CLICK TO WIN: BOOSTING THE BRAND WITH SWEEPSTAKES AND CONTESTS

Maral Kilejian
Haynes and Boone, LLP
Richardson, Texas

Michael S. Levitz
Nestle USA
Minneapolis, Minnesota

Robert E. Vinson, Jr.
Vinson Franchise Law Firm
Incline Village, Nevada

October 18-20, 2017
Palm Desert CA
# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>II. LOTTERY / ANTI-GAMBLING LAWS</td>
<td>2</td>
</tr>
<tr>
<td>A. Lottery Definition</td>
<td>2</td>
</tr>
<tr>
<td>B. Lottery Prohibitions</td>
<td>3</td>
</tr>
<tr>
<td>III. SWEEPSTAKES LAWS</td>
<td>4</td>
</tr>
<tr>
<td>A. Sweepstakes Definition</td>
<td>4</td>
</tr>
<tr>
<td>B. Sweepstakes Requirements and Restrictions</td>
<td>8</td>
</tr>
<tr>
<td>1. Federal Regulations</td>
<td>8</td>
</tr>
<tr>
<td>2. State Regulations</td>
<td>10</td>
</tr>
<tr>
<td>3. Common Law and General Statutory Issues</td>
<td>14</td>
</tr>
<tr>
<td>IV. CONTEST LAWS</td>
<td>15</td>
</tr>
<tr>
<td>A. Contest Definition</td>
<td>15</td>
</tr>
<tr>
<td>B. Contest Requirements and Restrictions</td>
<td>16</td>
</tr>
<tr>
<td>V. ANCILLARY LAWS</td>
<td>17</td>
</tr>
<tr>
<td>A. Privacy Laws</td>
<td>17</td>
</tr>
<tr>
<td>B. Trademark Laws</td>
<td>17</td>
</tr>
<tr>
<td>C. Copyright Laws</td>
<td>18</td>
</tr>
<tr>
<td>D. Rights of Publicity</td>
<td>18</td>
</tr>
<tr>
<td>E. Regulated Industries and Methods</td>
<td>19</td>
</tr>
<tr>
<td>F. International Law</td>
<td>19</td>
</tr>
<tr>
<td>IV. OFFICIAL RULES</td>
<td>20</td>
</tr>
</tbody>
</table>
A. Long-Form Rules for Sweepstakes ............................................... 20
   1. Basic Requirements ...................................................................... 20
   2. Standard Rules ............................................................................. 20
   3. Special Rules for Specific Types of Sweepstakes ....................... 25
B. Short-Form Rules for Sweepstakes ......................................................... 27
C. Rules for Contests ................................................................................... 28
   1. How to Enter ................................................................................. 28
   2. Submission Requirements ............................................................ 28
   3. Submission Restrictions ................................................................ 29
   4. Judging ......................................................................................... 29
   5. Intellectual Property and Publicity Rights ...................................... 30

VII. SOCIAL MEDIA CONSIDERATIONS ...................................................... 30

A. Platform Rules and Guidelines .......................................................... 31
   1. Twitter ........................................................................................... 31
   2. Facebook ...................................................................................... 32
   3. Instagram ...................................................................................... 33
   4. Pinterest ........................................................................................ 33
   5. General ......................................................................................... 34

B. Compliance Issues .................................................................................. 34
   1. Federal Trade Commission ........................................................... 34
   2. Statutory Disclosures .................................................................... 34
   3. User Generated Content ............................................................... 35

IV. EFFECTIVE IMPLEMENTATION IN FRANCHISE SYSTEMS ................. 35
A. Sweepstakes and Games of Chance .......................................................... 36
   1. Participating Locations Only ............................................................. 36
   2. To Compel or Not Compel ............................................................... 36
   3. While Supplies Last ..................................................................... 37
   4. Point of Sale Considerations ......................................................... 38
   5. Eligibility Issues ........................................................................ 40
   6. Protection of Game Pieces ........................................................... 41
   7. Winner’s Release and Affidavit of Eligibility ................................. 41
   8. Winners Lists .......................................................................... 42

B. Contests / Games of Skill .................................................................... 43
   1. Works for Hire .......................................................................... 43
   2. Original Works .......................................................................... 44
   3. Sponsor’s Decision Final ............................................................. 44
   4. Eligibility Issues ...................................................................... 44
   5. Winner’s Release and Affidavit of Eligibility .............................. 44
   6. Privacy Issues ........................................................................ 45

C. Fishbowl Promotions ....................................................................... 45

D. Prize Indemnity Insurance ................................................................ 46

E. Taxes on Winnings and Awards ......................................................... 47

VIII. WHEN THINGS GO WRONG .............................................................. 48
   A. FTC, Attorneys General, Courts .................................................. 48
   B. Human Error and Human Nature .............................................. 51

IX. CONCLUSION .................................................................................. 53
APPENDIX

1. Long-Form Official Rules Example .......................................................... 54
2. Short-Form Official Rules Example .......................................................... 55
3. Sweepstakes and Contests Checklists .................................................... 56

Speaker Biographies
CLICK TO WIN: BOOSTING THE BRAND WITH SWEEPSTAKES AND CONTESTS

I. INTRODUCTION

“The lust for profit by catering to and commercializing the gambling spirit has given rise to many ingenious devices . . . .”¹ These ingenious devices include sweepstakes and contests, such as:

“Get a hole in one and win a free car!”

“Submit your design for our charity event, and, if selected by our panel of judges, you will win free pizza for life!”

“Submit an essay on how our service has made a big difference in your life, and, if selected by our panel of judges, you will win a free trip!”

“Drop your business card in our fishbowl for a chance to win free lunch!”

“Scratch off your game piece for a chance to instantly win a free soda and other valuable prizes!”

“Mail in this entry form (or call this toll-free number) to enter a free drawing!”

“Bring this postcard to your local store to see if you are already a winner!”

“Collect game pieces in specially-marked packages to spell “SWEEPSTAKES” for a chance to win a valuable prize!”

“Be automatically entered into our sweepstakes every time you swipe your loyalty card at a participating location!”

“Click on this link to enter our sweepstakes for a chance to win a fabulous trip and other valuable prizes!”

“Respond to a brief online survey and be entered to win free stuff!”

“Like us (or follow us or share our post) and be entered for a chance to win!”

These types of sweepstakes and contests are widely used by franchise systems and non-franchised businesses to promote their brands. They can be powerful tools for promoting the sale of particular items or services, increasing traffic to businesses, obtaining consumer contact information, obtaining sales leads for prospective customers, developing customer loyalty, providing incentive for customers or the public to take some other action to benefit the sponsor, developing new creative ideas, developing goodwill, and raising public awareness of issues.

If properly designed and implemented, these promotions would be legal types of contests (also known as games of skill) or sweepstakes (also known as games of chance). But,

¹ Grimes v. State, 235 Ala. 192, 192, 178 So. 73, 73 (1937).
if there are problems with the design or implementation of what would otherwise be a legal
sweepstakes or contest, then the sponsor may have inadvertently created an illegal lottery or an
illegal gambling operation. There can be substantial liability for various types of legal violations
arising out of purported sweepstakes and contests, such as violation of anti-gambling and anti-
lottery laws, violation of laws governing sweepstakes and contests, breach of contract, fraud,
and violation of consumer protection and deceptive practices laws. Other risks associated with
an improperly designed or implemented promotion include waste of marketing resources,
negative publicity and loss of goodwill.

In addition to complying with laws normally affecting sweepstake and contests, a prudent
practitioner will also take into consideration ancillary legal issues commonly affecting the
promotion, such as privacy laws, trademarks, copyrights, publicity rights, special laws relating to
particular types of sponsors, prizes, promoted items and methods of solicitation, and
international laws. Many of these risks can be effectively eliminated or greatly reduced with an
adequate set of Official Rules governing the sweepstakes or contests – if the sponsor actually
follows the Official Rules.

If the sweepstakes or contest will be promoted via social media, there are extra
considerations that should be taken into account, such as proper structuring of the promotion for
social media, complying with social media terms of use, and dealing with disclosure issues. In
addition, due to the legal nature of the franchisor-franchisee relationship, there are particular
legal and practical challenges that should be addressed when sweepstakes and contests are
sponsored by franchisors or franchisees, including allowing franchisees to decide whether to
participate in a franchisor’s promotion, offering game pieces at franchised locations only “while
supplies last,” point-of-sale considerations at franchised locations, eligibility issues for
franchisees and staff, protection of game pieces from abuse, prize indemnity insurance for the
sponsor, and promotions sponsored by franchisees.

Mistakes can happen, such as flaws in the designs of sweepstakes or contests, printing
errors, lost mail, and distribution errors. Advertised prizes may not be available due to
discontinuation of service, force majeure or bankruptcy. Some people may attempt to cheat the
system. Even the most carefully-designed promotion can go awry in these and various other
ways, so practitioners need to know what to do when things go wrong with sweepstakes and
contest.

Laws governing lotteries, sweepstakes and contests vary from state to state, and
interpretation of these laws (even similar legal terms) varies among jurisdictions. This paper is
intended to discuss general legal and practical considerations for the effective design and
implementation of legal sweepstakes and contests in franchise systems. It is not intended to be
an exhaustive summary of the current state of the relevant law governing these types of
promotions.

II. LOTTERY / ANTI-GAMBLING LAWS

A. Lottery Definition

Before discussing the elements of a sweepstakes and a contest, it is necessary first to
understand the definitional elements of a lottery. A lottery is generally defined as having three
elements, all of which must be satisfied in order to constitute a lottery: (1) a prize (2) awarded by chance (3) for consideration.\(^2\)

The element of “prize” is generally defined broadly as “anything of value.”\(^3\) The element of “chance” means that the prize is awarded by a process involving random selection of the winner.\(^4\) Under the broadest interpretation adopted by some states, the element of “consideration” means “anything that is a commercial or financial advantage to the promoter or a disadvantage to any participant.”\(^5\)

Purchasing a Powerball ticket for a chance to win millions of dollars will constitute entry into a lottery. Similarly, the purchase of a raffle ticket for a drawing sponsored by a local school, church, charity or scout troop for a chance to win a modest prize will also constitute entry into a lottery.

B. Lottery Prohibitions

Lotteries may be an effective way to raise money for education or charities, but lotteries are broadly prohibited in the United States under anti-gambling laws and anti-lottery laws.\(^6\) A lottery is illegal unless it falls within an applicable statutory exemption. State-sponsored lotteries, such as Powerball, are exempt from anti-lottery laws.\(^7\) Some states also have exemptions for certain types of charitable lotteries.\(^8\)

A violation of state anti-lottery laws or anti-gambling laws is typically a misdemeanor punishable by a fine or imprisonment or both.\(^9\) The scope of criminal liability is usually quite

---

\(^2\) *Grimes v. State*, 235 Ala. 192, 193, 178 So. 73, 74 (1937); See, *e.g.*, *TEX. PENAL CODE § 47.01(7)* (2015) (a lottery is “any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win anything of value, whether such scheme or procedure is called a pool, lottery, raffle, gift, gift enterprise, sale, policy game, or some other name”).

\(^3\) *See, e.g.*, *TEX. PENAL CODE § 47.01(9)* (2015) (“‘thing of value’ means any benefit [other than free replays, such as may be won by playing a pinball machine]”).

\(^4\) *WIS. BUREAU OF CONSUMER PROTECTION, CONTESTS AND PROMOTIONS GUIDE 1* (2016), available online at [https://datcp.wi.gov/Documents/ContestsAndPromotions119.pdf](https://datcp.wi.gov/Documents/ContestsAndPromotions119.pdf) (“Chance means that the winner is chosen by the ‘luck of the draw,’ with little or no skill or ability involved.”) (last visited June 15, 2017).

\(^5\) *KAN. STAT. ANN. § 21-6403(c)* (2016); *OKLA. STAT. tit. 21, § 21-981(2)* (2016); *WIS. STAT. § 945.01(5)(b)(1)* (2016). Other states may take a narrower view. *See also* Andrea E. Friedman and Kathryn Mlsna, *You May Be a Winner! Legal Issues Affecting Sweepstakes and Contests*, ABA 24th Annual Forum on Franchising W-7, at nn.3-4 (2001).

\(^6\) *See, e.g.*, 18 U.S.C. §§ 1301-1304 & 1953(a) (2016); *id. § 1955(b)(4)* (2016) (“gambling includes . . . conducting lotteries . . .”); *see also* Friedman & Mlsna, *supra* note 5, at n.2 (listing of state statutes and cases defining illegal lotteries).

\(^7\) *See, e.g.*, *CAL. CONST. art. IV, § 19(a) & (d)* (prohibiting the sale of lottery tickets in the state, but authorizing the California State Lottery).

\(^8\) *See, e.g.*, *CAL. PENAL CODE § 320.5(a)* (2016) (exempting raffles conducted by certain private, non-profit organizations for the purpose of supporting beneficial or charitable purposes, subject to other requirements); *NEB. CODE § 9-510* (2016) (exempting lotteries conducted by certain Nebraska-based qualified nonprofit organization where the lottery gross proceeds will be $1,000 or less, the net proceeds will be used solely for charitable or community betterment purposes, and no more than one lottery will be conducted per month).

\(^9\) *See, e.g.*, *CAL. PENAL CODE § 320* (2016).
broad. Hiring a professional promotions firm to conduct a sweepstakes or contest will not normally insulate the sponsor from potential liability under anti-gambling and anti-lottery laws if the promotion is actually a lottery.

III. SWEEPSTAKES LAWS

A. Sweepstakes Definition

A sweepstakes is similar to a lottery, but eliminates the element of required consideration. To constitute a legal sweepstakes, there must be no consideration required for a chance to win the prize. The definitional elements of a sweepstakes are generally described as: (1) a prize (2) awarded by chance for (3) no required consideration. These definitional elements have the same meanings discussed above.

The element of “no required consideration” in the context of a sweepstakes merits further explanation because of its importance in avoiding illegal lotteries. The presence of monetary consideration is a fairly straightforward analysis. If a person is required to pay a fee to enter a drawing, then the element of consideration would clearly be present. If an entrant is required to purchase an item or service as a condition to entry in a drawing, then the element of consideration is usually present. In some states, if there is no price differential between a purchase that includes a sweepstakes entry or game piece and one that does not, the required purchase would not be considered to be required consideration for the entry of the sweepstakes. In other states, any required purchase in connection with a sweepstakes entry would likely be interpreted as consideration.

If a purchase is required during a period of eligibility that is limited to a time period before any announcement of a sweepstakes, then no consideration is deemed to be present because the purchase (consideration) would have previously occurred independent of the promotion.

10 See id. (regarding “every person who contrives, prepares, sets up, proposes, or draws any lottery”); id. § 321 (regarding “every person who sells, gives, . . . furnishes or transfers . . . any ticket, chance, share, or interest, or any paper, certificate, or instrument purporting or understood to be or to represent any ticket, chance, share, or interest in . . . any lottery”); id. § 322 (regarding “every person who aids or assists, either by printing, writing, advertising, publishing, or otherwise in setting up, managing, or drawing any lottery, or in selling or disposing of any ticket, chance, or share therein”).

11 See, e.g., OHIO REV. CODE ANN. § 2915.01(BBB) (2016) (“Sweepstakes” means any game, contest, advertising scheme or plan, or other promotion where consideration is not required for a person to enter to win or become eligible to receive any prize, the determination of which is based upon chance.”).

12 See, e.g., WASH. REV. CODE § 9.46.0356(4)(a) (2016) (no person eligible to receive a prize in a promotional sweepstakes may be required to pay any consideration to the promoter or operator of the business in order to participate in the sweepstakes).

13 See, e.g., id. § 9.46.0356(4)(b) (no person eligible to receive a prize in a promotional sweepstakes may be required to purchase any service, goods, wares, merchandise, or anything of value from the business, subject to certain exceptions).

14 See, e.g., NEV. REV. STAT. § 462.105(3)(a) (2016) (a person will not be deemed to have paid consideration for entry into a lottery by virtue of any payment for which the person received fair value for the payment).

15 See, e.g., Vt. Att'y Gen. CP Rule 109.01(b) (2013) (unfair and deceptive trade act and practice includes soliciting someone to engage in any sweepstakes which “requires any kind of entry fee, service charge, purchase or similar consideration in order to enter or to continue to remain eligible”).

This occurs, for example, in “customer-only” drawings where every customer during a certain period already concluded is entered into a later drawing to win a prize. This practice is generally acceptable as a legal sweepstakes, but the sponsor must be careful not to offer this type of promotion so often that customers begin making purchases in anticipation of being entered into a drawing.17

Some sweepstakes-type promotions have been structured to eliminate payment of any consideration as a condition to entry but to require payment of consideration by the winners in order to claim the prize. Although this technique may be successful in avoiding anti-lottery laws and sweepstakes laws, this type of post-drawing consideration violates the prize notification statutes in many states.18 These types of laws generally prohibit the sponsor from requiring a winner to pay a fee, make a purchase, or give other consideration as a condition to claiming a prize.19 This includes schemes where the payment to the sponsor is characterized as being for “shipping and handling charges,” “processing fees,” “insurance” or “taxes” to claim a prize.20

Determination of the existence of non-monetary consideration is even more challenging.21 Under sweepstakes and lottery laws, “consideration” generally includes the required expenditure of “substantial time or energy” which benefits the sponsor in some way.22 Examples of actions required for entry in a drawing that have been found to constitute non-monetary consideration in some states include:

- Making weekly visits to a store;23
- Studying advertising, which required expending “time, thought, attention and energy;”24
- Spending hours following a football prediction contest.25

---

17 Id.

18 See, e.g., CAL. BUS. & PROF. CODE § 17537(b) (2016) (“it is unlawful to notify any person by any means, as a part of an advertising plan or program, that he or she has won a prize and that as a condition of receiving such prize he or she must pay any money or purchase or rent any goods or services”). See Friedman & Msna, supra note 5, at Appendix 1 (for a summary of various state prize notification laws).

