



# Prize Promotions, Cause Marketing, and Digital Advertising: Key Trends in 2024 and What's Next in 2025

January 9, 2025



## **Melissa Landau Steinman**

Partner | +1 202.344.4972 | [mlsteinman@Venable.com](mailto:mlsteinman@Venable.com)

## **Cristina I. Vessels**

Counsel | +1 202.344.4706 | [civessels@Venable.com](mailto:civessels@Venable.com)

## **Shannon E. Sansom**

Associate | +1 212.218.2254 | [sesansom@Venable.com](mailto:sesansom@Venable.com)



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# **Developing and Executing Compliant Prize Promotions**

## **Understanding Legal Requirements and Obligations**

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# What Types of Laws Apply to Sweepstakes, Contests, and Prize Promotions?

- First and foremost, any prize promotion must be evaluated to make sure it does not violate **criminal lottery and gambling laws**.
- Many states also have **sweepstakes/contest laws** with specific requirements for disclosures for rules/advertising, posting rules, registration and bonding, etc.—form of consumer protection law.
- Even if there is no specific state sweepstakes/contest law in a given state, federal and state **Unfair and Deceptive Acts and Practices (UDAP)** laws give regulators and/or consumers the ability to pursue actions against brands that create confusion by failing to provide consumers with adequate information/disclosures about a prize or gift enterprise.
  - The FTC has brought numerous actions against sweepstakes promoters **under Section 5 of the FTC Act**, and most state attorneys general include UDAP or “Little FTC Act” claims.
  - The FTC is now using “dark patterns” theories as a broad tool for enforcement, in sweepstakes cases and otherwise. Similarly, the use of graphic or other interactive mechanisms that lead consumers to take actions that result in unknown or generally undesirable outcomes (i.e., giving up information, money, or time) is increasingly a source of UDAP enforcement.
  - Unfair promotional tactics may lead to consumer complaints, which may then turn into UDAP investigations, class actions, and even new legislation on the basis of UDAP principles.
- The more a consumer stands to lose by virtue of a promotion in terms of money, time, property, rights, or anything else of value, the more care should be taken in its design.

## How Do We Review Prize Promotions?

- The first step in evaluating any promotion is ensuring that it is not an **illegal lottery**.
- Lotteries are illegal under federal and state law—in some states there's a constitutional prohibition.



- Three elements:
  1. A **prize** is awarded;
  2. Winners are determined on the basis of **chance**; and
  3. Participants must submit **consideration** to enter (something of value, e.g., payment, purchase, or expenditure of time or effort).
- Removing one of these three elements will avoid an illegal lottery. For example, a free alternative method of entry (AMOE) may eliminate consideration, provided that (a) entrants using the free AMOE are offered equal dignity (the equal opportunity to enter and win) and (b) the free AMOE is clearly disclosed.

# What Is Permissible Consideration?

- **Consideration:** Something of value that must be given to play. May be **monetary** or **non-monetary** (e.g., an expenditure of substantial time and/or effort).
- **Monetary Consideration:** In most states, only a requirement that a person must purchase a product or service will constitute consideration in a promotional context.
- **Non-Monetary Consideration:** May render a promotion illegal in certain states, e.g., Delaware, Florida, Georgia, Iowa, Kansas, Michigan, New Jersey, Ohio, South Carolina, Texas, and Wisconsin (though it's not always clear what that means).
  - **Examples of potentially high-risk entry requirements:** Download of a paid app; attendance at a paid event; response to a lengthy survey; multiple visits to a location/scavenger hunt.
  - **Examples of potentially low-risk entry requirements:** Short survey questions; download of a free app; requiring a social post or comment on a free platform (where permitted); watching a TV program or listening to a radio program; return postage.

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## What Is “Post-Consideration” and Is It OK?

Is it necessary for a prize winner to spend additional money to redeem a prize? Is that illegal consideration?

At the time of entry, is it clear to the entrant that additional money/consideration will be required to make use of the prize?

- *Example:* Is it disclosed that winner will be required to travel to the location of the concert for which they have won tickets?

“Prize/gift notification” statutes deal with express or implied representations about prizes or gifts offered in connection with a required purchase or other valuable consideration.

Connecticut prohibits advertising a sweepstakes if there is any condition or restriction attached to the receipt of any prize a person wins in the sweepstakes, unless the condition or restriction to claim the prize is through any method that does not require any purchase, payment of a fee, or any other consideration.

Some states prohibit sweepstakes where attendance at a sales pitch is required to participate and/or pick up a prize. *See* Ohio, *Bank Night* cases.

# Free Alternative Method of Entry

**Offering a free alternative method of entry (mail-in, email, etc.) has traditionally negated consideration—but will it always work?**

- Yes, in a U.S. *promotional* sweepstakes. Largely irrelevant outside the U.S.

**In some contexts—particularly where the game is not promotional—the AMOE may be viewed as subterfuge and therefore ineffective.**

- E.g., *F.A.C.E. Trading* and *Lucky Shamrock* cases, video lottery terminal bans.

**“Promotional” = Promoting the sale of sponsor’s good/service in ordinary course of business—“limited and occasional” vs. all the time.**

- E.g., *Texas v. Ysleta Del Sur Pueblo* (2016) (“donation” method of entry was not “promotional” in nature and led to a finding that the sweepstakes was unlawful), but see *Couch v. Telescope, Inc.* (2007) (AMOE did not change the fact that a pay-per-text method of entry paid only “for the privilege of entering the Game”).

**In promotional context, AMOE must be clearly and conspicuously disclosed and offered to all participants.**

- AMOE must be given “equal dignity” = free entrants must have the same opportunity to enter and win; be given the same number of entries and same odds.
- Do not impose material disadvantages on those who want to enter via the AMOE. Small inconveniences (e.g., mail-in requirement, postage stamp) may be ok.

# Prizes and Prize Value

## **Are you even giving away a “prize” with any value?**

How do I accurately present the value of a prize that does not have a clearly ascertainable value?

