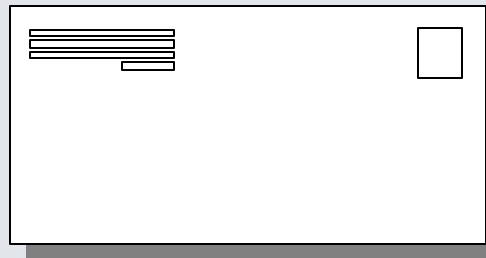


Promotions, Privacy and Postage

What You Don't Know Could Hurt You

Part I: Sweepstakes and Privacy

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Introduction

- Sweepstakes are a highly effective way to market your company's goods and services, but they are also highly regulated:
 - In-store contests
 - Direct Mail/Postal/Deceptive Mail Prevention and Enforcement Act
 - Telemarketing/E-Mail/Internet
- Failure to comply with the relevant laws can lead to regulatory inquiries, civil and criminal penalties

These Laws Do Affect You ... and More Often Than You Think

- Prize promotions are heavily regulated at both the state and federal level
- Typically, laws are directed at “chance” promotions (giveaways, sweepstakes), but states may also regulate games of skill
- Laws are often so broadly drafted that they apply to almost every type of giveaway – customer appreciation giveaways, trade show drawings, employee sales incentive contests, raffles, etc.

- With the proper disclosures and limitations, it is possible to structure a national promotion that will be in substantial compliance with all relevant state and federal requirements ... but
- **You need a good set of rules!**

Recent State Activity

States – generally the most aggressive regulators of promotional sweepstakes and contests – have been active recently:

- Eliot Spitzer's settlements with CVS and A&P supermarkets (Summer 2004)
- Contacts by other state Attorney Generals.
- Introduction of new and modified laws in state legislatures – *e.g.*, IA bill, FL bill

State Laws

- Criminal gambling laws – lottery prohibitions
- Consumer protection/false advertising laws – may be general or require particular disclosures
- States may have onerous and specific requirements and limitations applicable to games of chance specifically or promotional games generally (games of chance and skill) – e.g., highly detailed disclosure requirements, registration and bonding provisions

Federal Regulation

What are the relevant federal laws?

- The Deceptive Mail Prevention and Enforcement Act (1999) is the primary federal law affecting marketers' conduct in running promotional games
- Other relevant federal statutes: FCC Act, FTC Act, telemarketing laws, CAN-SPAM Act, postal statutes, criminal laws prohibiting lotteries

Is Your Promotion a Lawful Sweepstakes or an Illegal Lottery?

- The first step in evaluating any contest is ensuring that it is not an unlawful lottery
- Lotteries are illegal under the gambling laws in all 50 states
- Lotteries are generally defined as
 - (1) The awarding of a ***prize***
 - (2) By ***chance***, where
 - (3) The participants have been required to submit ***consideration*** to enter

Consideration

What is consideration? The giving up or undertaking something of value

- Often defined in in monetary terms
- Some states take a broader view – consideration may be anything that involves a significant expenditure of one's time and effort ... *“shoe leather consideration”*
 - Traditional case – in-store entry
 - Modern case -- Filling out a survey/agreeing to accept future marketing contacts
- Rule of thumb: the less that is required of the participant, the less likely it is to be consideration – limit amount of personal information required

More on Consideration

- Consideration issue may generally be avoided if the required action (e.g., filling out survey) is not mandatory – provide a *free alternative method of entry* (FAME)
- Another alternative -- past/historic consideration (limit to existing customers)
- Third party consideration and trade show promotions
- Consideration in Internet promotions -- a special issue

A Note on Free Alternative Methods of Entry (FAME)

- Your FAME can solve a lot of consideration issues but:
 - It must be given “equal dignity” – FAME entrants must be able to win, AND there cannot be a separate prize pool for FAME entries
 - It must be publicized – potential entrants must know it is available, and you must clearly disclose that “NO PURCHASE [is] NECESSARY TO ENTER OR WIN”
 - That said, you do not have to offer exactly the same means of entry – e.g., you can require that “free” entrants mail in a 3X5 card instead of e-mail

Official Rules

In designing your sweepstakes, the first and most important step is drafting your Official Rules.

- Essentially a contract between the sponsor and participant
- Lays out all the terms and conditions
- Insulates sponsor from liability

What Do You Need In Your Official Rules?