19 See, e.g., GA. CODE § 10-1-393(b)(16)(C) (“A promotion shall be a violation of this paragraph if a person is required to pay any money including, but not limited to, payments for service fees, mailing fees, or handling fees payable to the sponsor or seller or furnish any consideration for the prize”).


21 See Federal Communication Comm’n v. American Broad. Co., 347 U.S. 284, 293 (1954) (“So varied have been the techniques used by promoters to conceal the joint factors of prize, chance, and consideration, and so clever have they been in applying these techniques to feigned as well as legitimate business activities, that it has often been difficult to apply the decision of one case to the facts of another.”).

22 Id. at 293-97.


Based on these authorities, other actions that would likely a form of non-monetary consideration for entry in a sweepstakes-type promotion include visiting a specified location requiring substantial effort or expense (such as the Smithsonian Air & Space Museum), attending a sales presentation (including similar actions, such as test-driving a car or touring a model home), watching a movie in a theater, or answering a lengthy survey.

Examples of actions required for entry in a drawing that generally do not constitute consideration for purposes of applicable sweepstakes and lottery laws include:

- Watching a television program or listening to a radio program and correctly answering questions based on broadcasts information or clues;26
- Calling or writing the sponsor to request game pieces;27
- Traveling to the sponsor’s local place of business to deposit the entry form;28
- Mailing in an entry form (and paying the required standard postage);29
- Requesting a toll-free number by mail (for later telephone entry) or completing and mailing in an official entry blank;30
- Placing or answering a telephone call;31
- Completing an entry form or customer survey;32
- Purchasing a newspaper, magazine or a sporting event program in order to obtain a printed entry blank included in the publication;33
- Furnishing proof of purchase.34

28 California Gas Retailers v. Regal Petroleum Corp., 50 Cal. 2d 844, 861-62, 330 P.2d 778 (1958); Wis. Stat. § 945.01(5)(b)(f) (2016) (“visiting a mercantile establishment or other place without being required to make a purchase or pay an admittance fee”).
29 Haskell v. Time, Inc., 857 F. Supp. 1392, 1404 (E.D. Cal. 1994); Wis. Stat. § 945-01(5)(b)(d) (2016) (“sending the coupon or entry form and proof of purchase by mail to a designated address”).
32 Id.; Wis. Stat. § 945-01(5)(b)(2)(b) (2016) (“filling out a coupon or entry form that is received through the mail or published in a newspaper or magazine, if facsimiles of the coupon or entry form or handwritten and other informal entries are acceptable or if no purchase is required”).
34 Wis. Stat. § 45-01(5)(b)(2)(c) (2016) (“furnishing proof of purchase if the proof required does not consist of more than the container of any product as packaged by the manufacturer, or a part of the container, or a facsimile of either”).
• Signing publicity, liability or eligibility releases or assuming liability for federal, state or local taxes.\textsuperscript{35}

Similarly, the Federal Internet Gambling Prohibition Act\textsuperscript{36} adopts the standard that participants who do not risk anything of value other than their own personal efforts in playing a game have not engaged in gambling.\textsuperscript{37} Additionally, the Federal Internet Gambling Prohibition Act expressly excludes access to the Internet as any component of a “bet or wager.”\textsuperscript{38}

Based on these authorities, it is likely that the following personal efforts of entry into a sweepstakes using electronic means would not be interpreted as requiring consideration: clicking on a link and filling out an online entry form; sending or receiving an email message, text message or tweet; visiting a website and answering a brief questionnaire; “liking,” “friending,” “reposting,” “pinning,” “retweeting,” and the like in social media; and downloading a free app. However, it is possible that law enforcement authorities may reach an opposite conclusion.

A key aspect of the “consideration” element under sweepstakes law is whether consideration is “required” for entry. There exists a safe-harbor technique for ensuring that the lottery definitional element of “consideration” is negated in order for a promotion to qualify as a legal sweepstakes.\textsuperscript{39} This is generally referred to as an “alternative method of entry” or “AMOE.” As its name suggests, an alternative method of entry is a method of entering the promotion that is different than the standard method of entry and that requires no consideration.\textsuperscript{40} In order to qualify as an AMOE, the AMOE must be clearly and conspicuously disclosed, and entries submitted by AMOE must be of equal dignity as other methods of entry.\textsuperscript{41} Equal dignity requires that AMOE entries be treated the same as entries received by the standard method of entry. Due to the important role that an AMOE plays in rendering an otherwise illegal lottery into a legal sweepstakes, it is critical that the AMOE not require any consideration. If there is any form of consideration arguably involved in standard sweepstakes entries, then it is prudent to include an AMOE in the design of a sweepstakes.

\begin{itemize}
\item \textsuperscript{35} CONN. GEN. STAT. § 42-296 (2015).
\item \textsuperscript{36} 31 U.S.C. § 5362.
\item \textsuperscript{37} Id. § 5362(1)(E)(viii)(I).
\item \textsuperscript{38} 31 U.S.C. § 5362(1)(E)(viii)(I).
\item \textsuperscript{39} See, e.g., WASH. REV. CODE § 9.46.0356(4)(b) (2016) (the promoter or sponsor of a promotional sweepstakes may give additional entries or chances upon purchase of service, goods, wares, or merchandise if the promoter or sponsor provides an alternate method of entry requiring no consideration (except in connection with sweepstakes entered through direct mail solicitations)).
\item \textsuperscript{40} Id.
\item \textsuperscript{41} CAL. BUS. & PROF. CODE § 17539.15(c) (2016) (“sweepstakes entries not accompanied by an order for products or services shall not be subjected to any disability or disadvantage in the winner selection process to which an entry accompanied by an order for products or services would not be subject”).
\end{itemize}
B. Sweepstakes Requirements and Restrictions

1. Federal Regulations

At the federal level, sweepstakes are governed by Federal Trade Commission regulations, the Deceptive Mail Prevention and Enforcement Act administered by the U.S. Postal Service, and Federal Communication Commission regulations. Additionally, the Internal Revenue Service may impose certain requirements on sponsors of sweepstakes depending on the value of the prize awarded.

a. Federal Trade Commission

Section 5(a) of the Federal Trade Commission Act prohibits “unfair or deceptive acts or practices in or affecting commerce.” Under the Federal Trade Commission Act, advertising must be truthful and non-deceptive, and advertisements cannot be unfair.

In the context of advertising sweepstakes and contests, the FTC advises that:

Sweepstakes-type promotions that require a purchase by participants are illegal in the United States. Other agencies, including the United States Postal Service (USPS) and the Federal Communications Commission (FCC), also enforce federal laws governing contests and prize promotions. And each state has laws that may require promoters to make disclosures, seek licensing, or post a bond. Since state laws vary, check with the Attorney General’s Office in the state(s) in which you plan to advertise. If a contest or sweepstakes involves telephone calls, the FTC’s Telemarketing Sales Rule requires specific disclosures, such as the odds of winning a prize, how to participate without buying anything, and that no purchase or payment is required to win. If pay-per-call services are involved, the FTC’s 900 Number Rule requires certain disclosures. For more information, ask the FTC for the publications Complying with the Telemarketing Sales Rule and Complying with the 900 Number Rule.


43 FEDERAL TRADE COMM’N, ADVERTISING FAQS: A GUIDE FOR SMALL BUSINESS (2001), https://www.ftc.gov/tips-advice/business-center/guidance/advertising-faqs-guide-small-business (last visited June 15, 2017) [hereinafter FTC ADVERTISING FAQS]. An ad is considered to be deceptive if it contains a statement or omits information that is likely to mislead consumers acting reasonably under the circumstances, and is important to a consumer’s decision to buy or use the product. FEDERAL TRADE COMM’N, FTC POLICY STATEMENT ON DECEPTION (October 14, 1983), available online at https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf (last visited June 15, 2017). An ad or business practice is considered to be unfair if it causes or is likely to cause substantial consumer injury which a consumer could not reasonably avoid, and it is not outweighed by the benefit to consumers. Federal Trade Comm’n, FTC Policy on Unfairness (December 17, 1980), available online at https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness (last visited June 15, 2017).

44 FTC ADVERTISING FAQS. The Telemarketing Sales Rule, 16 C.F.R. § 310 requires disclosure of the following information in telemarketing calls regarding sweepstakes before a customer consents to pay for goods or services offered: the odds of being able to receive the prize; that no purchase or payment is required to win a prize or to participate in a prize promotion and that any purchase or payment will not increase the person’s chances of winning; details regarding the AMOE; and all material costs or conditions to receive or redeem a prize. Id. § 310.3(a)(1)(iv) & (v). The 900 Number Rule, 16 C.F.R. § 308, requires the following disclosures in pay-per-call service advertisements that promote sweepstakes: the odds of winning any prize, award, service, or product; that calling the pay-per-call number to enter the sweepstakes is not required; that there is a free method of entering the sweepstakes; instructions on how to enter free of charge or where consumers can write or call for that information; and, if the ad provides a description of the prize, the description must be truthful and accurate. Id. § 308.3(c)(1).
The FTC also has specific guidance for contests and sweepstakes on social media that will be discussed below. 45

b. Deceptive Mail Prevention and Enforcement Act

The Deceptive Mail Prevention and Enforcement Act, 46 administered by the US Postal Service, applies to any matter that includes entry materials for a sweepstakes or contest mailed through the U.S. Postal Service. 47

For sweepstakes, this law requires that the mailed matter clearly and conspicuously display certain disclosures. These disclosures must be “presented in a manner that is readily noticeable, readable, and understandable to the group to whom the applicable matter is disseminated.” 48 The required disclosures include: no purchase is necessary to enter; a purchase will not improve an entrant’s chances of winning; all terms and conditions of the sweepstakes, including the rules and entry procedures; identification of the sponsor or mailer, including its principal place of business or contact address; the estimated odds of winning each prize; the quantity, estimated retail value, and nature of each prize; and the schedule of any payments made over time. 49 Additionally, the Act prohibits: any representation that individuals not purchasing products or services may be disqualified from receiving future sweepstakes mailings; any requirement that an entry be accompanied by an order or payment; any representation that the recipient is a winner of a prize unless that individual has actually won such prize; and any representation that contradicts, or is inconsistent with the sweepstakes rules or any required disclosure. 50

For contests, the Act requires the following disclosures be clearly and conspicuously displayed: all terms and conditions of the skill contest, including the rules and entry procedures for the skill contest; identification of the sponsor or mailer, including its principal place of business or contact address; the number of rounds or levels of the contest and the cost to enter each round or level; that subsequent rounds or levels will be more difficult to solve; the maximum cost to enter all rounds or levels; the estimated number or percentage of entrants who may correctly solve the skill contest or the approximate number or percentage of entrants correctly solving the past 3 skill contests conducted by the sponsor; the identity or description of the qualifications of the judges if the contest is judged by other than the sponsor; the method used in judging; the date by which the winner or winners will be determined and the date or process by which prizes will be awarded; the quantity, estimated retail value, and nature of each prize; and the schedule of any payments made over time. 51


47 Id. § 3001(k)(3).

48 Id. § 3001(k)(1)(A).

49 Id. at (k)(3)(A)(ii)(I) – (V).

50 Id. at (k)(3)(A)(ii)(VI) – (IX).

51 Id. § 3001(k)(3)(B)(ii).
c. Federal Communication Commission

The Federal Communications Commission’s Contest Rule (the “FCC Contest Rule”) applies to sweepstakes and contests which are conducted by an FCC broadcast licensee and which are advertised or broadcasted by the licensee.\(^{52}\) The FCC Contest Rule requires the licensees to fully and accurately disclose the material terms of the promotion, either by broadcasting those terms or by making them available in writing on a publicly-accessible Internet website.\(^{53}\) The FCC Contest Rule also requires the licensees to conduct the contest substantially as announced, and prohibits any materially false, misleading or deceptive contest description.\(^{54}\) Due to the fact that the FCC Contest Rule is of limited application, further discussion of the FCC Contest Rule is outside the scope of this paper.

d. Internal Revenue Service

Prizes awarded through sweepstakes and contests are considered to be income of the recipient and subject to U.S. federal income taxes.\(^{55}\) If a prize has a fair market value of $600 or more, the sponsor of the promotion has a duty to report to the IRS (and to the recipient) the award of the prize to the recipient using IRS Form 1099-MISC by January 31 of the year following the year in which the prize was awarded.\(^{56}\) Regardless of the value of the prize, the recipient is required to include the value of the prize in its income for the year in which the prize was received.

A prudent sponsor will require the winner to submit an affidavit of relevant facts as a condition to awarding the prize, which will typically include a statement of the winner’s social security number. If the winner of a sweepstakes or contest prize valued at $600 or more refuses to provide his or her social security number, then the sponsor would be required to withhold taxes from any prize awarded in that situation.\(^{57}\) However, the better practice would be for the sponsor to refuse to award any prize unless the complete required affidavit is provided. The necessity for the winner to have a valid social security number is the primary reason that eligibility for most US-based sweepstakes and contests offering a prize valued at $600 or more is usually limited to legal residents of the United States.

2. State Regulations

Many states restrict or otherwise regulate some aspects of sweepstakes promotions.\(^{58}\) Some state laws are limited to certain types of sweepstakes. For example, the Florida

\(^{52}\) 47 C.F.R. § 73.1216(a).

\(^{53}\) Id.

\(^{54}\) Id.

\(^{55}\) 26 U.S.C. § 74(a) (“gross income includes amounts received as prizes”).


\(^{57}\) Id. at Box 4 (page 6).

\(^{58}\) See THE ASSOCIATION OF MAGAZINE MEDIA, HANDBOOK OF CONSUMER MARKETING: SELECTED FEDERAL AND STATE LAWS ON MARKETING (undated), available online at http://www.magazine.org/node/29332 (last visited June 15, 2017) (for a list of state laws and regulations regarding sweepstakes and contests).
sweepstakes laws apply only to game promotions in connection with and incidental to the sale of consumer products or services. Rhode Island sweepstakes laws apply only to “game, contest, or other promotion or advertising scheme or plan whereby a retail establishment offers the opportunity to receive gifts, prizes, or gratuities, as determined by chance, in order to promote its retail business, where the total announced value of the prizes offered to the general public is in excess of five hundred dollars ($500.00).”

State regulations of sweepstakes generally involve one or more of the following elements: (1) mandatory disclosures; (2) state registrations; (3) trust account / surety bond; (4) advertising/promotional restrictions; (5) dealer coercion; (6) operational restrictions; (7) winners lists; (8) special selection prohibitions; (9) sales presentation restrictions; (10) solicitation materials; and (11) recordkeeping.

a. Mandatory Disclosures

State mandatory disclosure laws generally require that the rules of the sweepstakes or contest be conspicuously posted at each retail outlet or place where the promotion may be played or participated in by the public. These laws typically also require that certain information be disclosed in all advertising for the sweepstakes or contest. Under Florida law, for example, advertising copy must include all rules of the promotion unless the advertising copy includes a website address, a toll-free telephone number, or a mailing address where the full rules and regulations may be viewed, heard, or obtained for the full duration of the game promotion, in which case, the advertising copy need only include the material rules. Under New York law, a statement showing the minimum number and value of prizes available to be won over a stated period of time and stated geographic area must be included in all advertising copy. Mandatory disclosures for certain types of sweepstakes notifications may include: the name and address of the sponsor, the retail value and odds of winning each prize, eligibility restrictions; and any shipping or handling fees.

b. State Registrations

In Florida, New York and Rhode Island, certain sweepstakes must be registered with the state before being offered or promoted. Under Florida law, the operator of a game promotion in which the total announced value of the prizes offered is greater than $5,000 must file with the Florida Department of Agriculture and Consumer Services a copy of the rules and regulations of the game promotion and a list of all prizes and prize categories offered, and must pay a filing fee of $100 at least 7 days before the commencement of the game promotion. Under New

---

59 FLA. STAT. § 849.094(1)(a) (2016).
62 FLA. STAT. § 849.094(3) (2016).
63 N.Y. GEN. BUS. LAW § 369-E(2) (2016).
64 See, e.g., WIS. STAT. § 100.171(3) (2016).
York law, the sponsor of a sweepstakes that promotes consumer products or services and has a total prize value greater than $5,000 must register the promotion with the New York Department of State, which requires the payment of a $100 filing fee at least 30 days before the start of the sweepstakes. Under Rhode Island law, the sponsor of a sweepstakes offered by a retail establishment in order to promote its business where the total announced value of the prizes is greater than $500 must first register the promotion with the state and must pay a filing fee of $150.

c. **Trust Account / Surety Bond**

Under Florida law, unless waived by the Florida Department of Agriculture and Consumer Services, the operator of a sweepstakes subject to registration in the state must also establish a trust account or surety bond in an amount sufficient to pay or purchase the total value of all prizes offered in the promotion as security for proper payment of the prize amounts. New York law provides similar requirements but without any express provisions for possible waiver of the requirements.

d. **Advertising / Promotional Restrictions**

Many states criminalize the printing, publishing or circulating of any false, deceptive, or misleading literature or advertising material used in connection with sweepstakes.

e. **Dealer Coercion**

In some states, it is illegal for any person to coerce a retail dealer to participate in any sweepstakes. Under the relevant statutes, coercion can be inferred where a course of business conduct between a supplier and a dealer extending over a period of 1 year or longer is materially changed for no legitimate business reason coincident with a failure or refusal of the dealer to participate in a sweepstakes.

f. **Operational Restrictions**

In order to preserve fairness of sweepstakes, some states have statutes imposing operational requirements for sweepstakes. For example, in Florida it is unlawful for any operator of a covered sweepstakes to arbitrarily remove, disqualify, disallow, or reject any entry,

---


68 FLA. STAT. § 849.094(4) (2016).


or to fail to award the prizes offered. In Rhode Island, it is unlawful for any operator of a covered sweepstakes to fail to distribute the offered gifts, prizes, or gratuities to designated winners.