- Assess the fair market value of the prize/experience.
- Establish a reasonable basis regarding the value to avoid a claim that there is a misrepresentation as to the value of the prize, e.g., is there an objective outside standard such as a specified secondary marketplace as of a particular date?

## **Are there situations where a prize has no “value”? Perhaps reposting content? Newly minted NFTs?**

- Remember, though, that the definition is very broad—even right to additional gameplay may be of value in some states (though that may depend in part on existence of secondary market). See *Kater v. Churchill Downs Inc.* (9th Cir. 2018); *Soto v. Sky Union* (N.D. Ill. 2016).
- Variation in value between different prizes to be won injects chance into what might otherwise be a free gift giveaway.



# Taxes

- If the value of a 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.
- Sponsor will also need to collect the winner's SSN/TIN (generally done using a form W-9) and issue a Form 1099 to the winner in the January following the win.
- If the prize has no readily available retail value, value may be calculated using any good-faith, reasonable method.
- Prizes awarded to employees are most often considered compensation.



# General Requirements for Sweepstakes

## Official Rules and Advertising Disclosures

- Rules are required under state and federal law; should be readily available to all participants and include details such as eligibility, prize details, how to enter, start and end dates, odds, etc.
- Certain “material terms” disclosures are required in all advertising: eligibility, dates/deadlines, sponsor info.

## Registration and Bonding

- Sweepstakes with a total prize value over \$5,000 must be bonded and registered in New York and Florida.
- Sweepstakes with a total prize value over \$500, and where a retailer is offering the opportunity to win, must be registered in Rhode Island.
- Additionally, certain types of “amusement gambling” intellectual skill contests where a purchase is required for participation must be registered in Arizona.

# FTC's Endorsements Guidelines Update

- Updated fall 2024
- Still requires disclosure of receipt of sweepstakes or contest entry as “material connection”
- Must disclose full term “sweepstakes” and not just abbreviated “sweeps”
- Employees who are allowed to participate should also disclose their employment connection
- Should also disclose brand name or similar identification
- New rules about sweepstakes offering entries in return for leaving a review as well, including
  - Disclosure that the review was incentivized must travel with the review
  - Entry cannot be conditioned on leaving a positive (or negative) review
  - Marketer cannot suppress negative reviews



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# Platform Rules for Promotions (The Basics, 1 of 2)

## Facebook

- You **MUST** include a specific release: Facebook is not affiliated with or a sponsor of this promotion.
- You **MUST NOT**:
  - “Likegate” a promotion;
  - Conduct prize promotions through users’ personal pages or timelines OR 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”
- Any user-generated posts or content must include hashtag disclosures (such as #[Sponsor]Sweepstakes) to disclose the purpose behind the post.

## Instagram

- You **MUST** include a specific release: Instagram is not affiliated with or a sponsor of this promotion.
- You **MUST NOT** ask or allow users to tag themselves or others in content/photos in which they do not actually appear.
- Any user-generated posts or content must include disclosures (such as #[Sponsor]Sweepstakes) that indicate that the post is associated with a branded sweepstakes.

## Platform Rules for Promotions (The Basics, 2 of 2)

### Twitter

- Expressly prohibits “**spammy**” promotions, where users are encouraged to repeatedly repost or retweet a post and/or create multiple accounts to engage with a brand or promotion.
- Any user-generated posts or content must include disclosures (such as #[Sponsor]Sweepstakes) that indicate that the post is associated with a branded sweepstakes.

### TikTok

- Also prohibits “**spammy**” promotions.
- Any user-generated posts or content must include disclosures (such as #[Sponsor]Sweepstakes) that indicate that the post is associated with a branded sweepstakes.

### Threads

- No policies yet—there aren’t any branded content tools available yet, either—but the guidance being offered is to follow the Instagram rules and make similar disclosures regarding sponsorship.



# Modification and Termination Clauses: When Can You Use Them?

***A sweepstakes is a contract with a consumer protection overlay***—Several states (e.g., CA, FL) require that all advertised prizes be awarded; fairness and other consumer protection principles must always be kept in mind.

## **Modification/Cancellation Clause**

- Typically provides substantial latitude for sponsors to make decisions “in [their] sole discretion.”
- A well-drafted modification/cancellation clause should leave room to craft a remedy if there is a delay.
- BUT under sweepstakes and UDAP laws, modification is a remedy of last resort, to be used only in situations, for example, where there has been force majeure or fraud or there is impossibility.
- In modifying, keep in mind contract law requirements.

## **Force Majeure Clause**

- Force majeure is supposed to free both parties from liability upon an unanticipated (unforeseeable) supervening event or circumstance beyond the control of the parties. It comes up frequently with COVID-19.
- *See also* doctrines of impracticability and frustration of purpose.
- Best Practice: Include specific language concerning a pandemic or epidemic, or at least a health event, in a force majeure clause.

# Dispute Resolution Clauses

Official Rules = Consumer Contract

- Construed against the drafter/concerns about contract of adhesion
- Protect sponsor
- Reduce likelihood of mistake/minimize confusion

The use of arbitration clauses has become increasingly common in sweepstakes and contests.

- *Root v. Robinson* (2021): Enforceability requires that the official rules be clear, understandable, and accessible; entrant must see and accept the rules for arbitration clause to be binding
- *Suski v. Coinbase* (2023): Dispute over whether dispute resolution clause in sweepstakes rules or terms of use clause applies

Include clauses in rules intended to address addressing disputes, such as:

- Administrative disputes—“judges’ decisions are final”
- Disputes caused by third parties that are no fault of sponsor or entrant, e.g., multiple entrants using same email address)
- An occurrence that raises an issue as to the promotion’s integrity (UDAP risk), e.g., modification/termination and random drawing among entries received

# What You Say and Where You Say It Matters: *Coinbase, Inc. v. Suski*

- In a recent decision, the Supreme Court determined that when parties agree to two conflicting dispute resolution provisions over the course of their relationship, a court must decide which provision will control the dispute at hand, not an arbitrator. ***Coinbase, Inc. v. Suski***, 144 S.Ct. 1186 (U.S., 2024).
- In ***Coinbase***, there was a conflict because there were different dispute resolution provisions in the sweepstakes rules and the website terms of use, at least one of which provided for arbitration.
- The Court held that “A court must decide which contract governs.”
- Earlier in the case, an interlocutory appeal also went to the Supreme Court, where the Court held that proceedings would be stayed while the appeal was decided.