- “No purchase is necessary to enter this sweepstakes [or contest].” In direct mail promotions, add “A purchase does not increase your chances of winning.”
- Void where prohibited
- Start and end dates
- Eligibility requirements
- Entry instructions (including FAME)
- Winner selection and notification procedures; odds of winning

What Do You Need In Your Official Rules? (cont.)

- Prizes and their value (including special disclosures and disclaimers)
- General conditions; release and limitations on liability; reservation of publicity rights; judges' decisions final
- Where to obtain rules and winners' list
- Where to find privacy policy
- Intellectual property statement
- Sponsor's name and address

Skill Contests

- Skill contests are different -- no illegal lottery even if consideration is present in all but seven states
- What is skill? Artistic skill, essay contest, basketball shoot-out, bake-off
- Judging criteria must be clearly established and clearly described in Official Rules
- Judges should be qualified, preferably independent
- Some states have specific laws regulating disclosures required -- similar to chance contests
- Note: Cannot have any chance in how select winner, e.g., cannot randomly select winner in tiebreaker

Additional Documentation

- Rules Summary – bare minimum disclosures for use in advertising (print, broadcast, radio, mail):
 - No purchase necessary; void in _____; start/end dates; eligibility restrictions; how to enter; prize description/value; odds; where to obtain full rules; identity of sponsor
 - Change in FL policy re disclosure of full rules?
- Winners' letters
- Affidavits of Eligibility/Releases – liability, publicity, copyright
- State Registration and Bonding forms

State Laws – Registration and Bonding Requirements

- Registration and bonding of chance promotions is required in NY and FL if total value of all prizes to be awarded exceeds \$5K
- Registration is also required in RI (but no bond) if total value of all prizes to be awarded exceeds \$500 – but only for contests conducted through retail outlets. There is a question as to whether the law applies to Internet-only promotions
- AZ requires registration of “amusement gambling” skill games, but this is narrowly defined

State Laws – Rules Posting and Publication Requirements

- GA, RI and MA require posting list of winners at all retail establishments that offer opportunity to participate in contest
- FL and NY require posting of number of prizes, geographic area of promotion, complete official rules at retail stores; FL requires publication of complete official rules in all advertising, but is considering amending statute to change requirement (which is currently the most onerous in the country)

State laws – Other Considerations

- In Tennessee, a sponsor cannot require an entrant to sign a publicity release as a condition of receiving a prize. The winner must give consent and cannot be compelled to provide a release
- Promoters must also be conscious of highly regulated industries in certain states— e.g., alcoholic beverages, tobacco, motor fuel and gasoline, dairy products, time-share promotions, and financial services – as there may be special rules that apply

Deceptive Mail Prevention and Enforcement Act (1999)

- Imposes certain requirements on promoters mailing sweepstakes materials:
 - Particular language/disclosures must appear when certain sweepstakes are sent through U.S. mail
 - Sweepstakes promoters must implement a name removal notification system so that recipients of sweepstakes mailings may request that their names be removed from mailing lists
- Grants consumers a private right of action to sue
- Response to sweepstakes mailer cases: American Family Publishers, PCH

Promotions on the Internet — Are There Special Rules?

At one point, the State of FL refused to register Internet sweepstakes, reasoning that a requirement that entrants have Internet access constituted illegal consideration. The State has since reversed itself, and no state has since adopted the same reasoning

- Consideration based on Internet access requirement should not be an issue
- Nevertheless, for the risk averse, there are ways of ensuring that consideration is not an issue:
 - Provide an off-line method of entry
 - Limit eligibility to individuals who had Internet accounts prior to the first due date of the promotion

Promotions on the Internet (cont.)