**g. Winners Lists**

In some states, statutes require sweepstakes operators to provide the relevant state agencies a list of: the names and addresses of all winners of prizes valued at $25 or more; the value of prizes won by each winner; and the dates the prizes were won or delivered. Many states require that the sweepstakes operator make available, without charge, a list of winners to anyone requesting it. Some states require the winners list for certain types of sweepstakes to be posted at all retail establishments that offered the opportunity to participate in the promotion.

**h. Special Selection Prohibitions**

In many states, it is unlawful for any operator to design, engage in, promote, or conduct a sweepstakes in which the winner may be predetermined. Similarly, it is unlawful to allocate a winning game or any portion thereof to certain lessees, agents, or franchises, or to allocate a winning game or part thereof to a particular period of the game or to a particular geographic area. In some states, this is expressed as a prohibition on dispersing gifts, prizes, or prizewinning objects to predetermined individuals or retail establishments.

**i. Sales Presentation Restrictions**

Some states have statutes that impose additional obligations in connection with any sweepstakes offered in connection with any sales presentation, seminar or the like. For example, under Maryland law, “a person may not notify any other person by any means, as part of an advertising scheme or plan, that the other person has won a prize, received an award, or has been selected or is eligible to receive anything of value if the other person is required to purchase goods or services, pay any money to participate in, or submit to a sales promotion effort.” Under Georgia law, persons who are offered an opportunity to participate in a sweepstakes involving a sales presentation must be given written disclosures of certain

---

73 FLA. STAT. § 849.094(2)(b) & (c) (2016).


76 FLA. STAT. § 849.094(5) (2016).

77 See, e.g., GA. CODE § 10-1-393(b)(16)(M) (2016).

78 See, e.g., FLA. STAT. § 849.094(2) (2016).

79 FLA. STAT. § 849.094(2) (2016).


81 MD. COM. LAW CODE § 13-305(b) (2016).
information before the person travels to the place of the sales presentation or, if no travel by the participant is necessary, before the start of any sales presentation.82

j. Solicitation Materials

Many states impose restrictions and requirements on the content of solicitation materials used in connections with a sweepstakes.83 For example, under California law, sweepstakes solicitation materials that include sweepstakes entry materials shall: not represent that a person is a winner or has already won a prize unless that person has in fact won; include clear and conspicuous statement of the no-purchase-or-payment-necessary message; not represent that a person has been specially selected unless it is true; not represent that a person is being notified a second or final time of the opportunity to receive or compete for a prize, unless that representation is true; and contain a copy of the official rules.84

k. Recordkeeping

Various states impose recordkeeping requirements in connection with sweepstakes. For example, Florida requires that all winning entries must be held by the operator for a period of 90 days after the close or completion of the promotion.85 In New York every person engaging in any sweepstakes must maintain “complete records” of the promotion for a period of 6 months after the end of the sweepstakes.86 In Rhode Island, every person engaging in any sweepstakes must maintain “adequate records to enable the person, firm, or corporation to report to the secretary of state, upon his or her request, the name and address of each winner of every prize having a value of more than twenty-five dollars ($25.00), the description of the prize won by each person, and the date when the prize was delivered to each person.”87

3. Common Law and General Statutory Issues

In addition to the regulatory requirements and restrictions governing sweepstakes, these types of promotions are also governed by general principles of contract law, general principles of fraud, and statutory consumer protection laws.

Under basic principles of contract law, the advertising or other marketing of a sweepstakes constitutes an offer for a unilateral contract.88 A person desiring to enter the sweepstakes can accept this offer only by performing the required act of entering the

84 CAL. BUS. & PROF. CODE § 17539.15 (2016).
85 FLA. STAT. § 849.094(5).
87 R.I. GEN. LAWS § 11-50-3 (2016).
88 See Lucas v. Godfrey, 161 Wis. 2d 51, 58, 467 N.W.2d 180 (1991) (a sweepstakes entrant who performs the act requested by the sponsor of the promotion (e.g. sending in an entry form) accepts the offer to enter the sweepstakes and forms a valid and binding contract with the sponsor). See also Harms v. Northland Ford Dealers, 1999 S.D. 143, 602 N.W. 2d 58 (1999) (golf tournament offering a prize for hole-in-one was an offer for a unilateral contract, which created an enforceable contract when the offeree accepted by performance).
sweepstakes. Upon acceptance of the offer, a valid and binding contract will be formed, which can give rise to contractual liability if breached by the sponsor. The terms of the contract will be governed by the "Official Rules" announced by the sponsor. The Official Rules for some sweepstakes and contests expressly state that the Official Rules are a binding contract between the entrant and the sponsor. Others may simply state that the entrant is bound by the Official Rules. Either method should be effective to invoke the Official Rules as part of the offer. Typically, breach of contract issues arise only when the sponsor does not adhere to the requirements of the Official Rules.

A sweepstakes sponsor can incur liability in tort if there is any fraud or misrepresentation involved in the solicitation or conduct of the sweepstakes. Typically, these type of tort issues arise when the sponsor intentionally conducts a sham sweepstakes, or when the sponsor fails to accurately describe the sweepstakes in the Official Rules and promotional materials.

Certain violations of states sweepstakes laws may expressly constitute unfair and deceptive trade acts and practices. Additionally, consumer protection laws and deceptive practices laws may subject a sweepstakes sponsor to liability if members of the public, who are acting reasonably under the circumstances, are likely to be deceived by the sweepstakes. This type of liability may result in statutory damages and penalties.

IV. CONTEST LAWS

A. Contest Definition

A contest is similar to a lottery, but is not a lottery because one of the definitional elements of a lottery is absent. To constitute a legal contest, the prize must be awarded on the basis of the participant's skill rather than chance. So, the definitional elements of a contest are: (1) a prize (2) awarded by skill not by chance. These definitional elements have the same meanings discussed above.

89 Harms v. Northland Ford Dealers, 602 N.W. 2d at 61.
90 Id.
91 Id. (contestant was not bound by sponsor's rules that were not included in promulgated contest rules).
92 See, e.g., Vt. Att'y Gen. CP Rule 109.01.
93 Freeman v. Time, Inc., 68 F.3d 285, 289 (9th Cir.1995) (a false advertising claim under the California Unfair Business Practices Act in connection with a sweepstakes requires a showing that reasonable consumers are likely to be deceived). See also FLA. STAT. § 849.094(11) (2016); GA. CODE § 10-1-393(a) (2016).
94 Courts generally distinguish between participating in a game of skill (even one requiring an entry fee, so long as the entry fees do not comprise the prize pool) versus betting or wagering on a game of skill. The former may be a legal contest, while the latter is probably illegal gambling. See Op. S.C. Att'y Gen. August 29, 2003, available online at http://2hsvz0l74ah31vgcm16peuy12iz.wpengine.netdna-cdn.com/wp-content/uploads/2013/03/03aug-29-Mcconnell.pdf (last visited June 15, 2017).
The definitional element of "skill" means that the prize must be awarded on the basis of some bona fide skill.\textsuperscript{96} Examples of bona fide skills include artistic and other creative talent, specialized knowledge, mental ability and athletic ability. Examples of legitimate skill contests include essay contests, poetry contests, art contests, recipe contests, photography contests, trivia contests, word games, puzzle solving, spelling bees, golf tournaments, fishing tournaments, and the like. Guessing games and contests involving predictions of future events are generally considered to be games of chance rather than games of skill. Because pure skill and pure chance may be viewed as ends of a spectrum, the majority rule appears to be that a game will be classified as a game of skill if skill is the predominant element (i.e. accounting for more than 50\% of the results) regardless of the presence any element of chance.\textsuperscript{97}

In order to maintain classification as a legal contest and to avoid classification as an illegal lottery, the safest practice is to ensure that the element of chance is negated throughout the contest. So, in case of a tie, the winner needs to be selected by some appropriate method other than a random tie-breaker procedure. To help demonstrate that skill is the predominant element in a contest, the Official Rules should adequately describe the type of contest, the entry requirements, the judging method, and the judging criteria and weight.

Note that the presence or absence of consideration is not an element in the legal definition of a contest. So, in most states, a sponsor may charge a fee or require a purchase as a condition to entry in a contest, and a free alternative method of entry is not required. Some states, however, impose restrictions on consideration for entry in contests. For example, under Arizona law, entry in a legal intellectual contest may require the purchase of a product at the established purchase price but not the payment of any fee,\textsuperscript{98} and the person conducting the contest must register with the Arizona attorney general's office and comply with other requirements.\textsuperscript{99} Under Maryland law, required disclosures to participants in certain contests must include notification that no purchase or payment is required to receive a prize.\textsuperscript{100} Under North Dakota law, a sponsor may not require a person to pay any money to the sponsor as a condition of awarding the person a prize.\textsuperscript{101}

B. Contest Requirements and Restrictions

Contests are subject to regulation in many states. Indeed, many of the statutory requirements and prohibitions applicable to sweepstakes discussed above apply equally to contests.\textsuperscript{102} Some states impose additional requirements on contests. For example, under

\textsuperscript{96} See, e.g., \textit{Tex. Penal Code} § 47.01(1)(B) (2015) (exempting from the definition of gambling "an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered in a contest").


\textsuperscript{99} \textit{Id.} § 13-3311.

\textsuperscript{100} \textit{Md. Com. Law Code} § 13-305(h) (2016).

\textsuperscript{101} \textit{N.D. Cent. Code} § 53-11-02(1) (2016).

\textsuperscript{102} See, e.g., \textit{Cal. Bus. & Prof. Code} § 17539.1 (2016) ("the following unfair acts or practices undertaken by, or omissions of, any person in the operation of any contest or sweepstakes are prohibited").
California law, the following must be disclosed in connection with each contest: the maximum number of puzzles or games that may be necessary to complete the contest and determine winners; the maximum amount of money, including the maximum cost of any postage and handling fees, that a participant may be asked to pay to win each of the contest prizes then offered; that future puzzles or games, if any, or tie breakers, if any, will be significantly more difficult than the initial puzzle; the date or dates on or before which the contest will terminate and upon which all prizes will be awarded; the method of determining prizewinners if a tie remains after the last tie breaker puzzle is completed; all rules, regulations, terms, and conditions of the contest; and the exact nature and approximate value of the prizes when offered. 103 Under Oregon law, the contest sponsor must also disclose the identity of judges or a description of judges’ qualifications (if other than the sponsor) and the method used for judging. 104

In addition to the regulatory requirements and restrictions governing contests, these types of promotions are also governed by the same general principles of contract law, general principles of fraud, and statutory consumer protection laws as discussed above. 105

V. ANCILLARY LAWS

A. Privacy Laws

Sometimes, the primary purpose of a sweepstakes or contest is to develop information from customers, potential customers or members of the general public. The collection of even basic information such as name and address can trigger privacy issues regarding the personal information collected. The following privacy policies are recommended for sponsors of sweepstakes and contests: describe the information being collected; identify who is collecting the information; disclose with whom the information may be shared; and allow entrants to choose whether to disclose sensitive information. There are special privacy law considerations applicable to information regarding children. 106 However, if eligibility requirements for sweepstakes and contests limit entry in the promotion to adults over the age of majority (and if the promotion’s web site is not otherwise directed to children under 13), application of special privacy laws relating to children should not be triggered. 107 Specific examples of privacy rules are shown below. 108

B. Trademark Laws

Trademarks and service marks may play an important role in sweepstakes and contests – particularly regarding the name of the promotion and marks associated with the prize

103 Id. § 17539.1(5) & (6); see also COLO. REV. STAT. § 6-1-803(15)(b) (2016).
105 See Section III.B.3, above.
108 See Section VI.A.2.j, below.
descriptions. Sponsors of sweepstakes and contests who develop meaningful names and/or
designs for the promotion should claim common law protection for the promotion name and/or
design to deter imitators, and these names and designs should be subject to trademark
clearance to avoid unintended infringement. Some sponsors may want the benefits that come
from federal registration of the sweepstakes or contest name and design, especially if the
promotion may be offered more than once.\textsuperscript{109} Identification of co-sponsors and descriptions of
prizes in the Official Rules for the promotion and in marketing materials should properly use and
denote the marks owed by third parties. In appropriate circumstances, the sponsor should
obtain licenses to use the marks from the marks’ owners.

C. \textbf{Copyright Laws}

Application of copyright laws may be triggered whenever original works of authorship are
involved in a sweepstakes or contest, including literary, dramatic, musical, and artistic works,
such as poetry, novels, movies, songs, computer software, and architecture.\textsuperscript{110} If entrants in a
sweepstakes or contest will provide the sponsor with any original works that the sponsor may
wish to publish, such as an essay, a video, or a design for a t-shirt or poster, then the sponsor
will need to obtain ownership or copyrights to the work. This is usually accomplished through
the Official Rules.\textsuperscript{111}

Generally, the Official Rules themselves for contests and sweepstakes may not be
Copyrighted.\textsuperscript{112}

D. \textbf{Rights of Publicity}

Rights of publicity generally protect against the unauthorized commercial appropriation
of an individual’s identity. Aspects of a person’s identity that may be subject to protection under
various state statutes regarding publicity rights includes names and photos, and may include
signatures, voices and likenesses.\textsuperscript{113} In order to avoid triggering application of publicity rights
laws, Official Rules typically include publicity consents.\textsuperscript{114} Additionally, many sweepstakes and
contests require the winners to submit an affidavit of eligibility and release in a form specified by
the sponsor, which may contain publicity consents. If the photograph or video of the winner
desired for promotional use includes other persons (such as the winner’s spouse or family), the
sponsor should also obtain publicity consents from, or on behalf of, these other persons. Some

\textsuperscript{109} \textit{See, e.g.,} “Geoffrey's Awesome Birthday Sweepstakes®,” U.S. Patent & Trademark Office, Reg. No. 5,210,056
(May 23, 2017).

\textsuperscript{110} \textit{U.S. Copyright Office, Copyright Basics} (2012) p. 1, available online at

\textsuperscript{111} \textit{See} Section VI.C.5, below.

\textsuperscript{112} \textit{Morrissey v. Procter & Gamble Co.}, 379 F.2d 675, (1st Cir. 1967) (“When the . . . subject matter is very narrow,
so that the topic necessarily requires, if not only one form of expression, at best only a limited number, to permit
copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all
possibilities of future use of the substance.”).

\textsuperscript{113} \textit{Cal. Civ. Code} § 3344(a) (2016).

\textsuperscript{114} \textit{See} Section VI.A.2.j, below.
states may restrict publicity waivers. For example, under Tennessee law, a sponsor cannot require a winner to sign a publicity release as a condition of receiving a prize.  

E. Regulated Industries and Methods

Sponsors of sweepstakes and contests should be sensitive to the fact that special laws and regulations apply to promotions involving certain types of regulated industries and to certain methods of solicitation or entry. Additional prohibitions and restrictions will likely apply to any sweepstakes or contest sponsored by sellers of alcohol, tobacco, firearms, motor fuel, groceries, pharmaceuticals and real estate. Similarly, special laws will likely apply if the promoted item in a sweepstakes or contest promotion is a time share or other real estate, or if any prize offered is alcohol or a live animal. If the methods of solicitation for the sweepstakes or contest involve direct mail, unsolicited telephone calls, unsolicited emails, door-to-door presentations, or web sites directed at children, the solicitations must comply with special laws and regulations. Finally, special laws and regulations may apply to any sweepstakes or contest involving entries by use of 900 numbers or in-pack game pieces (e.g. where a game piece is found on or enclosed within an item sold or its packaging). Prudent practitioners should become familiar with the special requirements and prohibitions if applicable or simply avoid triggering application of these special laws and regulations.

F. International Law

Compliance with federal and state laws in the United States can pose a challenge for the sponsors of most sweepstakes and contests. Compliance with international laws adds a significant degree of additional complexity, delay and costs because these types of promotions are prohibited or heavily regulated in many countries. For example, sweepstakes are illegal in Canada and heavily-regulated in Mexico. The safest course for most U.S.-based sponsors is to limit sweepstakes and contests to U.S. residents only. Sponsors sometimes run separate sweepstakes and contests in separate countries in order to avoid having to comply with sometimes conflicting international laws that would otherwise apply to multi-jurisdictional promotions.

---

116 See Deceptive Mail Prevention and Enforcement Act, 39 U.S.C. § 3001 (regarding direct mail solicitations); Telemarketing Sales Rule, 16 C.F.R. § 310 (regarding solicitations by telephone calls); Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. §§ 7701-7713 (regarding solicitations by emails), Trade Regulation Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 C.F.R. part 429 (regarding solicitations by door-to-door sales); and Children’s Online Privacy Protection Rule, 16 C.F.R. part 312 (regarding solicitations by web sites and on-line services directed to children under 13 years of age).
117 See Friedman & Misna, supra note 5, at 11 (for a brief discussion of the laws of other countries affecting sweepstakes and contests).
VI. OFFICIAL RULES

A. Long Form Rules for Sweepstakes

1. Basic Requirements

The primary purpose of the Official Rules for a sweepstakes is to describe the structure of the promotion and govern its operation in order to eliminate or minimize the risks to the sponsor. Remember that the Official Rules constitute the specific provisions of the contract that is formed when an eligible entrant submits a qualifying entry in the sweepstakes.

The Official Rules should: be clear and unambiguous; be consistent with applicable law; be consistent with proposed advertising; be tailored to each particular sweepstakes; contain all material terms and conditions of the sweepstakes; anticipate how people will try to cheat or beat the system; and try to anticipate other ways in which the promotion may go wrong.