# Entry Pool: Special Considerations

Your target audience may have important legal implications.

- **Can I limit my entry pool just to my customers?**
- **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; issues with hourly employees; potential work-for-hire issues when soliciting user-generated content (UGC).
    - Why do we exclude employees from sweepstakes anyway?
    - Does limiting eligibility help avoid fraud?
- **Promotions targeting children:**
  - Children's Advertising Review Unit (CARU) of BBB requires plain language disclosures and has cases on use of social platforms for kids' promotions.
  - Children's Online Privacy Protection Act requires parental notification and consent, with a few narrow exceptions. Can affect "mixed audience" promotions, too.
  - California Consumer Privacy Act/GDPR: Regulates promotions targeting teens, too.

# Discrimination, Civil Rights, and Promotions Law

State public accommodations and civil rights laws prohibiting discrimination may reach to discrimination in sweepstakes and promotions on the grounds of race, gender, ancestry and religion, marital status, sexual orientation, gender identity, and/or age-based discrimination.

Interpretation of these statutes varies and has resulted in a split—some courts find discrimination in promotions violates the law on its face, while others balance harm with the rights protected.

E.g., **California's Unruh Act** states that “all persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”

- In 1985, the CA Supreme Court found a car wash “Ladies’ Day” discount was prohibited. More recently, the CA Superior Court found that a 2005 “Mother’s Day” tote bag giveaway at an Angels game was simply a gift and not a de facto discount, and therefore did not violate the Unruh Act.



# Skill Contests and UGC Promotions

**While skill contests and UGC promotions 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
  - How to address, particularly when contest asks for “best results” or product reviews?
  - Arizona may require registration for “amusement gambling contests” (where purchase is required)
- Need for entry/content guidelines and moderation
- Winner selection: Judging and voting present special concerns
  - Need for judging expertise/independence
  - Clear voting and/or winner selection guidelines
  - Possibility of voter fraud and leaderboard concerns
- FTC Endorsements and Testimonials Guides
- Intellectual property considerations



# User-Generated Content and Third-Party Rights

- **The problem:** Users own any original content they post on social media—no right for sponsors to report user or third-party content.
- 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 it's questionable whether advertisers can reuse for commercial purposes 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; so is music.
  - **Trademark:** Many company names and most company logos and slogans are protected by trademark law. 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.
- Ideally, have entrants submit UGC through a website or app and obtain “click wrap” licenses/agreement to rules. There is still the problem of third-party content, though.

# Voting in Contests

Voting contests present special challenges:

- Need for clear guidelines and voter rules
- Possibility of voter fraud
- Is a voting contest even a skill contest? (Or the merits of a two-step winner selection process)

***Ward v. Crow Vote LLC et al. (2021)***: Class action alleging favorite-chef contest was a “cleverly designed lottery” whereby the winner was the person who had the most money spent on their behalf. Plaintiffs sued company founder and chef under RICO and California law, alleging that because the contest offered the option for voters to pay money to cast extra “hero votes” for their favorite participant, it was “[not an objective or even subjective test of cooking skills](#).”

- Contest encouraged people to vote/donate for their favorite chef, and 25% of each donation went to the Feeding America charity. A total of \$1,469,520.54 went to the charity.
- Court found Crow Vote was entitled to judgment as a matter of law and that the plaintiffs had failed to set forth specific facts showing any genuine issue to move to trial, and no economic injury to the plaintiffs.
- Separately denied two additional motions filed by the plaintiffs — a Motion for Class Certification and a Motion to Amend Complaint.

Generally recommended to add a judged round to ensure game is truly skill-based and control for sponsor—BUT make sure judges have expertise and judging criteria are clear.

# UGC Best Practices

## Terms and conditions/official rules

- Participants should view and “accept” terms (particularly if you may want to reuse content)
- Incorporate clear guidelines for submissions—technical and content
  - Will you permit music, third parties (persons, content/logos and marks, copyrighted materials)?
- Moderate/screen entries
- Need a clear delineation of IP rights, IP reps, and IP licenses, grant of publicity rights
  - Preferably, you should not rely on participant reps/warranties about third-party content
- Reference the requirement for signing winner agreement in the rules
- Prizes or gifts given are subject to all applicable laws

**Use winner agreement to obtain full rights to submission.**

**Consider a background check for winners.**

## Skill vs. Chance

Some prize promotions involve a mix of skill and chance in determining the winner. Different states apply different tests to determine how such “mixed game of skill and chance” should be evaluated for purposes of determining whether consideration may be permitted:

- **Dominant purpose or “predominance” test** (majority)—Does chance enter into the selection of the winner?
- **Material element test**—Is chance a “material element” in determining the winner?
- **Any chance test**—In the “any chance” states, if there is “any chance” present, the presence of consideration will render a promotion an illegal lottery. It is particularly important in these states to watch for the introduction of chance in tiebreakers, etc.

Most recently, this has come up in competitions where players are asked to predict who will win week to week in reality shows. Similar to fantasy sports, an argument has been made that prediction involves skill and knowledge, and thus far, the NY Department of State has rejected attempts to register.



# Getting Consent on Social Media

## *How do I get consent to reuse UGC?*

- Remember, social platform terms do not grant consent to commercial reuse. If you plan to reuse social posts (especially on a different platform/medium), you need clear consent.
- Simply having someone respond “yes” to a statement like “Fantastic photo! Do you approve of us featuring it?” is too broad and too fraught with possibilities for misunderstandings to use. Instead, make a specific request attaching/linking to release and asking for clear signifier of consent.
  1. Make a specific request and instruct participants to use a hashtag, or even two, that is/are so unique that there is very little chance you could inadvertently capture photos.
    - May also comply with FTC’s Endorsements Rule at the same time!
  2. Hyperlink terms and conditions that are posted either on your profile or in some linked area (website, profile) that explain what is and is not acceptable content (e.g., no obscene or inappropriate content, no third parties, no trademarks or logos, etc., which could also include a link to privacy policy).
  3. Moderate the feed to ensure that the photos submitted comply with (1) and (2).

