

# GOING VIRAL: NAVIGATING PROMOTIONAL SWEEPSTAKES LEGALITY IN THE SOCIAL MEDIA ERA

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The impact of social media is undeniable in today's society. Whether it is utilized for personal use, maintaining family connections, or capitalizing on the latest trends, social media is interwoven into the fabric of society. These opportunities are not; however, limited only to individuals. Social media can be an invaluable marketing outlet for all businesses. It allows companies the opportunity to advertise their products and services to large audiences, connect with the public, and strengthen their brand. Of note, promotional sweepstakes are a highly effective marketing tool that companies can utilize to achieve optimal results.

With the availability and convenience of promotional sweepstakes, also comes numerous opportunities to run afoul of the law (e.g., violations of gambling prohibitions, absence of official rules, failure to comply with state registration/bonding requirements or ignoring requirements of social media platforms). This article aims to call to your attention, a few of the more common pitfalls to be aware of when offering a promotional sweepstakes.

## *Legality of Promotional Sweepstakes*

Most states have commonality in that they typically define gambling as any activity in which the following elements are present: (1) the award of a prize, (2) determined on the basis of chance, including a future contingent event outside of their control, and (3) where consideration is required to be paid. If any one of these elements is removed, then the activity is generally lawful. The key focus of this article is the removal of the element of consideration.

While there are some promotional sweepstakes that are completely free to enter (i.e., no one pays to participate), more commonly, promotional sweepstakes involve participation by purchase of a product or service. In the latter case, to remove the element of consideration and avoid the general prohibition against lotteries, companies offer an alternative method of entry, in order for participants to enter for free ("AMOE"), for those that do not want to buy the product or service being promoted. While most entries into the promotional sweepstakes will be through the purchase of the promoted product/ service, the use of the AMOE is generally an effective mechanism of legally eliminating the consideration element.

However, when offering an AMOE, there are a few key considerations to be mindful of. First, when utilizing an AMOE, the company must disclose the existence of the non-purchase method of entry in a clear and conspicuous manner. Often the words "no purchase necessary" are displayed prominently on all promotional sweepstakes advertising materials. Secondly, non-paying participants must have "equal dignity" with paying participants, (i.e., equal opportunity to enter, to

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win and to win the same prizes). For example, when utilizing a mail in AMOE entry form to request free entries, a grace period should be implemented following an entry deadline to allow for ample time for mailed in requests to be considered, thus ensuring equal dignity with paying participants.

Additionally, a paying participant cannot get a disproportionate number of entries when compared to non-paying participant. Further, non-paying participants also should have equal chances to win all prizes offered. That is, separate prize pools may invalidate the AMOE, because the non-paying participants would not have the opportunity to win *the same* prizes. Likewise, non-paying participants should not face greater odds or obstacles to winning the prizes. Any material disparity (actual or perceived) can invalidate the use of an AMOE.

### *Official Rules*

Whether realized or not, participants are entering into a binding agreement with a company when they participate in a promotional sweepstakes. Quality official rules are therefore a must when offering a promotional sweepstakes. At a minimum, official rules should include: (i) promotion start and end dates; (ii) eligibility restrictions; (iii) entry methods and restrictions; (iv) winner selection details (including judging criteria if a skill-based contest); (v) description and approximate retail value ("ARV) of the prize(s); (vi) odds of winning; (vii) where to obtain a winners' list; (viii) disclaimers and limitations of liability; (ix) name and address of the sponsor; and (x) dispute resolution provisions.

Official rules also protect both the participants as well as the company. In the event of the dispute as to the administration of the promotional sweepstakes, well-crafted rules avoid any potential misinterpretation of the company's intent and anticipate any foreseeable issues, such as, ties, prize unavailability, prize damage during shipment, and cheating by participants. Detail, clarity and accuracy are therefore crucial in drafting official rules. Companies should also consider having participants check off a box affirming they have read the official rules and agree to be bound by such rules.

### *Bonding and Registration*

Several states require registration and bonding of the promotional sweepstakes if the prizes awarded exceed a state specific set amount. To register with a state, among other items, the promotional sweepstakes official rules and registration fees are required. Further, certain states require a winner's list to be publicly submitted. In addition to registration requirements, separate bonds/trusts based on the total ARV of all prizes are required for Florida and New York. When preparing to launch a promotion, it is important to give sufficient time for registration and bonding to be approved prior to launch. Failure to carve out sufficient time to obtain any required registration approvals may result in the launch being postponed or in the need to block such states in order to start the promotional sweepstakes on time.

### *Restrictions of Social Media Platforms*

A company offering a promotional sweepstakes through the use of social media must also be mindful of the applicable social media platform's restrictions and draft the official rules in compliance therewith. This step is key as a promotional sweepstakes could be terminated prematurely for noncompliance with the social media platform's restrictions. Further, this action could result in unintended consequences with a violation of the law, as the promotional sweepstakes did not proceed as set forth in the official rules.

*Conclusion*

A promotion sweepstakes that goes viral could significantly increase the popularity of a company. Nevertheless, with the availability and convenience of social media, also comes numerous opportunities to run afoul of the law and shift any garnered popularity into notoriety. Companies using a promotional sweepstakes should be aware that they are entering into an intricate and specialized industry and must be conscious of the complex legal boundaries in which the company must adhere to.

Hiring gaming counsel familiar with promotional challenges and familiar with the appropriate safeguards, can play a pivotal role in the design, review, and, ultimately, dissemination of any online promotional sweepstakes presence, and, at a minimum, can help protect companies from humiliation due to poorly planned promotional sweepstakes or in more severe circumstances, criminal penalties resulting from improperly implemented promotional sweepstakes.

**Tags:** Sweepstakes and Promotions