2. Standard Rules

Despite the recommendation that each set of Official Rules be customized for each promotion, the following provisions (or an applicable variation) should normally be included in most sets of Official Rules for sweepstakes:

a. No Purchase Requirement

“No purchase or payment of any kind is necessary to enter or win this sweepstakes. A purchase will not improve your chances of winning.” Some rules provide, “No purchase, payment or submission to a sales presentation is necessary to enter or win.”

b. Sponsors

Identify all sponsors by name and address. It may be prudent to also identify the third-party administrator, if any, of the sweepstakes by name and address. If any other brand included in the promotional materials may appear to be a sponsor, it may be appropriate to specify that that brand owner is not a sponsor.

c. Eligibility Requirements

Common eligibility requirements include:

- Age, such as “must be age 21 or older at the time of entry.”
- Residence, such as “limited to legal residents of the 50 United States and the District of Columbia” or more specific geographic area covered by the sweepstakes. Note: Puerto Rico still has some unusual legal requirements.
- Other required criteria, such as “licensed drivers,” or “full-time college students.”

Excluded classes, such as “Sweepstakes is not open to employees and their immediate family members (defined as spouses, children, siblings, parents, grandparents, and grandchildren and their respective spouses and step-family members) and household members of sponsor, administrator, and their respective affiliates, franchisees, suppliers, advertising agencies, promotional agencies, printers, judging agencies, and prize suppliers.”

d. Procedures for Entry

Describe exactly how to enter the sweepstakes. Be aware of any consideration component. Include a free alternate method of entry, if appropriate.

e. Limitations on Entries

Describe all applicable limitations, such as “limit one entry per person,” or “limit one entry per email address per day.”

f. Incorporate Official Rules

“By participating, you agree to be bound by these Official Rules and by the judges’ decisions.” “By entering this promotion, you agree to be bound by these Official Rules and the decisions of the sponsors, administrators and any judges appointed by sponsor, whose decision will be final and binding in all respects.”

g. Duration and Deadlines

State the start and end dates, times and time zones for the sweepstakes. The ending date may be dependent on when all game pieces have been distributed. State all relevant dates and deadlines, including: deadline for receiving entries (which should be the same deadline for standard entries and AMOE entries); date of drawing; deadline for submission of winning game pieces; and deadline for requesting list of winners. For sweepstakes spanning multiple time zones, the dates and deadlines should be specified with reference to a particular time and time zone.

h. Prizes

Describe each prize to be awarded through the sweepstakes, including the number of each prize to be awarded, the approximate retail value of each prize, and the odds of winning each prize. The odds of winning may be dependent on the number of eligible entries received. Additional disclosures are recommended for certain types of prizes, such as vehicle prizes (“excludes tax, title and license fees, vehicle will be released to winner only upon showing of valid driver’s license and proof of insurance”) and travel prizes (“includes only airfare, airport transfers at destination, and hotel for 2 persons, plus $1,000 cash for expenses, and excludes all other expenses”). Additional standard provisions relating to prizes typically include:

- Award of prizes is subject to verification of eligibility and compliance with Official Rules.
- Prizes are not assignable or transferable.
Sponsor reserves right to award cash equivalent instead of prizes and/or to substitute prizes of equal or greater value. Winner may not substitute prizes.

Any prize details not specified above will be determined by sponsor in its sole discretion.

The winner is responsible for all costs and expenses not included in the prize description.

If applicable, special rules for delivery of prizes in Alaska and Hawaii.

i. Winners

Describe the method of selecting winners, such as “winners will be selected in a random drawing from among all eligible entries received for each prize, under the supervision of the administrator.” Describe how and when winners will be notified. For sweepstakes with multiple prizes, disclose any limitations on the maximum number of prizes per person or per household. Other standard rules regarding winners typically include:

• Whether winner must be present at drawing to win.
• Forfeiture of the prize if the winner does not respond by specified deadline.
• Return of any prize or prize notification as undeliverable will result in disqualification and forfeiture.
• Requirement for winner to sign and return winner affidavit and release form and for compliance with all Official Rules.
• Requirement for W-9 or other tax forms (if prize value is $600 or more).
• If applicable, the procedures to be followed if the winner is a minor.
• All prizes will (or may not) be awarded.
• Details regarding second-chance drawing, if applicable, including method of entry, odds of winning, entry deadline, drawing date, and applicable prizes.
• Winner is responsible for all taxes.
• Details regarding how to obtain a list of winners.

j. Privacy and Publicity Issues

Disclose the sponsor’s privacy policy and any requirements regarding publicity rights. If the sponsor desires the right to use personal information of all entrants, then the following rules would likely be appropriate:
• “Sponsor will collect personal data from entrants when they enter this sweepstakes, and this information will be used for the purposes of administering the sweepstake, publicizing the sweepstakes and other promotional purposes that benefit sponsor.”

• “Information collected from entrant is subject to sponsor’s privacy policy which can be found at www.sponsor.com/privacy.”

• “By submitting an entry, you agree to sponsor’s use of your name, address, likeness or prize information for promotional purposes in any medium without additional compensation to the extent permitted by law.”

If, on the other hand, if the sponsor desires the right to use the personal information of only the winners, then simplified disclosures may be appropriate, such as:

• By participating in the sweepstakes, all winners agree to sponsor’s free use of their personal information for promotional purposes of any type to the extent permitted by law.

If an entrant or winner may be a minor, then these provisions should take into account the need for consent by the minor’s parent or guardian. If a prize requires involvement by persons other than the winner, such as a family vacation or a trip for 2, then these provisions may need to address the privacy and publicity issues of family members and travel companions.

k. **Disclaimers, Waivers, Releases and Limitations on Liability**

Disclose all of these types of contractual protections for the benefit of the sponsor and administrator. Standard provisions of this type include:

• “Sponsor is not responsible for late, lost, tampered with, postage due, misdirected mail or printing errors.”

• “Sponsor is not responsible for any lost or stolen entries.”

• “If for any reason the sweepstakes is not capable of running or is disrupted as planned by reason of infection by computer virus, bugs, tampering, unauthorized intervention, fraud, technical failures, or any other causes beyond the control of sponsor, which in the sole opinion of sponsor corrupts or affects the administration, security, fairness, integrity or proper conduct of this sweepstakes, sponsor reserves the right at its sole discretion to cancel, terminate, modify or suspend the promotion and select winners in accordance with the random drawing described above.”

• “If a winner does not respond to return a completed winner affidavit and release within the specified time period, then the selected winner forfeits his or her prize.”

• “By participating and redeeming a prize, winner (and, if under the age of majority, his/her parent or legal guardian) releases and agrees to hold harmless sponsor, administrator, the prize suppliers, and their respective advertising and promotional agencies, and the their respective affiliates, officers, directors,
employees, representatives and agents, from and against any and all liability for any injury, loss, or damage to persons, including death, and property, due in whole or in part, directly or indirectly, from or arising out of participation in this sweepstakes, or participation in any promotion-related activity, or the receipt, use or misuse of any prize.”

If the prize involves persons other than the winner, such as a family vacation or a trip for 2, then these provisions should reflect the need for family members and travel companions to join in these provisions as a condition to award of the prize.

I. **Dispute Resolution**

Examples of standard provisions in Official Rules regarding dispute resolution include:

- “Judges’ decisions are final and binding on all entrants.”

- “Except where prohibited by law, as a condition of participating in this sweepstakes, entrant agrees that (1) any and all disputes and causes of action arising out of or connected with this promotion, or prize awarded, shall be resolved individually, without resort to any form of class action, and exclusively by final and binding arbitration under the rules of the American Arbitration Association and held at the AAA regional office nearest the entrant; (2) the Federal Arbitration Act shall govern the interpretation, enforcement and all proceedings at such arbitration; and (3) judgment upon such arbitration award may be entered in any court having jurisdiction.”

- “Under no circumstances will entrant be permitted to obtain awards for, and entrant hereby waives all rights to claim, punitive, incidental or consequential damages, or any other damages, including attorneys’ fees, other than entrant’s actual out-of-pocket expenses (i.e., costs associated with participating in this promotion), and entrant further waives all rights to have damages multiplied or increased.”

- “Except where prohibited, all issues and questions concerning the construction, validity, interpretation and enforceability of these Official Rules, or the rights and obligations of participant and sponsor in connection with the promotion shall be governed by, and constructed in accordance with, the substantive laws of [state], without regard to its conflicts of law rules.”

m. **Mailing Addresses or Other Contact Information**

If not previously disclosed, add provisions describing:

- How and where to access or obtain copy of Official Rules.

- How and where to send AMOE (if applicable).

- How and where to request list of winners.
n. **Savings Provisions**

- “All federal, state and local laws apply.”
- “Void where prohibited or restricted by law [and, if applicable, in specified jurisdictions].”
- “These Official Rules constitute the entire agreement between the sponsor and each entrant.”
- “If any provision of these Official Rules is held to be invalid or unenforceable, all remaining provisions hereof will remain in full force and effect.”

3. **Special Rules for Specific Types of Sweepstakes**

a. **Instant-Win and Other Game-Piece Sweepstakes**

i. **Game Pieces**

Describe how to obtain game pieces including standard entry (i.e. by purchasing item) and AMOE, and how to interpret game pieces. Standard disclosures include:

- “Game pieces are included in specially-marked packs,” or “Game pieces will be distributed with each purchase of a qualifying product at a participating location.”
- “Game pieces will be available until [date] or while supplies last.”
- “Game pieces may also be obtained without any purchase while supplies last by sending a self-addressed stamped envelope to sponsor at [address] by [date]. Residents of Washington or Vermont omit postage.”
- “If your game piece says ‘winner,’ then you are a potential winner of that prize, subject to verification by the administrator. All other game pieces are not winners.”

ii. **Claiming Prizes**

Describe how to claim a prize with a winning game piece. There may be different procedures required for different types of prizes. Standard provisions may include:

- “Mail your entire game piece with your complete name, address, and (optional) day/evening telephone numbers hand printed on 3” x 5” paper to [sponsor or administrator name and address] to be received by [date].”
- “Claims for any prize valued at $1,000 or more must be sent via registered mail with sufficient postage. All other claims must be sent by first-class mail with sufficient postage affixed.”
- “Limit 1 prize claim per envelope.”
• “Game pieces constituting discount coupons may be redeemed at participating locations.”
• “Claims are subject to verification. You are not a winner until your game piece is verified by judges.”
• “Do not release, show or give any winning game pieces to any local store personnel. They are not authorized to verify or redeem prizes.”

iii. **Printing Errors / Tampering**

Sweepstakes are perhaps the type of promotion most likely to be affected by printing errors or tampering. Standard provisions to offset these risks include:

• “Sponsor is not responsible for printing errors.”
• “Any game piece that is illegible, mutilated, altered, duplicated, tampered with, forged, cut, torn, contains printing, typographical or other errors, distributed where prohibited by law or not obtained legitimately will be null and void.”
• “Liability for irregular game piece is limited to replacement with unexposed game piece.”
• “If, due to printing, production or other error, more winning game pieces are distributed or more prizes are claimed than are intended to be awarded, the intended prizes will be awarded in a random drawing from among all verified prize claims received for that prize level. In no event will sponsor be obligated to award more than number of prizes stated.”

b. **Mail-In Sweepstakes**

Special provisions for sweepstakes involving mail-in entries include:

• “All entries must be postmarked by [date] and/or received by [date].”
• “Sponsor is not responsible for late, lost, misdirected, damaged, altered, illegible, mutilated, undelivered or postage-due mail.”
• “Entries that are mutilated, illegible or incomplete are not eligible.”
• “Limit one entry per envelope.”

c. **Automatic Entry Sweepstakes**

Special provisions for sweepstakes involving automatic entries include:

• Requirements and explanations of the entry process.
• Instructions for AMOE.
d. **Internet Sweepstakes**

Special provisions for sweepstakes involving online entries include:

i. **Fraud / Tampering Provisions**

- Reservation of right to disqualify any person tampering with entry process or otherwise violating the Official Rules.
- Reservation of right to cancel, terminate or modify any sweepstakes not capable of completion as planned, including by reason of infection by computer virus, bugs, tampering, hackers, flamers, or technical failures of any sort.
- Disclaimer of liability for computer malfunctions, transmissions failures, lost, delayed or corrupted data, etc., damage to entrant’s system by participating in sweepstakes.

ii. **Official Rules**

- Consider requiring visitors to click through Official Rules to get to entry form.
- If rules are complex or unusual, consider requirement that users click to indicate acceptance and understanding of Official Rules.
- Describe how to obtain Official Rules offline.

iii. **Entries**

- Limitation on number of entries -- per day / per person / per e-mail address.
- In event of dispute as to identity of winner, the entry will be deemed submitted by the holder of the e-mail account.


e. **Social Media Sweepstakes**

See Section VII below.

B. **Short-Form Rules for Sweepstakes**

In advertising and promotional materials where space is too limited to set out the full set of Official Rules, it is generally permissible to use a shorter version of the Official Rules. The short-form version of the rules should contain, at a minimum the following provisions:

- “No purchase necessary.”
- “Void where prohibited or restricted by law [or in specified jurisdictions].”
- “Promotion is subject to Official Rules.”
- Instructions on how to access or receive copy of the full set of Official Rules.
• “Eligibility restrictions apply.”
• State start and end dates, and entry deadline.
• Identify sponsor.

C. Rules for Contests

Many of the standard and specialized rules discussed above are necessary or appropriate for contests. In addition, the following type of rules may be recommended or required for contests.

1. How to Enter

• “To enter the contest, mail your qualifying submission during the contest period with a completed official entry form in English to [address].”

• “Official entry forms are available at participating locations or online at www.sponsor.com/contestentryform.”

• “Your entry form must include a supporting statement of 50 words or less describing how your submission interprets the contest theme.”

• “Submissions received without a completed official entry form or a supporting statement will be disqualified.”

• “Limit one entry per person. Subsequent entries will be disqualified.”

• “Submissions will not be returned.”

• Free AMOE requirements if standard entry requires purchase or entry fee (or void states prohibiting purchase requirements or entry fee for contests)

2. Submission Requirements

• “The theme of the contest is [describe]. Your submission must reflect your interpretation of the contest theme described above.”

• “Your submission and supporting statement must be in English.”

• Format requirements, such as “your submission must be on one sheet of white paper, size 8.5 by 11 inches, two-dimensional and scannable.”

• Originality requirements, such as, “your submission and supporting statement must be an original, unpublished work that does not contain, incorporate or otherwise use any content, material or element that is owned by a third party or entity.”
• Content requirements, such as such as “your submission must include [the sponsor’s name] (or reference to [the sponsor’s promoted product]) (or the phrase “[sponsor’s tagline]<sup>SM</sup>”).

• “By entry in this contest, you warrant that your submission is your own original work and, as such, that you are the sole and exclusive owner and rights holder of the submission and that you have the right to enter the submission contest and grant all required licenses.”

3. Submission Restrictions

• “Your submission and supporting statement cannot contain any content, element, or material that violates a third party’s publicity, privacy or intellectual property rights.”

• “Your submission and supporting statement must not be derogatory, offensive, threatening, defamatory, disparaging, libelous or contain any content that is inappropriate, indecent, sexual, profane, tortuous, slanderous, discriminatory in any way, or that promotes hatred or harm against any group or person, or otherwise does not comply with the theme and spirit of the contest as determined by sponsor, in its sole discretion.”

• “Your submission and supporting statement must not contain content, material or any element that is unlawful, or otherwise in violation of or contrary to all applicable federal, state, or local laws and regulation.”

• “Your submission and supporting statement must not contain any content, material or element that displays any third-party advertising, slogan, logo, trademark or otherwise indicates a sponsorship or endorsement by a third party or that is not within the spirit of the contest, as determined by sponsor, in its sole discretion.”

• “The sponsor reserves the right, in its sole discretion, to disqualify any entry that includes a submission or supporting statement that does not meet the submission requirements and restrictions.”

4. Judging

• “Each submission will be evaluated and scored based on the following criteria: [describe],” (for example, “artistic skill, creativity, originality, communication of the contest theme in the submission and in the supporting statement, and adherence to these Official Rules”).

• If applicable, describe weight to be given to each criterion.

• If applicable, describe the classes of submissions, such as “entrants will be divided into 3 groups for judging: persons age 13 or less, persons aged 14 to 19, and persons age 20 or more, with all ages determined as of the contest end date.”
• If applicable, describe stages of contest, such as “There will be 2 stages of judging that will result in a group of finalists from each group, from which the winner of each group will be selected.”

• If applicable, describe the number of rounds, any fees required for each round, the maximum cost to enter all rounds, how to enter each round, whether subsequent rounds will be more difficult.

• Describe procedure and dates for judges to select finalists and winners, including tie-breaker procedures and criteria (not involving chance).

• Note: any public voting on submissions will require special rules.

• Identify judges and qualifications.

5. **Intellectual Property and Publicity Rights**

• “You will retain ownership of all intellectual and industrial property rights (including moral rights) in and to the submission.”

• “As a condition of entry, you grant sponsor a perpetual, irrevocable, worldwide, transferable, royalty-free, and non-exclusive license to use, reproduce, adapt, modify, publish, distribute, publicly perform, create a derivative work from, and publicly display the submission for any purpose, without any attribution or compensation to you.”

• “By entering the contest, you consent to sponsor using your submission for any lawful purpose, including for publicity, promotional, press and media purposes.”

• “By entering the contest, you agree to participate in any media or promotional activity resulting from the contest as reasonably requested by sponsor at sponsor’s expense, and you agree and consent to use of your name and/or likeness by sponsor for publicity purposes.”