## Other Types of Promotions



**Surprise and Delights = Free gifts are given away, but neither the gift nor the promotion are advertised before gifts are distributed.**

- 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, or the more frequently a Sponsor conducts them, the greater the risk that it triggers legal disclosure requirements.

# Mobile Marketing and Text Promotions

- Under federal law (TCPA), marketer must obtain ***express prior written authorization*** to send marketing messages via text message (applies to prize promotions).
  - Large and/or private class actions are a big risk here: *Hamza v. Dunhams Athleisure Corp.*, No. 16-11641, 2017 U.S. Dist. LEXIS 41074 (E. D. Mich. Mar. 22, 2017): Alleges Dunham's sent Hamza a proposed class of unauthorized text messages in connection with a promotional sweepstakes. Hamza recently won a motion to dismiss.
- **How do you make adequate disclosures with limited space available?**
  - FTC Dot.com disclosures provide guidance; FTC has issued mobile privacy guidelines.
  - FTC has stated promotions/disclosures must be mobile-optimized.
    - Recent Instagram influencer guidance—Disclosures must be made before “click for more.”
    - Disclosures in rules as well.
  - Trade association guidelines include industry protocols for signup, and additional disclosures in rules.





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## **Artificial Intelligence, the Metaverse, and New Tech in Promotions**

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# The Metaverse and Other Fun

***Recent reports to the contrary, the metaverse doesn't appear to be dead yet ...***

***According to Ad Age***, Fortnite has 400+ million users, with 80+ million active at any time

There are still opportunities in the world of interconnected digital platforms (AR, VR, Web3, AI; Crypto and NFTs are being used in tokenized formats)

- Gaming platforms like Fortnite, Roblox, and AxieInfinity are going strong.
- Sports: Card exchanges, VR activities, tokenized achievements (e.g., PlayersOnly).
- Metaverse meets AI: MeetKai, the Los Angeles-based metaverse and AI company, popped up at CES with a virtual reality installation called “The Brotherhood Deli.” MeetKai specializes in metaverse commerce and says it uses generative AI to build its digital stores.
  - “The Brotherhood Deli” resembles a bodega and showcases digital twins of real-world merch for the NBAPA, the NBA players’ union.
- AR/VR experiences



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# Gambling, Trading Cards, and NFTs

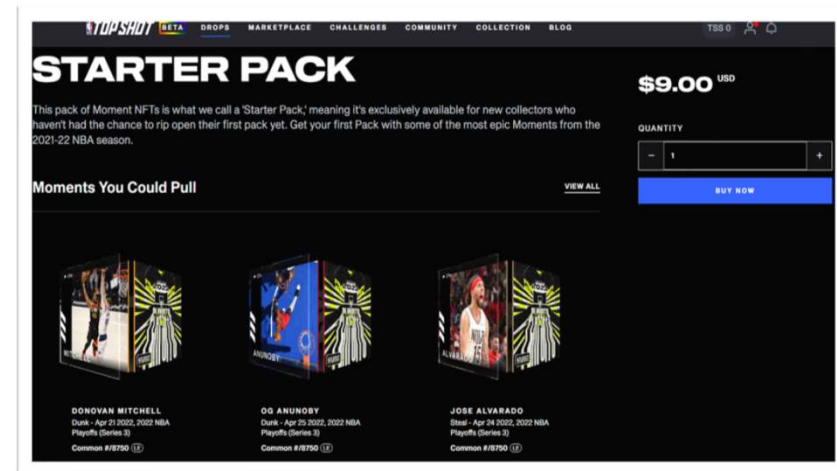
- NFTs have frequently been used as prizes in the last few years—triggering unique issues.

*Are NFTs securities? SEC says yes; courts say it is a fact-based determination.*

***Dapper Labs v. Friel (2023)***: NBA Top Shot: Unique NFT Collectible “Trading Cards” sold on exchange.

- Ownership could be tracked
- Verifiable product origin information, supply/production
- Design: game and player stats, action description, short video clip
- Sales on secondary market permitted
- Often offered in packs where it is not clear what is inside

***Ripple Labs (2023)***: Tokenized NFTs were not securities, institutional NFTs were.



## Non-Fungible Tokens (NFTs) and Cryptocurrency as Prizes

We're seeing increasing use of NFTs and cryptocurrency as prizes in sweepstakes. These may trigger additional issues—starting with the need for a clear definition of terms—as well as:

**Are NFTs securities?** Just last month, the SEC sent gaming site CyberKongz a Wells letter stating that it is considering an enforcement action, based in part on the fact that the agency believes that its Genesis Kongz NFTs were securities.

**Consideration:** Any requirement to purchase an NFT or cryptocurrency is consideration that may trigger lottery laws. May be additional hidden fees (e.g., in opening wallet) as well.

- May provide free AMOE, but must clearly and conspicuously disclose it. *See **Suski v. Coinbase Global, Inc.***

**Intellectual property:** NFTs are unique, one-of-a-kind digital files, which may trigger IP considerations regarding copyright and reproduction rights.

**Prize value:** Cryptocurrency may rise and fall in value over the course of a sweepstakes, and NFTs may have no value at all, except as determined by the secondary market—so how does one state “ARV” as required under state law?

# Artificial Intelligence and Promotions

**FTC and AI:** The FTC is actively monitoring AI and expects companies to design in anticipation of potential issues, e.g., fraud, deception, infringements on privacy, and other unfair practices. Hearing was held in early 2024; FTC has also adopted the impersonation rule and brought its first case, which targeted the misuse of facial recognition data in screening for shoplifters and other criminals.