- Internet promotions implicate technological considerations that must be addressed in your Rules:
 - To whom will entries be attributed (more than one person may access a given email address)?
 - Restrict eligibility/number of entries to discourage hackers
 - Tailor rules to address bugs, viruses and interruptions in service, and reserve the right to void entries that are not received or are incorrectly received
 - Reserve the right to disqualify entrants who violate the rules/interfere with the promotion
 - Address the possibility of technical difficulties, and reserve the right to cancel, suspend or modify the promotion if necessary

Promotions on the Internet

- Keep in mind that because Internet access provides you with worldwide exposure, you need to be precise with geographical restrictions in your promotion and be careful to comply with the laws of all relevant locations, particularly international locations

International Issues

If your promotion could potentially invite the participation of non-U.S. residents, you need to ensure that your promotion complies with the laws of those foreign nations or that you exclude residents from participating. For example:

- Canada forbids pure games of chance and requires a skill component
- In France, there are restrictions on “everybody wins” language
- Numerous Latin American countries require that sponsors obtain prior governmental approval
- Regardless, you should consult foreign counsel if your promotion may involve non-U.S. residents

Telemarketing

If a sponsor plans to conduct its sweepstakes in conjunction with any outbound telemarketing promotion, federal (TSR) and state telephone solicitation laws may apply, including specific requirements applicable to running promotions via the telephone

- Disclosure requirements (e.g., “No purchase necessary,” odds, material information, costs associated with entry)
- Record-keeping requirements

Privacy

One of reasons contests are so popular is because they are a good way to collect personal information from entrants for use in future marketing campaigns (e.g., name and address, survey data)

- A promoter conducting an Internet contest must have a privacy policy, which should be hyperlinked to the Rules wherever they are posted on the Internet
- Specific laws and precedent that govern how a promoter may collect and/or use entrants' personal information – e.g., COPPA, CAN-SPAM, telemarketing rules, FTC actions

Privacy

- You need to tell contest entrants what you will be doing with their names and personal information, and then follow through and do what you say what you will be doing
 - Link in your Official Rules
 - *Petsmart*, other FTC cases
- You need to protect the security of your customers' personal information

COPPA

A “sub-issue” of privacy: Any promotion in which children under the age of thirteen are allowed to enter must be compliant with the Children’s Online Privacy Protection Act

- Applies to web sites directed to children under 13 *and* web sites that have “actual knowledge” that children under 13 are submitting information

What are the requirements of COPPA?

- Privacy policy must be made available in the children's area of any website or close to any area where personal information is requested from children
- Parental notice and consent is required whenever a child's personal information is collected.
 - Exception: Email address for one-time contest entry
 - But: You cannot collect any other information (even a home address to deliver a prize), without following statutory parental consent procedures

The CAN-SPAM Act of 2003

E-mail is being used more frequently in conjunction with sweepstakes and “viral marketing campaigns.” If you use e-mail in conjunction with your sweepstakes, you may have to comply with the *Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003* (CAN-SPAM), which regulates the sending of all electronic “commercial messages”

- A “commercial message” is defined as any message that has the primary purpose of advertising or promoting a commercial product or service, including content, on an Internet website operated for a commercial purpose

Requirements of CAN-SPAM

- Messages must include a clear and conspicuous notice that the message is an advertisement or solicitation
- There can be no false or misleading header or “subject line” information
- The sender of the message must be accurately identified, and the message must include a valid physical postal address of the sender

Opting Out of Receiving Messages Under CAN-SPAM

There must be a functioning return email address or other Internet-based mechanism that the recipient can use to request not to receive future commercial messages from the sender

- Messages must include clear and conspicuous notice of the recipient's opportunity to opt-out
- Lists or menus from which the recipient may choose the specific types of commercial messages the recipient does and does not want to receive are allowed if the list has one option under which the recipient may choose not to receive any commercial messages from the sender
- Limits on transmission of recipients' information to others

Opting Out Under CAN-SPAM (cont.)

- The “opt-out” mechanism must function for 30 days after the message is transmitted
- Opt-out requests must be honored within 10 business days
- Recent FTC notice of proposed rulemaking includes a proposal that would prohibit marketers from subjecting recipients to any encumbrances before honoring opt-out requests

Miscellaneous Contest Issues

- Be careful using the phrases “everybody wins” or “free,” which may subject your promotion to specific federal and state regulations
- Trade promotions and commercial bribery
- In-pack promotions and the Kraft clause
- Federal and state Food, Drug, and Cosmetic Laws
- Special rules when you require attendance at a live presentation
- Some industries are subject to special rules: real estate and timeshare; banking Insurance; petroleum promotions; alcohol; cigarettes; etc.

Conclusion

- Sweepstakes and contests are heavily regulated, but highly effective marketing.
- By proceeding with caution at the start, you can avoid a lot of headaches – and it's not as hard as it looks. You need:
 - A good design
 - A good set of rules
 - A good marketing program
 - A good lawyer!