**VII. SOCIAL MEDIA CONSIDERATIONS**

More often than not these days, contests and sweepstakes are run, whether in whole or in part, through one or more social media platforms. The reasons for the prevailing use of social media in this context include the vast reach of such platforms, the ability to increase an online following of the brand, the affordable cost of using them, and the creativity and flexibility it allows in the structuring of these types of promotions. In addition to the framework of federal and state laws and regulations, and the official rules used by businesses to protect themselves, businesses must also be aware of, and plan for, the guidelines and strictures related to the use of various social media platforms when running a contest or sweepstake. This section will discuss the rules and guidelines set by the more popular social media platforms currently used for promotions, compliance matters relating to FTC guidelines and statutory disclosure issues and, finally, how running a promotion on social media platform creates legal concerns where user generated content is concerned.
A. Platform Rules and Guidelines

The applicable promotions rules and guidelines of the four most frequently used social media platforms are discussed here: Twitter, Facebook, Instagram, and Pinterest. Each platform uses the term “promotion” in its rules and guidelines to refer collectively to contests and sweepstakes. Each platform specifies that legal compliance is the sole responsibility of the businesses connected with each contest or sweepstakes. However, the platforms rules and guidelines also require certain methods of promotion and operation. This, in turn, affects the contents of the official rules and how the contest or sweepstake comports with certain legal obligations, such as disclosure. Counsel should not leave compliance solely in the hands of marketing personnel, and they, too, should be aware of social media platform rules, their effects, and possible repercussions.

1. Twitter

The Guidelines for Promotions on Twitter (“Twitter Guidelines”) provide both practical suggestions and specific requirements. They identify the likelihood that users will create multiple accounts to enter a contest more than once and explain that these duplicate accounts are likely to be locked or suspended by Twitter. 120 The recommendation in the Twitter Guidelines is that the official rules include language “stating that anyone found to use multiple accounts to enter will be ineligible.” 121 Another way to encourage entries through a single account would be to limit entries to one entry per person per day. A second issue Twitter has faced in the past is a flood of duplicate posts resulting from promotions attempting to trend and to increase the likelihood of being found in search results. The Twitter Guidelines, now wise to the havoc this wreaks on the platform, actively discourages posting the same (or similar) Tweet repeatedly. 122 This is not only a violation of Twitter’s general terms of use, 123 but also may result in entrants being automatically filtered out of, that is removed from, Twitter searches. 124 The Twitter Guidelines suggests that a promotion’s rule state that “multiple entries in a single day will not be accepted.” 125 Again, this is typically captured by the “one entry per person per day” limitation many promotions adopt.

The Twitter Guidelines recommend that entrants mention the sponsor when tweeting (i.e. using the sponsor’s account @username), so that all entrants’ tweets will appear in the sponsor’s notification timeline when it’s time to choose a winner. 126 Also, the Twitter Guidelines remind sponsors that hashtags must be relevant to each post, therefore, pre-determining relevant hashtags for entrants to use when posting (or in Twitter parlance, “updating”) will not only help entrants avoid violating the Twitter rules which prohibit the use of hashtags that do not


121 Id.

122 Id.


126 Id.
relate to the post, but also comply with FTC guidelines recommending the use of #sweepstakes, #contest, or #giveaway in identifying posts related to promotions.127

Any promotion that runs afoul of “The Twitter Rules,” Twitter’s general terms of use, including restrictions on content, abusive behavior, and spam, is also subject to possible repercussions from Twitter. Such repercussions include the temporary locking or permanent suspension of accounts, or a request from Twitter requesting the removal of certain content.

2. Facebook

In 2013, when Facebook changed their promotion rules to allow for the administration of promotions through page timelines, it became much easier and less expensive to run a promotion on Facebook.128 This update in the promotion rules also allowed greater flexibility in how promotions are structured. Now, entrants may enter a promotion by “liking” a post, by commenting on a post, by posting on a sponsor’s page, or by sending messages to a page.129 Promotions, however, cannot require that posts be made to personal timelines.130 For example, a sponsor is prohibited from asking entrants to post anything on their timelines or to post an item on a friend’s timeline. Facebook also restricts the owner of a page from tagging or encouraging entrants to tag themselves in posts or with respect to content in which they are not depicted.131 Requiring that a user “like” a page as a means of entry is also prohibited.132 Finally, in Facebook’s Statement of Rights and Responsibility, Facebook prohibits an entrant from opening multiple accounts.133 To ensure that a promotion does not encourage violation of this rule, the same limitation as encouraged in the Twitter Guidelines is also applicable in the case of promotions run through Facebook, that is, that entrants found to be entering through multiple accounts will be ineligible to win.

Facebook requires that all promotions include “a complete release of Facebook by each entrant or participant” and an “acknowledgement that the promotion is in no way sponsored, endorsed, or administered by, or associated with, Facebook.”134 Typically, a business will include Facebook among the long list of other parties released in broader release section in the official rules, whereas the acknowledgement may be found anywhere in the rules, though it is often at the very end. Finally, if the promotion collects any information or data, a page is required to make it clear that they (and not Facebook) are collecting it, and they will provide notice and obtain user consent for the use of the content and information collected.135

129 Id.
130 Id.
132 Id.
135 Id.
3. **Instagram**

Given that Instagram is owned by Facebook, it comes as no surprise that many of the requirements in Instagram’s Promotion Guidelines (“Instagram Guidelines”) are the same as those in Facebook’s. Both social media platforms begin their promotion guidelines by stating that the party running the promotion is responsible for the lawful operation of the promotion. Specifically, Instagram promotion operators and sponsors are responsible for: “1) official rules; 2) offer terms and eligibility requirements (ex: age and residency restrictions); and 3) compliance with applicable rules and regulations governing the promotion and all prizes offered (ex: registration and obtaining necessary regulatory approvals).” Both social media platforms also require, as mentioned above, “a complete release in their favor by each entrant and participant” and an “acknowledgement that the promotion is in no way sponsored, endorsed or administered by, or associated with, Instagram.”

The Instagram Guidelines also specify that a promotion should neither inaccurately tag nor encourage others to inaccurately tag content, such as encouraging users to tag an individual in a photograph where that individual does not appear in the photograph. This avoids clogging a user’s home feed with images not necessarily desired by the user, or associating the user with images or ideas with which they have not chosen to be associated. Violation, whether in letter or in spirit, of Instagram’s terms of use may result in termination of the Instagram account.

4. **Pinterest**

Pinterest, too, has the “follow all relevant laws” caveat in their promotion guidelines, but the platform has adopted some very specific dos and don’ts related to running promotions. First, Pinterest also prohibits requiring entrants to pin a specific image. Instead, the platform wants to allow its users to choose for themselves what images to pin “based on their own tastes and preferences, even if it’s from a selection or a given website.” Second, Pinterest specifically states that a sponsor should not allow more than one entry per person, which is perhaps the most restrictive requirement imposed by a social media platform to date. All promotions must make it clear to entrants that Pinterest neither sponsors nor endorses the sponsor or the promotion.

---


137 *Id.*

138 *Id.*


141 *Id.*

142 *Id.*

143 *Id.*

144 *Id.*
5. **General**

Regardless of the social media platform, knowing not only guidelines applicable to promotions but also a platform’s general terms of use, community guidelines, and other rules of conduct will ensure that, in the structuring of the promotion and drafting or review of the official rules, a promotion is not created to entice, encourage, or lead users and entrants to violate platform terms. The consequences of violation include account suspension, after all, which will not only call negative but also very public attention to the company and the promotion misfire.

Finally, even if a platform does not require the sponsor to ensure that entrants release the platform, it may be a good idea to include the platform in the list of parties released under the release from liability section of the official rules, in case there is an entrant-related issue and the platform looks to the sponsor for damages.

**B. Compliance Issues**

1. **Federal Trade Commission**

   In May 2015, the FTC issued “The FTC’s Endorsement Guides: What People Are Asking” (“Endorsement Guide”) to address the increasing prevalence of individuals being asked, encouraged, or incentivized to either explicitly or implicitly endorse a product or company on their social media accounts.\(^{145}\) Where the connection between a user’s post on social media and the incentive given to that user for the post is not clear to the public, the FTC views these posts as misleading and in violation of Section 5 of the FTC Act. For example, if a restaurant company were to ask their followers on Twitter to take a picture of themselves in front of one of their restaurants and tweet the photograph in an update with the hashtag #bestburgerjoint for a chance to win a prize, when that update appears on the feed of everyone who follows those who entered the sweepstakes, those followers would have no way of knowing that those updates were posted in order to gain an entry into a sweepstakes. To resolve this issue, the FTC’s Endorsement Guide recommends using the words “contest” or “sweepstakes” as hashtags, or as part of hashtags, in order to educate the viewer of the update that the post was made by the user in order to gain something valuable, an entry into a sweepstakes\(^{146}\). In addition, the Endorsement Guide clarifies that the FTC does not recommend using the term “sweeps” as a hashtag, or as part of a hashtag, stating that they did not feel that the public was sufficiently aware that the term was short for “sweepstakes.”\(^{147}\)

2. **Statutory Disclosures**

   Another unique problem that comes with running promotions on social media platforms is the character limitation. Twitter updates are limited to 140 characters. While Facebook posts have a character limit of over 60,000, marketing teams are likely to push back at the idea of having long posts full of legal terms and conditions. However, as explained above, under both

---


\(^{146}\) Id.

\(^{147}\) Id. This specific guideline appears to be a direct result of the FTC’s investigation into Cole Haan’s #WanderingSole sweepstakes more fully described in Section VIII below.
federal and state law, businesses are required to disclose a minimum amount of information on marketing and advertising materials related to a promotion. To address this, each social media platform community has created certain norms for itself, and the Attorneys General and FTC have not yet validated their approaches.

The Twitter community simply uses #sweepstakes #giveaway, #contest and other similar hashtags to clarify that their post is regarding a sweepstakes, and using a short form link to the rules, at times specifying that the link leads to details or rules (i.e. “Rules: bit.ly/abc234ef”). Facebook users have adopted a similar strategy, typically including a link to the rules or the main promotion website that appears prominently in the post promoting the sweepstakes. More sophisticated users may imbed a photo with a headline that links to the main sweepstakes page. Pinterest and Instagram promotions also tend not to include any abbreviated rules and rely on links to outside online rules.

These approaches do not meet most mandatory disclosure requirements, however, it appears that, for now, the enforcing bodies have not elected to take adverse action.

C. User Generated Content

Promotions administered through social media require public actions. Whether it is a simple “like” on a Facebook page post, or a request that the user take a photograph then post it on Twitter, social media is subject to the whims and creativity of the general public. While a discussion on the various ways promotions have run awry in the past, and lessons learned, appears later in this paper in Section VIII, for all promotions run on social media platforms, counsel should invariably be concerned with the specificity of what is being requested, (i.e. whether it could it lead to illegal activity), whether what is being requested could lead to possible infringement concerns, whether the content generated will be reused by the company for commercial purposes, and if all of the foregoing is clearly being communicated to entrants through marketing and official rules.

VII. EFFECTIVE IMPLEMENTATION IN FRANCHISE SYSTEMS

Perfect rules and great prizes do not alone make a sweepstakes or contest a success. Effective implementation within a franchise system requires careful consideration and planning, taking into account both the desired unit-level dynamics, as well as foreseeable, hopefully preventable, problems. In fact, it is important to consider the factors likely to impact program implementation before finalizing the rules. It is easier to conform the rules to reality, than it is to conform reality to the rules.

The goals of unit-level implementation are several: ensuring administration in accordance with applicable laws and the rules, preventing franchisee/employee misconduct, creating consumer awareness, and delivering consumer satisfaction. Effective implementation requires that the franchisor’s expectations be clearly understood by, and therefore clearly communicated to, both franchisees and their employees.

As with other franchise system promotions, the overall success of sweepstakes and contests executed at the unit-level is to a significant degree dependent on franchisee engagement. Therefore, it is generally in the franchisor’s and franchisee’s best interests that

---

148 Where just a few years ago, abbreviated rules on Twitter tended to include more detail, like the following: NoPurchNec 18+ US(excl FL&NY) 03/15-04/15 Rules: www.company.com.
the franchisor obtain representative franchisee input during the programs planning and design stages, such as from an advisory or advertising council.

A. **Sweepstakes and Games of Chance**

Sweepstakes and games of chance often involve a significant number of components. Careful consideration and planning will contribute to the promotion’s overall effectiveness and ease of execution.

1. **Participating Locations Only**

System-wide promotions tend to generate traffic for both franchisor-owned and franchisee-owned units.\(^{149}\) However, in a franchise system, less than 100% unit participation is not uncommon, which is why franchisors typically describe a promotion as taking place at “participating locations only” or their equivalent. These phrases help to manage consumer expectations, or reactions when a consumer visits a non-participating unit. They are the difference between a consumer being disappointed and being misinformed, and can even protect an advertiser from a false advertising claim.\(^{150}\)

Franchise system participation is often less than 100% because a franchisor may be unable to require 100% participation due to the absence of an entitlement in the franchise agreement,\(^{151}\) or may elect to not require 100% participation. In some instances a franchisor may elect to exclude units in one or more states, simply because it perceives compliance with a particular state’s sweepstakes laws to be too onerous.\(^{152}\)

Irrespective of why a particular unit is not participating in a promotion, managing consumer expectations as well as possible will add to the success of a promotion. This includes taking steps to enable consumers to identify which locations are participating before visiting any locations. In today’s mobile-friendly world, franchisors can make it easy for consumers to identify which units are participating, and which are not, by publishing the information on the franchise system’s website, mobile application, and social media pages.\(^{153}\)

2. **To Compel or Not Compel**

Even when a franchisor carefully considers the impact of a promotion on its franchisees, the franchisor may find that some franchisees are resistant to participate. A franchisor in this

---

\(^{149}\) Victor D. Vital, Sarah A. Walters and Brittaney N. Davis, At Participating Locations Only: Legal Implications of Encouraging Franchisees to Participate in Discounting or Promotional Programs, 34 Franchise L.J. 1-15 (Summer 2014).

\(^{150}\) See *Wood v. Honey Baked Ham, Inc.*, No. B261248 n. 5 (Cal. Ct. App. Nov. 8, 2016) (class action predicated on unavailability of ham advertised at a certain price dismissed where advertisement clearly stated that advertised hams were available in limited quantities, while supplies lasted, and at participating locations).

\(^{151}\) See *Stuller, Inc. v. Steak N Shake Enterprises, Inc.*, 695 F.3d 676 (7th Cir. 2012) (upholding grant of preliminary injunction preventing termination of franchise agreement on account of franchisee’s refusal to implement pricing policies established by franchisor).

\(^{152}\) See Section III.B.2, above.

situation will need to consider two separate questions: (1) can it compel participation? and (2) should it compel participation?

Whether a franchisor can compel unit-participation in a promotional program is principally a matter of contract interpretation. It is not unusual for a franchise agreement to mandate that the franchisee participate in all national marketing campaigns. Several states have laws that make it unlawful for a supplier to coerce a dealer’s participation in a sweepstakes promotion. For example, Florida law provides:

No operator shall force, directly or indirectly, a lessee, agent, or franchise dealer to purchase or participate in any game promotion. For the purpose of this section, coercion or force shall be presumed in these circumstances in which a course of business extending over a period of 1 year or longer is materially changed coincident with a failure or refusal of a lessee, agent, or franchise dealer to participate in such game promotions.

Therefore, it is important that a franchisor intending to compel participation, or declare a franchisee in default for failing to participate, first determine whether the franchisor’s intended course of action is legal under both applicable state law and the franchise agreement.

Even when a franchisor is able to compel participation, it may elect to make participation optional, or may allow units meeting certain criteria to opt-out. For example, a franchisor may permit franchisees operating in some venues, such as airports or stadiums, to opt out, in part because the increased sales benefit to those franchisees may be relatively small given the captive audience dynamics. In rare cases, a franchisee may be precluded from participating in a sweepstakes or game due to industry laws.

3. **While Supplies Last**

In the case of games involving instant-win or collect-to-win pieces, there is no way to accurately predict the date at which all game pieces will be distributed. Some units will distribute their entire supplies of game pieces sooner than others. At the same time, the equal dignity principle requires that the franchisor make available free game pieces while game pieces are available at units. In the case of a mail-in option to request a game piece, the franchisor should honor a compliant mailed request for a game piece postmarked during the same period game pieces are distributed at the units.

Franchisors can estimate the number of game pieces to provide to each outlet using sales records, and estimating a reasonable increase in sales in response to the game. As noted above, some units will exhaust their supplies of game pieces before others. Any game pieces remaining at the end of the final day of the promotion should be properly destroyed, particularly if the end of the redemption period extends beyond the end of the promotion period,

---

154 See *Burger King Corp. v. E-Z Eating*, 41 Corp., 572 F.3d 1306, 1314 (11th Cir. 2009) (franchisor’s authority to modify system standards sufficient to require participation in value menu program).

155 See Section III.B.2.e above.

156 FLA. STAT. § 849.094(7) (2016).

157 See Section III.A above, and Section VII.A.4.a below.
which is typical. The franchisor can either provide specific instructions regarding the destruction of the remaining game pieces, or can require the franchisees to promptly ship all remaining game pieces to the franchisor or its designee for destruction.

The discarding of game pieces increases the possibility that the most valuable prizes will not be awarded. Some game piece sweepstakes rules guaranty that certain or all major prizes will be awarded. If the rules communicate that certain or all major prizes will be awarded, then the major prizes will be determined by the second chance drawing or other methodology described in the rules.

