a “refer a friend” component should be vetted for CAN-SPAM compliance.
 - CAN-SPAM Act may apply if coupons, points, additional sweepstakes entries offered in return for forwarding a commercial email, *including a social media message*.
 - Platform rules for Facebook and Twitter discourage “spammy” behavior.
- Prohibitions:
 - False header information
 - Misleading subject lines
 - E-mail address harvesting/dictionary attacks
- ***Key element: “Referred” friends must be vetted against your internal “do not email” list...***

Charitable Promotions

- **Charitable Promotion or Commercial Co-Venture (CCV)** – Arrangement between a charity and a business in which the business advertises in a sales or marketing campaign that the purchase or use of its goods or services will benefit a charity or charitable purpose
 - (1) Not a charitable solicitation
 - (2) Tied to purchase of goods/services (*MA)
 - (3) Benefit charity or charitable purpose
- **26 states have laws that regulate CCVs**
- **Issues/regulatory requirements:**
 - Registration / bonding (4 states)
 - Written contract
 - Advertising disclosures, e.g., amount/minimum donation, dates, fundraising registration number
 - Accounting and recordkeeping
- ***What about free action promotions?***

International Considerations



- Online gaming and sweepstakes law can vary drastically across countries.
- Important to check with counsel if sweepstakes or game will occur outside of U.S.
 - Some countries prohibit cash awards (e.g., Brazil).
 - Others require rules translation/disclosures in particular language (e.g., Canada).
 - Several require registration (e.g., Brazil (both sweepstakes and contests), Mexico, Quebec, Canada, Australia (certain provinces)).

Practice Tips



Consider:

- Use of intake forms/initial review of all promotion structures by counsel.
- Generally an area where forms can be valuable:
 - Rules: Sweepstakes, contest/UGC, other types of promotions
 - Releases: Winners, guests, third-party publicity releases, premises releases
- Have policies in place, e.g., social media influencer policies/agreements, monitoring, UGC moderation, crisis management.
- For joint promotions:
 - Obtain indemnification, representations, and warranties clause, insurance
 - Clarify roles, e.g., who is registering?
- Hire local counsel if necessary (international promotions, or even local/experiential).
- Keep up to date with social media platform rules!

Questions?



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