**General compliance:** Companies should be thinking about:

- Adopting an internal compliance policy
- Vetting partners
- What individual consumers/audiences may require in terms of disclosures regarding how AI is being used/trained and how their information is being used

## **Promotions:**

- Consider the intellectual property rights stemming from using AI applications in connection with promotions, including use of AI by consumers in generating UGC entries.
- Can an AI application be used to judge entries? How can you test that?
  - Determine what criteria the AI application will use to evaluate entries, investigate code.
  - Is sufficient context or intent coded into the application to inform how entries will be evaluated?
  - Is it even possible for AI to judge in some contexts, e.g., where empathy is required?
- Can AI be used to “train” players in skill contests/competitions, and how can you take that into account?

# Gaming and Loot Boxes

- Loot boxes and the use of the loot box mechanic in gaming have drawn scrutiny from regulators and created class action risk.
  - Some countries have prohibited loot boxes altogether, or else require a license or regulate (e.g., Belgium, the Netherlands, Slovakia).
  - Highest level of scrutiny in loot box cases occurs where:
    - Children may purchase or earn items;
    - Loot box items may be ***sold (or transferred) for cash/value.***
- *FTC Staff Report* (2020), issued after 2019 hearing, calls for meaningful disclosures that allow players to make informed choices, consumer education, and improved industry self-regulation.
- CFPB issued Report (April 2024) and followed up with Advisory highlighting financial risks and vulnerabilities (especially to children/families) associated with gaming and claiming industry use of design tricks, technology, and surveillance data to lure kids into spending more.
- Litigation—Considerable litigation has been filed, although many cases have been dismissed on various grounds.

## **Focus on:**

- **Clear disclosures of any purchase requirements, odds.**
- **Compliance with laws and cases regarding advertising to children (or better yet, exclude kids).**
- **Limiting redemption of items for cash/sake on secondary market.**



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## **Why This Matters: An Example**

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## Prize Promotions and Politics



- October 7, 2024: America PAC launched an offer to pay individuals \$47 (later increased to \$100 for PA voters) for each registered voter that person referred to sign the PAC's "Petition in Favor of Free Speech and the Right to Bear Arms."
- October 19, 2024: America PAC and Elon Musk announced that if a registered voter provided their home address, cell phone number, and e-mail (all considered PII) and made a political pledge by signing a petition supporting "the Constitution, especially freedom of speech and the right to bear arms," that voter would be eligible to randomly win \$1 million. The announcement was coupled with an indication that the recipient would agree to be a spokesperson for the PAC.

# Prize Promotions and Politics: Can They Even Do That?

The legal trouble begins:

- October 28, 2024: PA's district attorney filed a complaint seeking injunction against America PAC and Musk alleging (1) their scheme created an illegal lottery, and (2) the illegal lottery also violated PA's consumer protection laws.
- Basis for illegal lottery: Individuals were asked to exchange PII and make a political pledge in exchange for entry, fulfilling all three elements of an illegal lottery: prize, chance, consideration.
- Basis for consumer protection violations:
  - Lack of complete set of rules;
  - Failure to show how PII would be protected;
  - False claims that winners would be selected randomly, since multiple winners were individuals who were attending Trump rallies in PA (implying control over winner selection).

## Prize Promotions and Politics: Some Answers—For Now

- Trial court found that the DA failed to show a preliminary injunction was necessary, noting the following:
  - The DA did not establish that the three elements of an illegal lottery were created.
    - **Prize:** DA failed to prove there was a prize to be won, since defendants offered testimony that those selected to receive the \$1 million earned the money by agreeing to be a paid spokesperson for America PAC.
    - **Chance:** Defendants' testimony indicated recipients were not determined by chance.
    - **Consideration:** DA failed to establish there was payment of consideration by those selected to receive the money—no evidence was provided to show that individuals were “scammed” to provide PII attached to political preferences in exchange for entry. And PA currently defines consideration as monetary consideration only; PA's Unfair Trade Practices and Consumer Protection Law defines consideration as “the payment of cash or the purchase of goods, services or intangible property,” and past courts limited consideration to monetary exchange.
  - The DA also failed to make a clear showing of deceptive conduct: according to the court, the posts and advertisements did not rise to the level of deceptive conduct, since individuals were always made aware the \$1 million was being earned, not simply awarded.



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# Cause-Related Marketing

Charitable Sales Promotions, Charitable Sweepstakes, and Beyond

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## Cause-Related Marketing



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**Portion of Purchase**



**POS Donations**



**Matching Campaigns**



**Social Media-Driven Donations**



**Crowdfunding**



**Charitable Sweepstakes**



## Charitable Sales Promotions

- A commercial coventurer (CCV) is generally any person who conducts a charitable sales promotion
- A charitable sales promotion is a campaign where a person **advertises** that the **purchase or use** of a **good or service** will **benefit** a charitable organization



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**Learn more >**

## In General, CCV Compliance Requires



Due  
Diligence



Contract



Registration



Bonding\*



Accounting,  
Reporting



Disclosures



BUT WAIT . . .