4. **Point of Sale Considerations**

In the franchising context, a primary goal of a sweepstakes or game of chance promotion is to increase unit traffic and sales. It is therefore common for a franchise system promotion to take the form of an instant-win or collect-to-win game promotion, where the game pieces are distributed at point of purchase, in some instances even attached to a purchased item, such as a beverage cup.

a. **Alternative Method of Entry and Equal Dignity**

As discussed above in Section III.A, in order to avoid converting a game of chance into an unlawful lottery, consumers must have a “no-purchase-necessary” means of participating in the promotion. In the context of an instant-win or collect-to-win promotion, this necessitates having a way for a consumer to obtain a game piece without making a purchase.

In 2008, franchisor H&R Block settled an enforcement action brought by the New York Attorney General for $245,000. 158 Among the alleged deficiencies was that while consumers who paid for tax preparation services were provided with an instant-win game piece, H&R Block failed to provide non-purchasing consumers with in-store information about how they could participate. 159 The Attorney General was also concerned that while media advertisements promoting the game mentioned a no-purchase option, the “qualification was either flashed on screen briefly with no verbal announcement in television ads; announced with rapid-fire language at the end of radio ads; or buried in a small footnote in print ads.” 160

As a practical matter handing out game pieces to non-paying consumers from each franchised unit would likely frustrate the sales objectives of the game promotion, but equal dignity requires that the no-purchase-option not be unreasonably cumbersome. In general, a franchisor can satisfy equal dignity requirements by permitting a consumer to obtain a game piece through the mail, 161 as long as the odds of winning are no different, and the number of

---


159 Id.

160 Id.

game pieces that may be requested by a single consumer are not unreasonably limited. However, the terms of a settlement entered into in 2004 by CVS and Attorney General Elliott Spitzer suggests that, in New York, where a purchase results in a consumer automatically being entered in a sweepstakes, no-purchase entry forms need to be made available in the store.  

b. **Posting Abbreviated Rules**

Some state laws require that sweepstakes or game rules be publicly posted or available at each retail location participating in the promotion. Given that the full rules may be very cumbersome to display in some units, a franchisor may elect to provide the units with abbreviated rules. As discussed above in Section VI.B, short-form or abbreviated rules should include:

- No purchase necessary.
- Void where prohibited or restricted by law (or in specified jurisdictions).
- Promotion is subject to Official Rules.
- Instructions on how to access or receive copy of Official Rules.
- Eligibility restrictions apply.
- State start and end dates, and entry deadline.
- Sponsor Identification.

Because an absence of posted rules can result in a sweepstakes or game being unlawful, franchisors must give careful consideration to how rules will be securely displayed within the franchised units, and how to ensure that franchisees and their employees understand the necessity of conspicuously posting the abbreviated rules.

Presumably, of most interest to consumers, is how to participate without making a purchase. To reduce the risk of a consumer attempting to walk away with no-purchase option instructions, consider including a tear pad of copies of the abbreviated rules, or a QR code that can be scanned for easy access to the full rules. Note that a QR code is not an alternative to the posting of abbreviated rules at point of sale.

c. **Clear Communications**

The success of the sweepstakes or game of chance promotion is dependent on execution at the unit level. This means that the franchisor must provide its franchisees with clear directions regarding how to implement the promotion, consistent with the rules and applicable law. These clear instructions should include, at a minimum:

---


163 See Press release, Attorney General Cuomo Stops H&R Block's Deceptive Advertising Tactics in Sweepstakes Programs, supra note 160.
• The manner in which game pieces or items to which game pieces are affixed should be secured before and during the promotional period.

• The date that all point of sale materials must be displayed. If teaser point of sale materials will be used (e.g. “instant win game begins on …”), then the franchisor will need to distinguish between the teaser communications, and those to be display during, and only during the actual promotion. Depending on the nature of the communication piece, the franchisor should consider putting display dates on the back of the communication piece itself, or on outer envelopes containing the communication piece.

• The date that game pieces must be provided to consumers.

• The date that all point of sale materials must be removed, and any remaining game pieces destroyed or returned to the franchisor.

• Steps to be taken if game pieces are exhausted before the end of the promotional period.

• A crew handout, on how to answer certain consumer questions. These may be in a Q&A form. For example:

  Q: How can I play for free?  A: The instructions for getting a free game piece are in the rules posted on the wall.

  Q: Are employees eligible to pay?  A: No. Neither employees, nor their family members are eligible to win prizes.

  Q: Can employees give extra game pieces to friends?  A: No. Giving away extra game pieces is like giving people free food or money from the register.

• Directions on how to direct any major prize winners to the rules for redeeming those prizes.

5. Eligibility Issues

A franchisor structuring a sweepstakes promotion should consider the franchised concept’s target audience, typical consumers, and nature of the prizes when determining who may participate. By way of example, it would not be unreasonable to restrict eligibility to licensed drivers, where the prize is an automobile. On the other hand, if the concepts' customer-base is largely made-up of teenagers, then perhaps only teenager-appropriate prizes should be planned. At the same time, privacy laws bode in favor of limiting eligibility to persons who are 13 years of age or older.164

In the case of a franchise system that is limited in geographic reach, the franchisor might also consider excluding residents from states where there are no system outlets. Doing so would also limit the number of persons eligible for non-purchase entry. For a franchisor with no

164 See Section V.A above.
units in those states having relatively onerous requirements, such as New York and Florida, by excluding residents (and units) in those states, the franchisor will avoid needing to comply with those states’ atypical requirements. Even when a franchise system is national in scope, it is important to distinguish between persons residing in “any of the 50 United States and the District of Columbia” and U.S. possessions and territories, such as Puerto Rico.

To avoid any appearance of impropriety, and to reduce the risk of any improper conduct, the franchisor should declare as ineligible:

- Officers, directors and employees and contractors of the franchisor (and any affiliates), and their immediate family members;
- Officers, directors and employees and contractors of the franchisor’s franchisees, and their immediate family members;
- Officers, directors and employees of any advertising, marketing, website, printing, and fulfillment agencies in any way involved in the administration of the promotion, and their immediate family members.

6. Protection of Game Pieces

A game’s integrity is significantly dependent upon game pieces being properly seeded and given, in the correct quantity, solely to eligible consumers. Security begins even before the game pieces are printed, by ensuring that only reputable agencies are involved in the printing.165

Because game pieces have value, they need to be carefully handled. They should be kept in a locked safe or similar secured location, except as needed for use. This includes securing unused game pieces at the end of each day. By way of example, if game pieces are affixed to beverage cups, cups not used during operating hours should be secured overnight unless the franchise unit is itself completely secured from anyone who might pilfer the cups.

Similarly, a process should be firmly established to account for each redeemed instant-win game piece, to ensure that it is not reused, and to enable redemption by the franchisor in those cases in which the franchisor reimburses the franchisee for all or part of the value of the prize.

7. Winner’s Release and Affidavit of Eligibility

A franchisor should prepare a form of winner’s release and affidavit based on the content of the Official Rules. A winner’s release and affidavit of eligibility may not be necessary for low-value prizes, such as a hamburger. Because some states require the compilation of lists of winners awarded prizes having a value exceeding $25,166 franchisors may elect the same threshold – exceeding $25 – for requiring a winner’s release and affidavit of eligibility. This will

---

165 See U.S. v. Chandler, 388 F.3d 796, 799 (11th Cir. 2004) (describing how the director of security of a franchisor’s marketing firm embezzled high-value game pieces which he shared with his friends and relatives).

166 See Section VII.A.8 below.
enable the franchisor to compile the winners list from the completed winner’s releases / affidavits of eligibility.

The winner’s release and affidavit of eligibility should:

• Have a place for the date of completion to be entered;

• Have a place for each the winner’s name, and address;

• Affirmatively represent that the winner has complied with the Official Rules;

• Social security number (needed if the value of the prize is $600 or more).

The affidavit of eligibility should require the winner to confirm the specific requirements for eligibility set for in the Official Rules, including:

• Age requirements (e.g. at least 18 years of age on the date the promotion started, or was entered, as applicable);

• Residency requirements (e.g. lawful resident of the United States);

• That the winner is not an individual covered by the scope of exclusions (e.g. not an employer of the franchisor, etc.).

A contest sponsor may refuse to award a prize to a person who does not meet the official eligibility requirements.167

If the winner’s name, or likeness will be used, then the winner’s release should grant the promotion sponsor the affirmative right to use the winner’s name, or likeness, in the manner contemplated by the Official Rules, and should release the sponsor (i.e. franchisor), franchisees, marketing agencies, and their respective employees, officers, directors, agents from any claims and liabilities in any way related to the intended publication, including with respect to claims based on publicity rights, and privacy rights. Even when the franchisor does not intend to use the winner’s name or likeness for promotional purposes, the winner’s release will cover any claims that might arise by virtue of the publication of a winners list.

Additional release language should be included if the prizes include the winner attending any event, such as a concert, or traveling. If the winner is entitled to bring companions, a corresponding release should be obtained from each companion.

8. **Winners Lists**

As discussed above in Section III.B.2.g, some states require the compilation and filing or publication of a winners list. Several states, including Florida, New York, and Rhode Island,

---

167 See, e.g., Krueger v. Elder MFG. Co., 260 S.W.2d 349, 353 (Mo. Ct. App. 1953) (winning jingle entrant disqualified due to being employed by a hospital which also operated a retail store which sold the sponsor’s apparel); Cashway Building Materials, Inc. v. McCurdy, 553 S.W.2d 787, 790 (Tex. Civ. App. 1977) (security guard furnished by security company to provide services during store grand opening properly disqualified as an employee of a vendor).
have specific requirements for compiling and filing or publishing lists of all persons who win a prize having a value in excess of $25.\textsuperscript{168}

A franchisor structuring a sweepstakes or game in which consumers can win or redeem prizes at individual franchise system units should give considerable thought to this issue when structuring the promotional program. If consumers can instantly win or redeem entries for prizes having a value of more than $25 at individual system units, then the franchisor’s compliance with the winners lists publication requirements will necessitate the collection of winners list information at the unit level. If the nature of the franchised business is such that systematic collection of winner information at the unit level would be challenging, then the franchisor should give serious thought to structuring the promotion so that prizes awarded at franchised units do not have values exceeding $25.

**B. Contests/Games of Skill**

A contest or game of skill can take many forms. A franchisor may, by way of example, invite contestants to design a new logo, create a new food recipe, enter a photo contest with the franchised concept as its subject matter, or even film a new promotional message. Contests and games of skill would seem to present relatively little risk to the sponsor, until one considers that prizes are often significant, and the franchisor may desire to publicize or make other use of contestants’ submissions, and some submissions may include images of people and other third-party intellectual property content.

The criteria for selecting a winner can be objective, such as sinking a basket from center-court, or subjective, such as selecting the photograph that best captures a franchised concept’s brand essence. As discussed above in Section IV.A, the key distinction between a contest or game of skill and a sweepstakes or game of chance is that the winner is not determined by chance.\textsuperscript{169}

1. **Works For Hire**

When a contest involves a creative work, such as a design or photograph, issues of ownership must be considered. If the franchisor wants to publish the work, even if just for the purpose of the contest itself, then it will need permission or a license to do so.

In order to fully exploit the work, the franchisor will want to acquire ownership. Typically ownership is acquired through works for hire and assignment language. As a best practice the works for hire and assignment language should be included in both the rules, and a release that the putative winner must sign as a condition precedent to being declared the official winner. If the submission will be made electronically, the electronic submission process is also an opportunity to reinforce that, upon submission, the creative work will become the sole property of the sponsor, and considered a “work for hire” under U.S. copyright law, and that to the extent any element of the creative work is not a “work for hire” as defined by U.S. copyright law, any claims the contestant has are assigned and transferred to the sponsor upon submission.

\textsuperscript{168} FLA. SAT. § 849.094(3) (2016); N.Y. Gen. Bus. § 369-e; R.I. GEN. LAWS § 11-50-3.

\textsuperscript{169} See generally, Burford Distributing, Inc. v. Starr, 20 S.W.3d 363, 366 (Ark. 2000) (Arkansas prize promotion act inapplicable to hole-in-one contest, which is a game of skill).
2. **Original Works**

To prevent infringing on third-party intellectual rights, a franchisor sponsoring a creative works contest should make clear in the rules, and in any required submission form accompanying the entry:

- That the entry is an original work created by the entrant;
- That the entry has not been previously published;
- That the entry does not (and its publication will not) infringe upon any third-party copyrights, trademark rights, publicity or privacy rights or other intellectual property rights;
- That, if the entry depicts any persons, that the entrant has obtained permission from each person whose image or likeness is depicted.

The franchisor should also include an indemnity obligation by the entrant in the franchisor’s favor, in the event of third-party claims of infringement.

3. **Sponsor’s Decision Final**

When a contest involves judging, the contest rules should generally describe the judging criteria, in part to increase the likelihood that entries will be consistent with what the franchisor is hoping to receive. Most importantly, however, the rules should make absolutely clear that the franchisor, as the contest’s sponsor, has an unfettered right to determine the winning entry, and that the sponsor’s decision is final.

4. **Eligibility Issues**

The same eligibility issues discussed in Section VII.A.5 above, with respect to sweepstakes and game of chance, apply to contests and games of skill.

In contrast to sweepstakes and games of skill, certain contests involve a transfer of intellectual property rights from the contestant to the sponsor. Therefore, in structuring a contest involving a creative work, a franchisor should consider limiting eligibility to persons who are at least attained the age of majority. In most states the age of majority is 18, but it is 19 in Alabama170 and Nebraska171 and 21 in Mississippi172. Even when a works for hire agreement is signed by both a child and parent, the agreement might under some circumstances remain voidable by the minor.173

5. **Winner’s Release and Affidavit of Eligibility**

The same winner’s release and affidavit of eligibility issues discussed in Section VII.A.7 above, with respect to sweepstakes and game of chance, apply to contests and games of skill.

---

170 ALA. CODE 1975, § 26-1-1.
171 NEB. REV. STAT. § 43-2101.
172 MISS. CODE ANN. § 1-3-27.
However, contests often involve the transfer or licensing of intellectual property rights. For example:

- Jingle to be used in marketing a product;
- Photo contest in which winning photo will be featured in a photography magazine;
- Artwork in which the winning entry will be incorporated in the franchisor’s design décor.

The winner’s release, consistent with the Official Rules, should convey or license the intellectual property rights to the winning submission as appropriate to enable the franchisor to use the winning submission as intended. Note that the prize should be identified as consideration in part for the rights being transferred or licensed.

6. Privacy Issues

In many instances, a franchisor may want to display, on a website or otherwise, contest entries and contest winners. The display of entries and winners may can implicate the privacy issues discussed in Section V.A above.

To ensure that a franchisor may publish entries, the franchisor should require that a release be executed as part of the submission process itself. As a best practice the release should require that each person depicted in an image or video be identified by name, be represented as being at least 18 years of age (19 in Alabama or Nebraska; 21 in Mississippi)\(^\text{174}\) on date of production, and contain an affirmative representation that each person has in fact consented to being included in the entry. If the franchisor has any doubt, such as where it appears that an individual may not have been aware of the filming or photography, the franchisor should consider obtaining a signed release from each individual prior to publication. If the video or image contains any minors, the franchisor should not publish the entry without having first obtained express parental written permission.

C. Fishbowl Promotions

While most of this paper is focused on system-wide promotions, at times a single franchisee may want to use a “fishbowl” promotion – where cards or entry slips are dropped into a goldfish bowl or other receptacle – from which one or more winning entries is randomly drawn. This type of promotion might be supported by a franchisor in connection with a particular event, such as the unit’s grand opening, or a customer appreciation day. Fishbowl promotions are a form of sweepstakes, and as discussed in Section III.A above, would constitute an unlawful lottery if each of the following elements is present:

- Consideration
- Prize
- Chance

\(^{174}\) See Section V.B.4 above.
However, as long as participation in the promotion involves no payment or required purchase, it will not be an unlawful lottery.\(^{175}\) Often the primary objective of gathering the entries is to compile a list of potential customers. A franchisor permitting its franchisees to conduct these types of promotions should provide some guidance to ensure:

- If the franchisee is compiling a mailing, email, or similar distribution list, the reason why the information is being collected should be identified on the receptacle, entry slip or in some other conspicuous manner. Ideally, the franchisee should provide a form to be completed, with a checkbox that the person completing the form will manually check, if that person wants to be contacted for promotional reasons.

- The franchisee should not collect personally identifiable information from minors.

- The franchisee should ensure that it protects the personally identifiable information as discussed in Section V.A of this paper.

- The franchisee should only use personally identifiable information for the specific purpose it was collected, consistent with the consumers’ written consent.

- The franchisee should avoid prizes having a total value that would trigger state sweepstakes filing laws in applicable states.

It is noteworthy that even a single text message sent to a consumer for marketing or advertising purposes without that consumer having provided prior express written signed consent, can result in a violation of the Telephone Consumer Protection Act.\(^{176}\)

### D. Prize Indemnity Insurance

Prize indemnity insurance is specialized insurance intended to cover the costs of high-ticket prizes in sweepstakes and contests where the award of all prizes is not guaranteed.\(^{177}\) A relatively common example of prize indemnity insurance is referred to as “hole-in-one” coverage, which a golf tournament prize sponsor can purchase insurance to cover the costs of a prize, in the unlikely event it must be awarded.

In the franchising context, prize indemnity insurance could be purchased in connection with a “collect to win” type game where consumers must collect a number of game pieces to spell a word or phrase, the number of potential high price winners is limited, and there is a considerable chance that some recipients of the most valuable game pieces will not even play the game. A franchisor purchasing prize indemnity insurance needs to ensure that the insurance policy does not impose conditions inconsistent with the rules, or the manner in which

---

\(^{175}\) See Section III.A above.

