

# PUBLICATION

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## Keeping Your Social Media Contests Compliant

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Let's say that your marketing department plans to launch a product promotion through dedicated software applications (apps), the Internet, and/or social media, primarily accessed by the target audience on hand-held mobile devices. Your company has recently conducted similar promotions, with results it views as great success.

In the digital age, these types of promotions are a key method of effectively reaching your intended audience in a timely and cost-efficient manner. However, be aware that such promotions implicate a staggering number of laws and other limitations, some of which are mentioned below. Reliance on your standard promotion materials, drafted years (or even several months) ago, to administer such promotions, may be misinformed.

### Technical Issues

An obvious limitation on product promotions conducted via the Internet, social media, or apps is the underlying technology itself. These promotions are subject to a host of potential claims by entrants (e.g., damage to an entrant's computer/mobile device from accessing the promotion online), an entrant's inability to enter the promotion due to malfunction of the sponsor's computer system/server, and lost, interrupted, or misdirected entries. Such promotions are also subject to tampering, including flooding the promotion with multiple entries or outright corruption of the promotion. Sponsors must continually update their hardware, software, cybersecurity and technical expertise, and standard promotion materials to prevent or limit these technical failures or appropriately deal with them when they do occur.

### The Basics/State Law

As sponsors have rushed to advertise and conduct their product promotions via the Internet, social media, and apps, the basics of a legal promotion (generally governed by state law) have remained the same. A promotion (whatever a sponsor chooses to call it) cannot include all three classic elements of "gambling," (i.e., prize, chance, and consideration). "Sweepstakes" – which include the prize and chance elements – and "skill contests" or "contests" – which include the prize element and possibly the consideration element but not chance – are generally deemed legal promotions. "Lotteries" – which include all three elements – are not. However, these basics are constantly being reinterpreted and reevaluated in the contexts of new and continually-evolving technologies.

### Consideration

The precise definition of "consideration" varies from jurisdiction to jurisdiction but often centers on factors like (1) how easy or difficult it is to participate in the promotion and (2) whether an alternative method of entry (AMOE) (such as submitting an entry form via U.S. mail) is available. In the early days of Internet promotions, an entrant would need both a personal computer and a paid Internet connection, neither of which was inexpensive or widely accessible to the public. Fearing that these underlying requirements would constitute consideration, sponsors automatically included an AMOE in their sweepstakes. Over time, sponsors began to drop the AMOE due to the broader availability of public computers and free or low-cost Internet connections.

However, the rise in sponsor use of promotions focused on mobile devices and apps has revived the consideration specter. For example, does offering a promotion only through an app that must be downloaded

to the participant's smartphone implicate consideration? What if the app is free? What if it isn't? What if the participant uses some of her paid data to enter the promotion? What if she uses a wifi/free connection instead of data? What if the entry process requires not only downloading an app but also completing a lengthy entry form via the app? What if the participant doesn't have to pay for the app but does have to input credit card information before submitting his promotion entry?

## **Chance**

The specific requirements of a "contest" vary among jurisdictions, and the intricacies regarding whether a promotion includes any disqualifying element of chance are many. However, most agree that in a contest qualified judges select the winner based predominantly on his/her skill using criteria specified in the promotion's official rules. Contest questions or puzzles cannot have multiple possible answers. Spelling bees, cooking contests and math contests are usually deemed skill contests; guessing games are not. It is generally settled law that contest winners may be chosen based on the creativity and originality of their entries (e.g., essay contests, photo contests, or art contests).

To boost media-savvy audiences' participation and interest in their promotions, sponsors are increasingly turning to the public to select online "contest" winners. However, the use of a popular vote to select a winner not only promotes "vote farming" (soliciting votes using social media, email, and other means, without regard to the judging criteria) but also calls into question the promotion's status as a true contest. Arguably, a winner chosen in this manner is not selected by qualified judges or based on specified criteria or a skill. Further, allowing the public to choose a winner could lead to undesirable results for the sponsor (e.g., what if the winner's entry contains language/images/etc. that are actually uncomplimentary to the sponsor's product or brand or that defame an individual or entity?)

## **Federal Law**

### **Specific Legislation**

Sponsors using the Internet to promote or operate a sweepstakes or contest must comply with a number of specific federal acts, including the Children's Online Privacy Protection Act (COPPA), which prohibits unfair or deceptive acts or practices in connection with the collection, use, and/or disclosure of personal information from and about young children (individuals under the age of 13) on the Internet, and the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM), which establishes a set of national standards for the use and transmission of commercial email, criminalizing certain types of commercial email and giving recipients the right to opt-out of receiving certain email.

Due to the prevalence of smartphones, sponsors are anxious to advertise and conduct their promotions using texts. Promotions involving telephone (including cell/mobile phone) calls or texts are subject to the Telephone Consumer Protection Act (TCPA). For TCPA purposes, a text is the equivalent of a telephone call. Among other things, the TCPA requires a company to obtain a consumer's written consent before sending a commercial text to the consumer. The company cannot simply add such consent to its privacy policy and have the consumer accept the privacy policy change; nor can it include such consent as part of its promotion rules or use a text to obtain the required consent. The Federal Trade Commission (FTC), which administers the TCPA, has issued no guidance that would allow sponsors to work around the requirements by using push notifications within an app to administer their promotions.

### **Deceptive or Misleading Advertising**

A current hot topic in advertising is hashtag contests, where users post on social media using a unique hashtag. All Tweets/posts made during the promotion's stated entry period become entries, provided that they

include the required hashtag. Sponsors favor these promotions because they are often cheaper to administer than website-based promotions and can require relatively short lead times.

However, the FTC has expressed concern that many readers might not understand that the hashtag means that the poster made the post as part of a sweepstakes or contest and in return for a chance to win a prize. According to the FTC's Endorsement Guides, "Making the word 'contest' or 'sweepstakes' part of the hashtag should be enough. However, the word 'sweeps' probably isn't, because it is likely that many people would not understand what that means." Creative marketing departments have already concocted possible workarounds. For example, will the FTC crack down on sponsors who, arguably, can avoid these disclosure requirements by allowing entrants to simply repost a sponsor statement?

## **Other Limitations**

When advertising or operating a sweepstakes or contest via the Internet, an app, or social media, sponsors must also comply with numerous non-governmental obligations, including web site terms of use (e.g., advertising rules, community standards, and privacy policies), contracts with ad agencies or others assisting the sponsor in conducting the promotion, contracts with third parties (e.g., name and mark licensing agreements), and their own privacy policies. Failure to comply with these obligations can result in premature termination of the promotion, negative publicity, termination of the sponsor's account privileges, and/or breach of contract claims or intellectual property disputes.

For example, social media sites/platforms often have written (but sometimes difficult to locate) guidelines about advertising and operating promotions like contests and sweepstakes there. While many of the promotion guidelines contain some common requirements (e.g., each participant in a promotion must release the website/platform from any liability related to the promotion, the promotion must clearly state that the website/platform is not sponsoring, endorsing, or administering the promotion, etc.), specific guidelines do vary on social media. Confirm that your proposed promotion is an acceptable use of a particular site or platform before utilizing it to run or advertise your promotion.

Companies can benefit greatly from using evolving technology to advertise and administer their product promotions. But, as Tumblr's promotion guidelines advise marketers, "Keep in mind that you're always responsible for the legality of your contest, sweepstakes, or giveaway ... and lots of detailed state and federal laws apply (at least in the U.S.), so we urge you to take them seriously and ask a lawyer if you have questions or concerns."