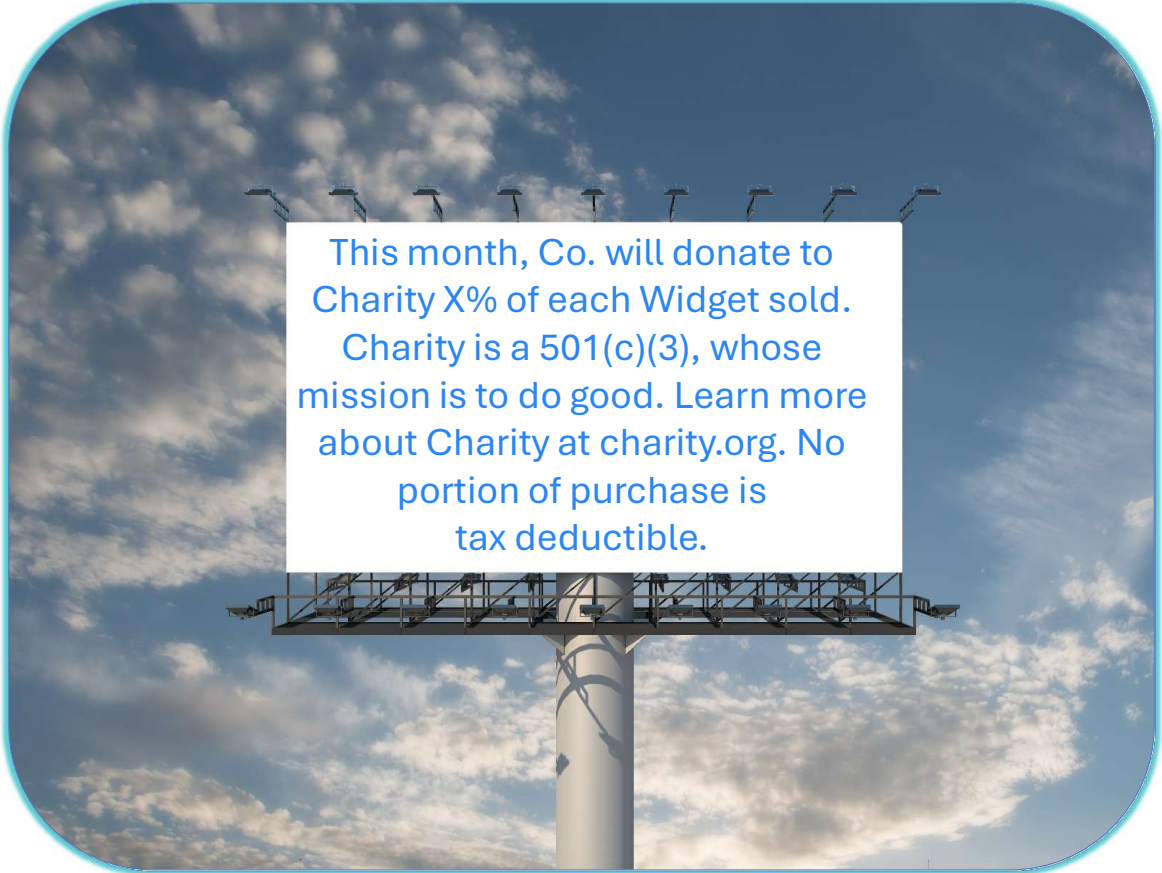


For online campaigns  
benefiting 6+ charities, see  
new Platform Rules, too

## Disclosures: Charitable Sales Promotions

- State law requirements (minimal)
- New York AG Best Practices
- BBB Wise Giving Alliance, #19
- Other industry standards
- Include at least:
  - Names of the parties
  - Dates of the campaign
  - Benefit amount per purchase
  - Statement of non-deductibility
  - Charity contact info and mission
  - Other material terms (minimums, maximums, discount codes), etc.

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This month, Co. will donate to  
Charity X% of each Widget sold.  
Charity is a 501(c)(3), whose  
mission is to do good. Learn more  
about Charity at [charity.org](http://charity.org). No  
portion of purchase is  
tax deductible.

# Free Action Campaigns

- Public not required to buy any product or use any service (donation triggered by a free action)
- How does the state define a commercial coventurer? Do “events” other than sales qualify as charitable sales promotion activity?
- Generally, follow the CCV campaign rules, including for disclosures
- If occurring online, be sure to consider the charitable fundraising platform rules that now apply, too
- Social media and other platform rules may also apply depending on where the campaign occurs online

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**TimberTech**  
EVERYTHING WOOD SHOULD BE™



#### **This Earth Day, Help Us Plant Trees**

At TimberTech, we prevent deforestation all year round with our sustainable decking. And this Earth Day, we're celebrating our planet by planting trees.



#### **This Earth Day, Help Us Plant Trees**

At TimberTech, we prevent deforestation all year round with our sustainable decking. And this Earth Day, we're celebrating our planet by planting trees.

#### **Here's how you can help:**

1. Log in to your favorite social media platform.
2. Like or share our Earth Day post.
3. We'll plant a tree on your behalf.