\(^{176}\) 47 C.F.R. §§ 64.1200(a)(3); (f)(8).

the sweepstakes or contest will be conducted. By way of example, there are a number of reported decisions related to an insurer denying hole-in-one coverage when the hole was closer to the pin than contemplated by the policy.

Also keep in mind that indemnity insurance would not be appropriate for those promotions in which all high-value prizes are guaranteed to be awarded through second-chance drawings.

E. Taxes on Winnings and Awards

As discussed in Section III.B.1.d, Sweepstakes cash prize constitutes taxable income to the winner. In the case of a non-cash prize, the winner has taxable income based on the fair market value of the prize. The same is true in the case of an award resulting from a contest of skill.

A franchisor awarding prizes having a value of $600 or more will have a taxable income reporting obligation. Specifically, the United States Internal Revenue Service requires that a sweepstakes or contest sponsor report miscellaneous income for each person to whom the sponsor has paid at least $600, or the fair market equivalent, during the year. The income is required to be reported in box 3 of Internal Revenue Service form 1099-MISC.

Franchisors may want to consider this tax reporting obligation when determining the value of prizes to be awarded through a sweepstakes or contest promotion, as well as the maximum value of prizes that will be awarded at participating locations. In those instances when a franchisor awards prizes having a value of $600 or more, the franchisor will need to ensure that it has a process in place to collect the necessary information for preparing the 1099-MISC form, including obtaining the prize recipient’s social security number. To ensure paperwork is properly completed, a franchisor awarding prizes having a value of $600 or more

---

178 See Servco Pacific Ins. V. Axis Ins., 129 F. Supp. 3d 1143, 1146 (2015) (insurer’s liability reduced to maximum coverage available for hole-in-one witnessed by a single person when insured failed to have two witnesses present at the target hole).

179 See, e.g., Harms v. Northland Ford Dealers, 1999 SD 143, ¶ 15, 602 N.W.2d 58, 62 (1999) (auto dealer required to award prize despite lack of indemnity coverage where winning contestant, a female athlete, shot from the women’s tee box, which was closer to the pin than the maximum distance covered by insurance); Talbot 2002 Underwriting Capital Ltd., v. Old White Charities, Inc., 5:15-cv-12542, slip. op., S.D.Va., January 6, 2017 (no coverage where policy required distance to tee of no less than 150 yards and hole-in-one shots were from 137 yards), under appeal, 17-1180, 4th Cir.

180 26 U.S.C. § 74(a), Silver v. Commissioner of Internal Revenue, 42 B.T.A. 461, 463 (1940) (winnings from sweepstakes ticket gifted to husband and wife resulted in each being liable for income tax on one-half the winnings).


182 Robertson v. United States, 343 U.S. 711, 714 (1952) (symphony composition contest winnings awarded to composer taxable income); Simmons v. United States, 308 F.2d 160, 165 (1962) (fishing angler who won $25,000 for catching specially-tagged rock fish was taxable income).

183 Internal Revenue Service, 2017 Instructions for Form 1099-Misc, p. 1, 5.

184 Id.
should consider centrally administering fulfillment of those higher value prizes, rather than fulfillment at the unit level.

VIII. WHEN THINGS GO WRONG

Even where promotions are carefully structured and implemented, their rules prepared and reviewed by counsel, and where there is no intent to deceive or incite problems, sometimes things go horribly wrong; and—with the far reaches of social media, cell phones, and the internet, and the array of federal and state laws, regulations, and guidelines—it’s no wonder. Sometimes the FTC or various Attorney Generals’ offices single out a particular promotion to create a new industry standard or to create a shift in the norm, sometimes it’s a matter of simple human error, and sometimes it’s a matter of human nature, whether the desire to laugh or make a statement, or otherwise. This Section summarizes the latest cases that shifted industry standards, call attention to a particular issue, or which simply amuse us while teaching a valuable lesson.

A. FTC, Attorneys General, Courts

Perhaps the most current and largest example of a social media contest that caught the eye of the FTC was Cole Haan’s #WanderingSole contest on Pinterest in 2014. The contest itself asked consumers to pin five pictures of their favorite Cole Haan shoes and their favorite places to wander and tag them with the hashtag #WanderingSole. Cole Haan promised to award the most creative entrants with a $1,000 award. Participants were not required to use any other hashtag or identifier that would have clarified why the pin was pinned to the entrant’s Pinterest board, namely, in exchange for the chance to win a prize.

As a direct result, Cole Haan received a letter from the FTC. The letter reminded the company that Section 3 of the FTC Act “requires the disclosure of a material connection between a marketer and an endorser when their relationship is not otherwise apparent from the context of the communication that contains the endorsement.” As the FTC had not previously addressed if a contest was a material connection requiring disclosure, nor had they identified pins on Pinterest, specifically, as being a form of endorsement—as well as the fact that the promotion was for a limited time and drew only a small number of participants—the FTC took no further action. The message in the letter, however, was that a material connection did exist between a business and the entrants in their contest and that such a connection required a disclosure. The letter did not, however, address what the disclosure should be. To clarify this ambiguity, the FTC set new guidelines detailing what type of additional hashtags should be enough to deter an action or notice from the agency, more fully described above in Section VII.B.1.

This was a classic case of technology moving faster than law. Until the Cole Haan letter and the subsequent FTC Endorsement Guide, could businesses truly have been faulted for not


\[186\] Id.

\[187\] Id.

identifying the lack of endorsement disclosure? At least the FTC did not think so. Hopefully, with such cases of first impression and new concerns, the FTC will continue to take the same guiding and not punitive action it demonstrated in this case.

The next example relates to the recent shake-up of the incredibly popular fantasy sports industry, where various Attorney General Offices and the FTC have also gotten involved. Historically, fantasy sports tournaments were seen as contests of skill, and, therefore, not illegal lotteries, despite the payment requirement to participate and ultimately, perhaps, win a prize. The industry was thrust into the spotlight, however, when a DraftKings employee inadvertently released data that shows the prevalence of particular players across lineups submitted for the contest. If a player has access to this type of data, it could provide them with a significant edge over those who do not. The same employee who posted the data won $350,000 the week of the data leak—although there was no evidence that the win was related to the data that was leaked nor that this particular employee had access to similar leaked data that would have given him an advantage over others who did not. While most promotions and contests exclude company employees from eligibility, fantasy sports companies had not previously adopted this type of eligibility exclusion. Following the leak, however, the two largest fantasy sports companies, DraftKings and FanDuel, announced policies that prohibited play by certain employees. This also thrust the legality of their entire structure back into question and into the spotlight.

Fantasy sports contests have taken the country by storm over the last ten years and have continuously been under government and public scrutiny. The industry got its start following the Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”) which was meant to prohibit wire transfers to off-shore gambling websites. Instead of targeting consumers, the UIGEA put pressure on banks to prohibit the transfers. Importantly, however, fantasy sports were made an exemption to the Act. This explicit gap in the law left room for fantasy sports to flourish and companies seized the opportunity while waiting for a definitive answer from the government and courts regarding legality. But as the industry expanded, the question of legality lingered. In 2007, a New Jersey District Court judge ruled that fantasy sports are a game of skill and not a game of chance and the long-advocated stance these companies had taken appeared to be validated. And with no major decisions opposing the fantasy sports structure, these companies continued to grow, raising millions through capital raises. Part of that growth was

190 Id.
191 Id.
a shift from month- or year-long contests, to weekly or daily contests.\textsuperscript{195} In fact, just daily fantasy sports as an industry alone is expected to be valued at over $5 billion by 2020.\textsuperscript{196}

This shift, however, brought with it more scrutiny, particularly at the state level, and while a majority of states still have fantasy sports operators, most of them exist because neither their courts nor their legislatures have made an affirmative decision as to the legality of fantasy sports.\textsuperscript{197} There is, however, a patchwork of state by state decisions where some outright ban fantasy sports and deem it to be illegal in their state, while others affirmatively legalize the tournaments. For example, the day after Tennessee enacted a bill legalizing fantasy sports—the third state at the time to do so—Alabama made the activity illegal.\textsuperscript{198} In a letter released by the Alabama Attorney General, the state declared that fantasy sports constitute illegal gambling under Alabama state law.\textsuperscript{199} To date, at least nine states have little to no fantasy sport operations following determinations by their respective state's legislature or Attorney General.\textsuperscript{200} This scrutiny on what a true “game of skill” consists of, especially in the sports context, is likely to continue. Therefore, when in doubt, sponsors should include an alternative method of entry, especially if, while the outcome may be partially related to skill, there is still some element of chance involved.

In addition to the FTC, state Attorneys General, and legislators, courts also see contest cases in their docket, though typically in a class action setting. The most well-known case was brought in 2007 by plaintiffs who participated in a sweepstakes offered through the two televisions shows Deal or No Deal and American Idol. Entrants could enter the sweepstakes by text messaging their entries for a fee of $.99 and $.49 or via a free alternative method of entry through the Internet.\textsuperscript{201} Filing a motion to dismiss, the defendants argued that the alternative free method of entry provided to participants prevented the sweepstakes from being considered an illegal lottery, however, plaintiffs countered by clarifying that they did not receive anything of economic value in exchange for the fee and, therefore, the sweepstakes was structured as an illegal “pay to play” game. The judge sided with the plaintiffs and denied the motion to dismiss, finding that a “pay to play” sweepstakes could violate the state’s lottery law.\textsuperscript{202} In 2011, four years after plaintiffs started the suit, the court approved a $50 million settlement in favor of

\begin{thebibliography}{99}
\item Id.
\item Id.
\end{thebibliography}
plaintiffs. The lesson to be learned here is twofold. The first, and perhaps less obvious one, is to consider whether to include an arbitration provision and class action waiver in the official rules. The second, however, is that even if a sweepstakes offers a free alternative method of entry, if an entrant is paying to participate in a sweepstakes sponsors should ensure that the entrant is receiving fair value for their payment in addition to the sweepstakes entry.

As mentioned earlier, user generated content can create pitfalls for unwary systems. Quiznos decidedly took a risk in 2008 when it ran a contest called the “Quiznos vs. Subway TV Ad Challenge” where consumers were encouraged to submit homemade commercials drawing “a comparison between Quiznos and Subway with Quiznos being superior.” Subway brought suit under the Lanham Act and the Communications Decency Act claiming that the entries disparaged and made false claims about the brand. Quiznos alleged that they were merely a publisher of content and were thus immune to a suit. This argument was rejected by the judge, who found the issue a question of fact for a jury. As the case was settled out of court, there is no definitive answer with regards to whether the sponsor of a promotion would be immune to a similar suit as merely a publisher, however, when a sponsor solicits negative user generated content directed at a competitor, the likelihood the competitor will find out and take action is extremely high, and should be taken into account when structuring a promotion of this kind.

The next example involves a promotion run by Topps Company, the maker of Ring Pop candies, popular with children and young adults, who ran a contest in 2014 seeking user generated content. The contest asked users to post photos tagged “#RockThatRock” and presented users the opportunity to win tickets to a pop-rock band, R5, concert, a band popular with children and young adults. The posts, however, are what caused 10 advocacy groups to organize and ask the FTC to investigate Topps Company for violation of the Children’s Online Privacy Protection Act (COPPA). Teenage and pre-teenage girls, and some who appeared to be even younger, posted pictures on the brand’s Facebook and Twitter pages in which they struck provocative poses, some with their lips puckered around a Ring Pop. While the FTC elected not to investigate, counsel should always be aware of the elevated scrutiny that comes with promoting brands or goods that are popular with children. Relying on Facebook rules (which do not permit children younger than 13 to register), or other social media platforms, which typically state that their platform is not intended for use by children, may not be enough. A promotion’s rules should be clear, and the promotion monitored to ensure, that entrants younger than 13 are not eligible to, and do not, participate.

---

206 Id.
208 Id.
209 Id.
B. Human Error and Human Nature

Perhaps the most valuable lesson to learn when faced with the incredible ways in which promotions go awry is that it is impossible to overstate the importance of drafting escape clauses in the official rules. Closely consider the various ways in which a promotion could go wrong, and give the sponsor the discretion to resolve a vast array of issues. Courts have, after all, historically shown great deference to enforcing contest rules. Each of the following examples created public relations issues for the sponsor; however, having greater flexibility in the rules to resolve potential problems gives the company more options in how to respond when faced with unexpected results.

The first example is of a now infamous contest by Wal-Mart with an unexpected result. The contest idea was simple, Pitbull, famous for rapping, would be sent to the store that received the most votes. The internet caught on and did what it does best, vote for the least likely candidate to win. The store that received the most votes was located in Kodiak, Alaska.210 Pitbull, to his credit, honored the commitment and went to Alaska to perform.

Another musician, Hannah Montana, was involved in a contest with a significant rule issue. Club Libby, the sponsor of the contest, offered tickets to the best essay submission. A Garland, Texas six year old submitted an essay on the subject of her father’s death in Iraq. After winning the contest, it turned out her essay was a work of fiction.211 Luckily for the fan—but not the sponsor—the rules did not specify whether the essay should be fact or fiction. Regardless, the Club Libby elected, in the end, to withdraw the award and present it to another family.

In an example of pure human error, Centex Homes mistakenly gave away two grand prizes for a dream home worth more than $200,000.212 Mistakenly, two keys were created that opened the front door to the home, indicating the winner. While in this case, the rules did provide for a resolution by drawing a final winners name from a pool of all the winners, the loser of the drawing was, understandably, still extremely unhappy. They claimed that, as stated in the rules, the drawing was only appropriate due to a malfunction and that what occurred was, instead, human error. Centex opted to not litigate the issue, and instead awarded both winners the grand prize.

Other campaigns have used well drafted rules to escape inconsistent results. For example, a “biggest fan” contest was run for a Taylor Swift concert. Internet sites voted a 39-year-old man to the top spot.213 The rules of the contest allowed the company the right to

---


terminate the contest if the rules or integrity had been compromised.\textsuperscript{214} Thus, rules should always be drafted with an eye towards the event unfolding in an unintended manner.

\textbf{IX. CONCLUSION}

While the laws, regulations, guidelines, industry standards, and best practices surrounding contests and sweepstakes are numerous, they are no match for the marketing power of a well-structured and well-run promotion. Contests and sweepstakes continue to gain popularity as more and more methods of communication and online communities thrive. It is not unreasonable to assume, then, that sweepstakes and contests are here to stay and have likely already been integrated into a franchisor’s marketing plan. To this end, it is important for counsel to be aware of the possible legal and human elements that affect such promotions, and to provide for each, from the beginning stages of structuring the promotion, preparing the rules, and reviewing marketing materials, through the administration of the promotion and awarding of prizes.

\textsuperscript{214} Id.
SPIN-A-FIDGET SWEEPSTAKES – OFFICIAL RULES

PROMOTION IS OPEN TO LEGAL RESIDENTS OF THE 50 UNITED STATES & DISTRICT OF COLUMBIA, 18 YEARS OF AGE (19 IN ALABAMA AND NEBRASKA, 21 IN MISSISSIPPI) OR OLDER AND SHALL BE CONSTRUED AND EVALUATED ACCORDING TO U.S. LAW. DO NOT ENTER THIS SWEEPSTAKES IF YOU ARE NOT LOCATED THE 50 UNITED STATES OR DISTRICT OF COLUMBIA.

NO PURCHASE NECESSARY. PURCHASE WILL NOT INCREASE YOUR CHANCES OF WINNING.

Sponsored by Whirligig Fidget Corporation

1. **What is a PIN?** A PIN is a unique, seven character alphanumeric code. Each PIN is good for one (1) entry into the Spin-A-Fidget Sweepstakes. PINs have no cash value. Each PIN can only be used one time.

2. **How to get a PIN:** Look for your PIN on the game piece affixed to specially marked Whirligig Spin-A-Fidget packages (while supplies last) at participating Whirligig Store locations from 7/16/2017 through 9/15/2017 (“Promotion Period”). Sweepstakes officially ends 9/30/2017. All PINs must be entered online by 11:59 p.m. ET 9/30/2017. Refer to Section 3 to find out how to get a PIN without making a purchase.

3. **How to get a PIN without Making a Purchase:** To obtain one official game piece without purchase, while supplies last, send a 3” x 5” card on which you have hand-printed your name and address, along with a hand-printed self-addressed stamped envelope to: SPIN-A-FIDGET SWEEPSTAKES, c/o CRC, 6321 Bury Drive, Suite 10; Eden Prairie, MN 55346. Limit one free game piece request per stamped outer envelope and one free game piece request per person, per day. No mechanically reproduced or photocopied requests accepted. Residents of VT may omit return postage. Game piece requests must be postmarked by 9/15/2017 and received by 9/30/2017. Sponsor is not responsible for lost, late, mutilated, misdirected, illegible, incomplete or postage due mail requests.

4. **To Enter:** Access www.spinafidgetsweepsakes.com between 12:01 a.m. ET on 7/16/2017 and 11:59 p.m. ET on 10/15/2017 and follow the onscreen instructions to register and enter the Whirligig Stores Spin-A-Fidget Sweepstakes. All entrants must have a valid e-mail address. Limit one entry per PIN. In case of dispute as to identity of the winner who enters, the winning entry will be declared made by the registered user (meeting eligibility criteria) of the e-mail account, and if a prize is won, it will be awarded to that registered user.