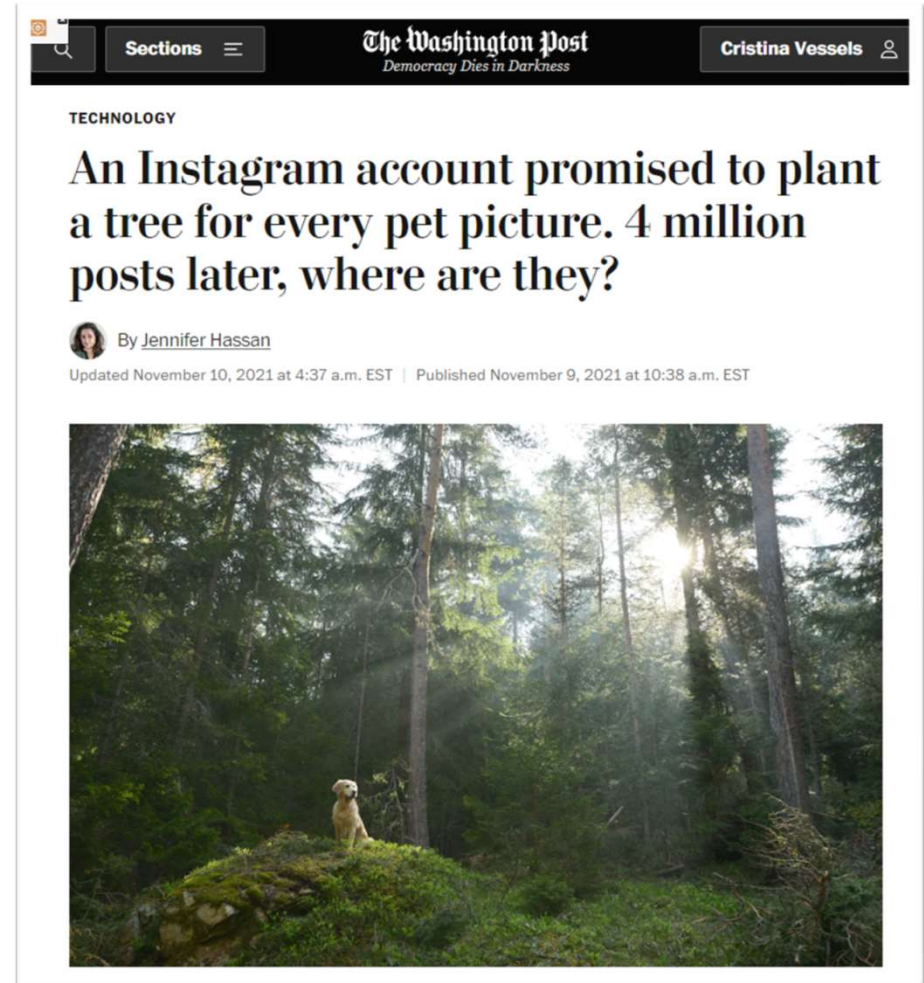




# Minimum Compliance for Free Actions

- Execute contract with charity and ensure rights to use their name and marks in advertising
- Maintain invoices and other records—these are especially critical for in-kind contributions
  - Track the number of qualifying consumer engagements and the amount of the donation to be made as a result
  - Publicize limits or restrictions on the campaign, including relevant dates, donation caps, etc.
- For free actions available online, be sure to consult the **charitable fundraising platform rules** (more on that shortly!)

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# Customer Donation Programs

- Can be straight donation requests
  - Add a dollar amount to transactions
  - Round up to the next whole dollar
  - Donate rewards and loyalty points
- Or donation requests can be paired with incentives:
  - Matching campaigns
  - Donate money or goods in exchange for a benefit (e.g., discount, freebie, etc.)

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## That spare change you donate at checkout is adding up to millions for charities

MARCH 10, 2024 · 7:00 AM ET

By Scott Neuman



So-called point-of-sale donations have sharply increased in recent years, bringing in hundreds of millions of dollars a year. But the requests to "round up" your bill for charity have really taken off.

# Compliance for Customer Donation Programs

- **Agreement:**
  - Obtain a license to use charity's name and marks
  - Outline payment terms, accounting, donation limits, limited agency to handle contributions
- **Disclosures:**
  - Amount to be transferred (100%)
  - Charity's name, mission, contact information (some linking is fine)
  - Any other material terms
- **Charitable Fundraising Platform:**
  - If the campaign is happening *online*, consider additional compliance requirements



## Support & Give

### Ayuda

Provides legal, social, and language services to help immigrants in our DMV neighborhoods.

☐ Round up and give \$0.72



## Support & Give

### Ayuda

Provides legal, social, and language services to help immigrants in our DMV neighborhoods.

☐ Round up and give \$0.72



## Charitable Sweepstakes

- A free alternative method of entry may solve the issue of consideration
- The “Donate to Enter” entry method must be optional
- Entrants using this entry method must be given an **equal opportunity** to win
- The free alternative entry method must also be **clearly disclosed**


**GIVE SMALL.  
WIN BIG.**

Support a great cause and win the experience of your dreams.  
For as little as a \$10 donation, the next winner could be you.

No donation necessary to enter or win.

## Disclosures (and Rules) for Charitable Sweepstakes

- Must be readily available to all participants and include details such as eligibility, prize details, how to enter, start and end dates, odds, etc.
- Certain “material terms” disclosures are required in all advertising: eligibility, dates/deadlines, sponsor info, prize value, odds of winning
- Some social media sites have their own rules, requiring special disclosures and releases
- Generally, it’s a good idea to also include publicity and liability disclaimers and releases, the right to modify rules, and a link to the sponsor’s privacy policy



**Must clearly identify  
post as an entry  
#[brand]SweepstakesEntry**



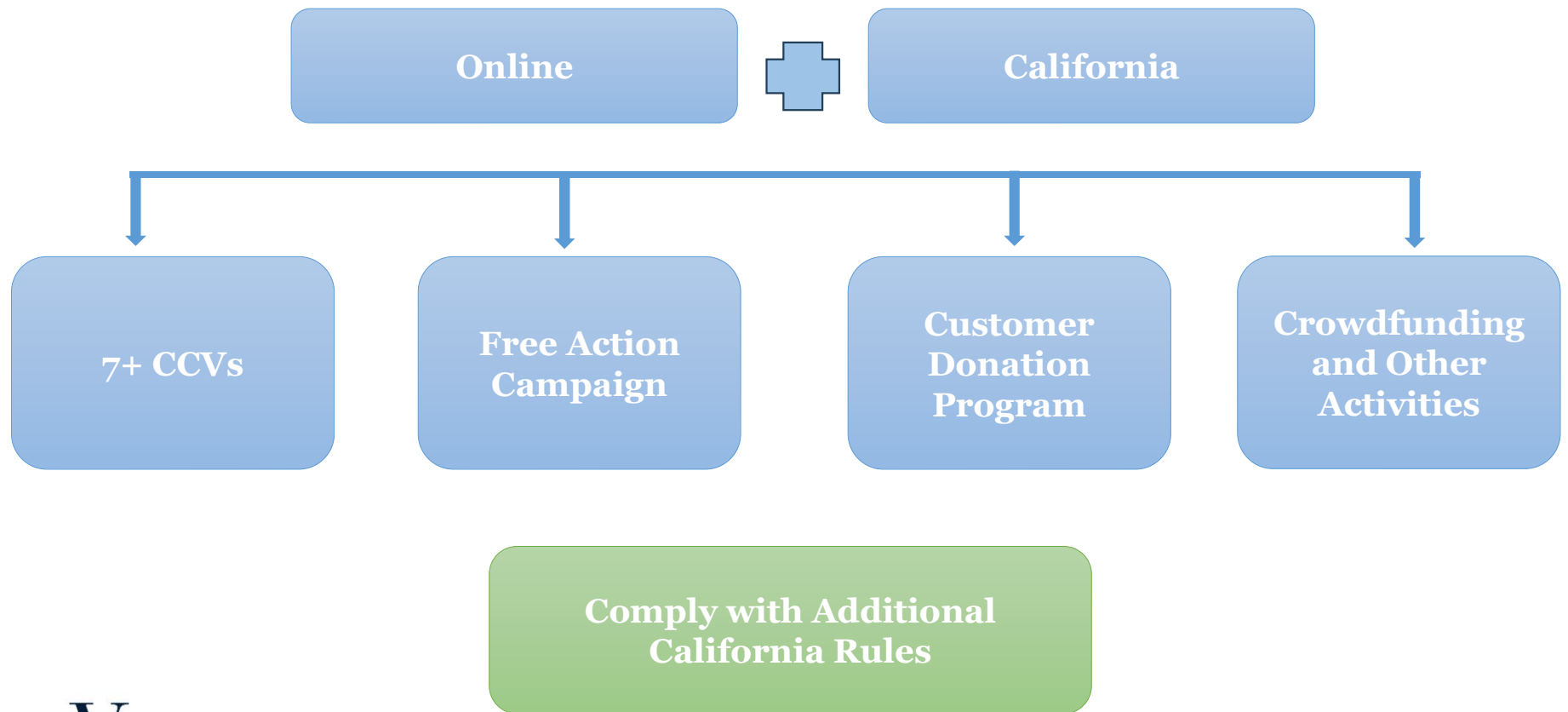
## Sidebar: “Raffles” Are Only for Qualified Charities

- Raffles involve all three elements of a lottery, but are state-sanctioned **exemptions** to the lottery rules
- A **raffle** is a prize promotion where a **qualified charitable organization** sells tickets in exchange for the chance to win
- Charitable raffles are not permissible in every state and not every charity will be eligible to conduct a raffle
- The states that do allow them have nuanced registration and administration requirements
- Companies should avoid using the term “raffle” to avoid unnecessary risk and scrutiny of charitable *sweepstakes*





# Charitable Fundraising Platforms



## **This Means Quite a Few Additional Requirements**

- Verify good standing with the IRS, California FTB and AG
- Maintain separate account(s) for charitable donations
- Observe a strict donation transfer schedule
- Provide tax donation receipts to certain donors
- Offer certain donors opt-in data-sharing choices
- Give donors opportunities to confirm their donations

# Disclosures: Charitable Fundraising Platforms

- **Content:**

- Make clear the entity or person to whom the donations will be made
- Provide a statement that the recipient charity may not receive donations and why this may occur, if at all
- Detail the maximum time it takes to send the donation to a recipient charity, and the reason for this
- Disclose the fees and other amounts charged or retained by the platform or others; includes digital payment processing fees
- Provide a statement about the tax deductibility of the donation

- **Placement:**

- The disclosures (whether full text or hyperlinks to additional text, where permitted) should be adjacent to the content being explained
- If technically impossible to be adjacent to info being explained, disclosures should be as close as possible

- **Formatting:**

- Disclosures should be formatted to clearly call attention to the information
- “Easily noticeable” and “difficult to miss”



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# International Considerations

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# International Considerations

## How do we (efficiently) address compliance and risk in multi-jurisdictional promotions?

Online gaming and sweepstakes laws can vary drastically across countries, and it may be necessary/desirable (for cost/timing reasons) to narrow the scope of the promotion to the most important “targeted” countries)

Important to check with counsel if sweepstakes or game will occur outside the U.S.

- Some countries prohibit all games of chance (Canada, Sweden)
- Some prohibit cash awards (e.g., Brazil)
- Others require rules translation/disclosures in particular languages (e.g., Mexico, Canada, France)
- Several require registration (e.g., Brazil (both sweepstakes and contests), Mexico, Quebec, Canada, Australia (certain provinces))
- Some countries require separate prize drawings for residents (Spain), limit the intellectual property rights waivers that may be required, etc.
- Some countries require promotion-related servers to be located *in* that country (Italy)
- There are also some quirky requirements for charitable programs





**What's the worst that could happen, anyway?**



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# Concurrent Federal, State, County, and Municipality Investigations and Prosecutions

Who investigates these cases?

- Criminal: Local law enforcement, state police or federal agents using the same techniques and strategies by which they prosecute murder, fraud, human trafficking
- UDAP/Consumer Protection: Federal Trade Commission, state attorneys general, and other agencies (e.g., Florida Department of Agriculture and Consumer Services)
- Also: other federal regulatory enforcement (FCC, Postal Service)
- Often follow-on class actions as well

Who prosecutes these cases?

- Federal or state prosecutors, usually with no specialized training or experience

What are the penalties?

- Millions in disgorgement and redress
- Civil and criminal penalties
- Individual liability and prison

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## But the FTC Has Lost Some of Its Bite

- ***FTC Sweepstakes Settlement (2023)***: A 2023 FTC complaint alleged that defendant sweepstakes publisher violated Sections 13(b) and 19 of the FTC Act and the CAN-SPAM Act and employed “dark patterns throughout the consumer’s experience” to encourage prospective entrants to purchase. Defendant agreed to an order requiring it to **pay \$18.5 million to consumers and to enact changes in how it conducts business online.**
- ***FTC Sweepstakes Settlement with Matthew Pisoni, Marcus Pradel, and John Leon (June 2024)***: A 2015 FTC complaint alleged that three defendants helped operate an illegal sweepstakes operation that ultimately took more than \$28 million from consumers in the U.S. and other countries by mailing consumers personalized letters falsely telling them they had won large cash prizes, and they would receive the money if they mailed back a \$20-\$30 cash fee. **The settlements permanently ban all three defendants from any involvement in any sweepstakes or prize promotion, but BCP director Samuel Levine talked about a new limit on the FTC’s powers:** While these settlements will keep defendants from harming more consumers with bogus prize claims, they will unfortunately not return money to consumers, since the Supreme Court’s decision in the AMG Capital Management case removed the FTC’s ability to put money back in consumers’ pockets.
- ***What’s coming next?***

## Questions?



**Melissa Landau Steinman**

Partner

+1 202.344.4972

[mlsteinman@Venable.com](mailto:mlsteinman@Venable.com)



**Cristina I. Vessels**

Counsel

+1 202.344.4706

[civessels@Venable.com](mailto:civessels@Venable.com)



**Shannon E. Sansom**

Associate

+1 212.218.2254

[sesansom@Venable.com](mailto:sesansom@Venable.com)

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