5. **To Find Out if You Have Won:** Upon registering and creating your account on www.spinafidgetsweepsakes.com, you will be asked to enter your PIN to see if you have won. You will then need to go to your email account and check for new mail. If you receive an email message that states, “YOU WIN!” and indicates your prize, then follow the instructions to redeem your prize. Prize fulfillment is subject to PIN / game piece verification, and subject to eligibility restrictions. Note that any SPAM filters used with email account may need to be disabled, before you enter your PIN, to prevent the notification email from being blocked or rejected.
6. **Sweepstakes Prizes:**

(a) One (1) Grand Prize is available. The Grand Prize is a trip to the Fabulous Fidget Convention in Palm Desert, California (approximate value: $3,500; cash option: $2,500). Odds of winning the Grand Prize is 1 in 150,000. The Grand Prize consists of:

i. Attendance for two at the Fabulous Fidget Convention in Palm Desert, October 18-20, 2017.

ii. Two Round Trip Coach Airline Tickets to Palm Springs, California, from the major airport nearest to the Grand Prize winner’s home.

iii. Transportation to/from the airport in both cities.

iv. 3 night stay in Hotel in Palm Desert.

v. $1,000 Amex Gift Card. (All other expenses are the responsibility of the winner.)

(b) First Prizes: There are five (5) First Prizes available. Each First Prize is a Whirligig branded jacket, having an approximate retail value of $50.00. Odds of winning a First Prize is 1 in 30,000.

(c) Second Prizes: There are ten (10) Second Prizes available. Each Second Prize is a Whirligig branded sweatshirt, having an approximate retail value of $25.00. Odds of winning a Second Prize is 1 in 15,000.

(d) Third Prizes: There are one hundred (100) Third Prizes available. Each Third Prize is a one-year subscription to Spin-A-Fidget magazine, having an approximate retail value of $25. Odds of winning a Third Prize is 1 in 1,500.

(e) Fourth Prizes: There are one hundred (100) Fourth Prizes available. Each Fourth Prize is a Whirligig branded t-shirt, having an approximate retail value of $10.00. Odds of winning a Fourth Prize is 1 in 1,500.

(f) Fifth Prizes: There are two hundred (200) Fifth Prizes available. Each Fifth Prize is a certificate redeemable for one Whirligig fidget having approximate retail value of $8.50. Certificates have a maximum value of $10.50. Certificates must be redeemed by 12/31/2017; restrictions apply. Purchase price in excess of $10.50 is the responsibility of the winner. Change will not be given for purchases under $8.50. Each certificate is valid for only one purchase; certificates cannot be combined. Odds of winning a Fifth Prize is 1 in 750.

7. **Grand Prize Second Chance Drawing:** If the Grand Prize is not awarded through on-line sweepstakes play, then there will be a second chance drawing, with the Grand Prize winner being selected through random drawing from the pool of non-winning on-line PIN entries. No other prizes, which are not won through on-line sweepstakes play, will be awarded.

8. **Unclaimed Prizes.** Any prizes not claimed within 30 days from email notification shall be deemed forfeited.

9. **Prize Awards:** All prizes awarded are subject to verification and compliance with these Official Rules, including complete sweepstakes registration, and submission of the game piece containing the winning PIN. Except in the case of the Grand Prize, as described above, no cash substitutions for prizes will be permitted; prizes are non-refundable and non-transferable, except at sole discretion of Sponsor. Grand Prize winner will be sent a Winner’s Agreement and Release, which must be signed and returned by date specified in
notification letter, or prize will be forfeited in its entirety and another winner may selected. In the event of non-compliance, a winner’s prize will be automatically forfeited. Grand Prize travel must be completed by 10/20/2017 and scheduled before 10/18/2017 using Sponsor’s designated travel agent. Sponsor reserves the right to substitute prizes of equal or greater value. Federal, state and local taxes are solely the responsibility of the winner.

10. **General Information:** By entering the sweepstakes, entrants accept and agree to these rules and the decision of the judges, which shall be final. If any prize or notification is returned, or undeliverable, winner will forfeit their prize. By submitting an entry, a winner agrees to allow use of his or her name, likeness and/or biographical information for promotional purposes (including posting of first name and last initial on the Web site), except where prohibited.

11. **Eligibility:** Sweepstakes open to legal residents of the 50 United States & DC, 18 or older (19 or older in Alabama and Nebraska, 21 or older in Mississippi), except employees and the families of Whirligig Fidget Corporation, its affiliates, subsidiaries, promotion, interactive, advertising, and similar agencies. Whirligig Fidget Corporation, its affiliated companies, representatives, agents or employees are not responsible for, and shall be indemnified by the prize winner against, any claims, injuries, losses or damages of any kind resulting from acceptance, use, misuse, possession, or loss of the prize. Subject to all federal, state and local laws. Void where prohibited or restricted by law.

12. **Other Conditions:** Sponsor assumes no responsibility for computer system, phone line, hardware, software or program malfunctions or other errors, failures of any kinds, delayed computer transmissions or network connections that are human or technical in nature, including the non-receipt of email winner notifications due to the proper operation of SPAM filters. Sponsor reserves the right in its sole discretion to cancel or suspend this sweepstakes, in its entirety or in part should virus, bug, tampering, unauthorized intervention, fraud, technical failures, or other causes beyond Sponsor's control corrupt the administration, security, fairness, integrity or proper play of the sweepstakes. Sponsor is not responsible for incorrect or inaccurate entry information whether caused by Internet users or by any of the equipment or programming associated with or utilized in the sweepstakes by technical or human errors that may occur in the processing of the entries in the sweepstakes. Sponsor reserves the right to withdraw the transmission of this sweepstakes at any time and award the Prize from among eligible entries received prior to the date of the withdrawal. Sponsor reserves the right at its sole discretion to disqualify any individual it finds to be tampering with the entry process or the operation of the game or web-site or to be acting in violation of the Rules. By participating, all participants signify their agreement to be bound by these Official Rules. By participating, all participants, on behalf of themselves, their legal representatives, estates, heirs and assigns, agree to release Sponsor and its affiliated companies, representatives, agents, marketing and promotions companies, and their respective agents and employees from any claims, injuries, losses or damages to persons or property of any kind sustained in connection with the promotion, or the receipt, possession, or use or misuse of any prize.

13. **Winners List:** For a list of prize winners log on to www.spinafidgetsweepsakes.com no later than 11/15/2017.

14. This offer may not be published elsewhere without the written permission of Sponsor. Sponsor: Whirligig Fidget Corporation, Minneapolis, MN 55415.
APPENDIX 2 – Short-Form Rules Example

SPIN-A-FIDGET SWEEPSTAKES

Sweepstakes Official Rules – Content Checklist


☐ Method of Entry
  ☐ How to Enter
  ☐ Any limits on number of entries (if applicable)

☐ Alternative Method of Entry (AMOE)
  ☐ Equal Dignity
  ☐ Sponsor not responsible for lost/misdirected/illegible entries
  ☐ Residents of VT may omit return postage
  ☐ Any limits on number of entries (if applicable)

☐ Promotion Period
  ☐ Official time zone if entry by internet
  ☐ Start Date; End Date; Other Key Dates

☐ Eligibility
  ☐ Residency; Excluded States (if applicable)
  ☐ Age Restrictions
  ☐ Exclusion of Franchisor (Sponsor), Franchisees, Employees, Agencies, and their Immediate Family Members (definition of immediate family members), and their household members.

☐ Entry Binds Entrant to the Rules

☐ Prizes
  ☐ Number
  ☐ Value
  ☐ Odds of Winning
  ☐ Cash Option (if applicable)
  ☐ Unclaimed Prizes
  ☐ Second Chance Drawing (if applicable)
  ☐ Winner Responsible for Taxes

☐ Winner Selection

☐ Winner Notification (how, when)
- Winner Verification
- Winners List
- Winner’s Release (eligibility, publicity)
- Printing Errors (Kraft)
- Malfunction / Fraud
- Privacy Policy / How Collected Information May be Used
- Choice of Law (if specifying)
- Dispute Resolution (if specifying)
- Sponsor Identification
- Proper Trademark Usage / Trademark Ownership Information
- Social Media Requirements (if applicable) – Refer to Separate Checklist
Sweepstakes Short Form (Abbreviated) Rules – Content Checklist

☐ NO PURCHASE NECESSARY.
☐ Void where prohibited. (Or void in specified jurisdictions).
☐ Special eligibility restrictions (e.g. Open to U.S. residents 18+).
☐ Start and end dates of promotion; entry deadline.
☐ Odds of winning depend on number of entries.
☐ Subject to Official Rules.
☐ Instructions for obtaining full Official Rules.
☐ Sponsor identification.

New York requirement for Rules Posted in Participating Retail Establishments

☐ Minimum number and value of prizes available to be won over a stated period of time and stated geographic area.
Sweepstakes Registration Checklist

☐ FL (if value of total prizes exceeds $5,000)
  ☐ At least 7 days before promotions period:
    ☐ Game Promotion Filing Application (State Form)
    ☐ One of the Following:
      ☐ Original Surety Bond
      ☐ Game Promotion Statement of Trust Account (State Form)
      ☐ Request for Waiver of Trust Account of Surety Bond (State Form)
        (Requires 5+ consecutive years problem-free Sweepstakes in FL)
    ☐ Filing Fee
    ☐ Official Rules
  ☐ Within 60 days after end of promotion:
    ☐ Winners List (name, address, $25 or more; date delivered)

☐ NY (if value of total prizes exceeds $5,000)
  ☐ At least 30 days before promotion period:
    ☐ Games of Chance Registration (State Form)
    ☐ One of the Following:
      ☐ Games of Chance Surety Bond (State Form)
      ☐ Certificate of Deposit (State Form)
    ☐ Filing Fee
    ☐ Official Rules
  ☐ Within 90 days after end of promotion:
    ☐ Winners List (name, address, $25 or more; date delivered)

☐ RI (if value of total prizes exceeds $500; and promoted at retail outlet)
  ☐ Prior to start of promotion:
    ☐ Statement with Reference to Games of Chance (State Form)
    ☐ Filing Fee
    ☐ Official Rules
  ☐ Maintain for six months following promotion (provide to State upon request):
    ☐ Winners List (name, address, $25 or more; date delivered)
Sweepstakes Prize Fulfilment / Post Promotion Administration Checklist

☐ Obtain signed winner’s release and affidavit of eligibility for each prize having a significant value.
  ☐ Require social security number if prize has a value of $600 or more.
  ☐ Include publication release if winner’s name / likeness will be used for promotional purposes.

☐ Document delivery of prizes.

☐ Issue 1099 to Winners of Prizes having a value of $600 or more.

☐ Document delivery of prizes.

☐ Prepare Winners List (for prizes having a value of $25 or more).
Social Media requirements for Rules Checklist

☐ Facebook: Promotions (Sweepstakes and Contests) communicated or administered on Facebook must contain:

☐ A complete release of Facebook by each entrant or participant.
☐ A statement that the promotion is in no way sponsored, endorsed or administered by, or associated with Facebook.
☐ Does not allow posting to personal timelines.
☐ Does not encourage opening of multiple accounts.

☐ Instagram: Promotions (Sweepstakes and Contests) communicated or administered on Instagram must contain:

☐ A complete release of Instagram by each entrant or participant.
☐ A statement that the promotion is in no way sponsored, endorsed or administered by, or associated with Instagram.
☐ Require that “sweepstakes” or “contest” be part of the hashtag (without abbreviating either term).
☐ Does not encourage opening of multiple accounts.

☐ Pinterest: Promotions (Sweepstakes and Contests) communicated or administered on Pinterest must contain:

☐ Cannot require users to save a specific image.
☐ No more than one entry per person.
☐ Statement that Pinterest neither sponsors or endorses the promotion.
☐ Require that “sweepstakes” or “contest” be part of the hashtag.

☐ Twitter: Promotions (Sweepstakes and Contests) communicated or administered on Twitter must contain:

☐ Anyone found to use multiple accounts to enter will be ineligible to win.
☐ No more than one entry per day.
☐ Discourage posting the same (or similar) Tweet.
☐ Request that sponsor’s user account (@username) be mentioned in Tweet.
☐ Require that “sweepstakes” or “contest” be part of the hashtag (without abbreviating either term).
Franchised (and Corporate) Unit Point of Sale Materials Checklist

☐ **Point of Sale Materials Package Content:**

☐ Franchisee / Unit Manager Instructions.

☐ Crew Instructions (tear pad sufficient to ensure distribution in duplicate to all crew members).

☐ Point of Sale Instructions (sufficient quantity to ensure a copy will be located at each cash register).

☐ Game pieces (or instructions for obtaining, as applicable).

☐ Point of Sale Materials (including short form rules).

☐ Winner’s release / affidavit of eligibility form (if applicable; tear pad; sufficient based on significant value prizes anticipated to be awarded at locations).

☐ **Franchisee / Unit Manager Instructions:** Detailed instructions concerning:

☐ Safekeeping of game pieces prior to, during, and after promotion.

☐ When to distribute crew instructions / have pre-shift briefings.

☐ Verbally walk crew through instructions.

☐ Have each crew member sign/date/return one copy & retain second copy.

☐ When and where to post point of sale promotional materials.

☐ Secure placement of point of sale instructions at each cash register.

☐ When to remove / how to properly dispose of promotional materials.

☐ Handling instructions:

☐ For game pieces remaining at end of game.

☐ Game pieces redeemed by consumers, to be transmitted to franchisor for reimbursement (if applicable).

☐ Winner releases / affidavits of eligibility (if applicable).

☐ Ineligibility of franchisee / employees / family / household members to participate.

☐ How to direct consumers to official rules; and no-purchase alternative method of entry.

☐ When to require completion of winner’s release / affidavit of eligibility as a condition of prize award.
☐ **Crew Instructions: Detailed instructions concerning:**

☐ Distribution of game pieces / proper handling.

☐ Redemption of game pieces / proper handling / register procedures.

☐ Ineligibility of employees / family / household members to participate.

☐ How to direct consumers to official rules; and no-purchase alternative method of entry.

☐ When to advise franchisee / manager / shift leader of consumer attempting to redeem prize for which a release / affidavit of eligibility will be necessary (if required).

☐ How to respond to consumer questions regarding availability of game pieces.

☐ **Point of Sale Instructions: Detailed instructions concerning:**

☐ Distribution of game pieces / proper handling.

☐ Redemption of game pieces / proper handling / register procedures.

☐ How to direct consumers to official rules; and no-purchase alternative method of entry.

☐ When to advise franchisee / manager / shift leader of consumer attempting to redeem prize for which a release / affidavit of eligibility will be necessary (if required).

☐ How to respond to consumer questions regarding availability of game pieces.
MARAL KILEJIAN

Maral Kilejian is counsel at Haynes and Boone, LLP. Prior to joining Haynes and Boone, Maral was a partner in a franchise law firm in Dallas, Texas named Mullin Russ Kilejian PC. Her practice focuses on franchise and distribution law, trademark law, and advertising and promotional law. Maral routinely represents franchisors and multi-unit franchisees across various industries.

Maral provides practical counsel and legal support to franchisors in the structuring and operation of domestic franchise programs and international expansion, franchise regulatory compliance, non-traditional venues, alternative distribution channels, managing franchisee relationships, crisis management, operations manuals, marketing-related legal issues, development and implementation of social media policies and guidelines, trademark matters, and nation-wide and international sweepstakes and contests.

Maral is an active member of the American Bar Association’s Forum on Franchising, a Topics and Articles Editor for the Franchise Law Journal, and from 2013 to 2015 served on the Forum’s Diversity Caucus’s Steering Committee. Maral has given presentations at conferences held by the International Franchise Association, and has spoken and written regularly on franchise issues at both local and national venues.

Maral holds a J.D./M.B.A from the University of Houston Law Center and Bauer School of Business and also speaks French and Armenian.
MICHAEL S. LEVITZ

Michael S. Levitz is currently Legal Counsel, Nestlé USA, and supports various business units including Nestlé Dreyer’s Ice Cream Company, and its subsidiary, The Häagen-Dazs Shoppe Company, Inc. The Häagen-Dazs Shoppe Company is the franchisor of Häagen-Dazs ice cream shops in the United States, headquartered in Minneapolis, Minnesota, with more than 200 franchised locations. Michael has supported Shoppe Company for more than twenty years (under several different corporate structures). Nestlé Dreyer’s Ice Cream Company manufactures and distributes Nestlé, Häagen-Dazs, Dreyer’s, Edy’s, and The Skinny Cow brand ice cream products; and also distributes Nestlé’s brands of frozen pizzas.

Michael has presented papers at prior ABA Forum on Franchising conferences, as well as at the International Franchise Association’s Annual Legal Symposiums.

Before joining Shoppe Company’s prior corporate parent, The Pillsbury Company, Michael practiced primarily in the area of construction litigation. Michael earned is J.D. from New England School of Law in 1988, and earned a B.S. (Industrial Construction Management) from Colorado State University in 1985. Michael is admitted to practice in Massachusetts, Minnesota and New York.
Rob Vinson is sole practitioner at Vinson Franchise Law Firm in Incline Village, Nevada, located on the north shore of Lake Tahoe. His represents start-up franchisors, existing franchisors, international franchisors, master franchisees, existing franchisees and prospective franchisees in all types of franchise transactional matters, franchise regulatory compliance matters, acquisitions, and related counseling.

Before forming Vinson Franchise Law Firm, Rob was a partner in the Franchise Practice Group in the Dallas office of Strasburger & Price LLP.

Rob and his brother, Kit Vinson, are co-founders of FranMan, Inc., a company specializing in preparing franchise operations manuals, with a cutting-edge, proprietary platform for hosting online manuals.

Rob earned his J.D. degree from Southern Methodist University School of Law in 1987, and his B.S. (Petr. Engr.) degree from Texas Tech University in 1983. He is admitted to practice in Texas, California and Nevada.

Rob has presented papers at the International Franchise Association’s Annual Legal Symposium, at the Direct Selling Association’s Legal & Ethics Seminar, and to the Dallas Bar Association’s Franchise and Distribution Law Section.

In the Lake Tahoe / Reno area, Rob is an active member in the Rotary Club of Tahoe-Incline, and he volunteers with Incline Middle School, Reno Jazz Orchestra, Red, White & Tahoe Blue, and other organizations and events.