

INTERNET ALERT

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GUMP

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LEGAL COMPLIANCE ISSUES GOVERNING ONLINE SWEEPSTAKES

Sweepstakes contests have long been popular marketing tools that can generate interest in your business and help build customer databases. Internet-based sweepstakes (i.e., sweepstakes that are promoted through a Web site and allow entry through a Web site) are increasingly common because they provide the added benefit of attracting traffic to your Web site, where entrants typically will receive additional information and can make online purchases. Perhaps the greatest benefit of Internet-based sweepstakes is that they allow the sponsor to reach a worldwide audience at a fraction of the cost of mailing paper sweepstakes materials or promoting the sweepstakes solely through the broadcast media and with far more immediacy.

Significant legal regulations govern sweepstakes promotions, and the consequences of violating these regulations could result in criminal liability. Internet-based sweepstakes present additional concerns that may not arise in a traditional sweepstakes. For example, the global reach of the Internet means that, unless limited to U.S. residents, a sweepstakes must comply with the laws of every state and every foreign country where the sweepstakes will be valid. Although some of the legal limits on sweepstakes are consistent from jurisdiction to jurisdiction, many requirements and prohibitions vary based on locale. Thus, what may be a perfectly legal sweepstakes in one state may get the

sponsor in trouble elsewhere. The lack of uniformity in the laws of foreign nations can make it an enormous task to operate a legal international sweepstakes, which unfortunately impairs the ability to take full advantage of the Internet's global reach.

This *Alert* discusses some of the legal problems commonly encountered when sponsoring an Internet-based sweepstakes. A thorough evaluation of the proposed contest and the official rules will help you run a sweepstakes that generates publicity rather than legal liability.

The Lottery Problem

Unwary marketing executives often fall into the trap of sponsoring a sweepstakes contest that, from a legal standpoint, looks more like a private lottery. Private lotteries, which are illegal in every state, are generally defined as having the following three elements: (1) **something of value** is given away; (2) by **chance**; and (3) entrants must provide **consideration** for their entry.¹ Genuine games of skill, such as trivia or essay contests, remove the element of chance. Since sweepstakes necessarily require that something of value be given away by chance (i.e., random drawing), the only way to avoid running an illegal lottery is to eliminate the third element—consideration. This is accomplished by providing a free

¹ See Cal. Penal Code § 319 (West 2000); N.Y. Penal Law § 225.00(10) (2000); Tex. Penal Code Ann. § 47.01(7)(2000).

method of entry and not requiring any purchase for participation in the sweepstakes.²

Obviously, charging an entry fee to enter the sweepstakes would constitute consideration and would be unlawful. In many states, however, the consideration need not flow directly to the sponsor of the sweepstakes to be deemed a violation of the lottery laws. For example, accessing the Internet could be determined to be sufficient "consideration" to warrant concern and many sweepstakes provide an alternate mail-in method of entry. If the only way to enter a sweepstakes is through the Internet, limiting the sweepstakes only to entrants that have Internet access prior to the start of the sweepstakes is one way to ensure that no incentive is given to purchase Internet service. Even requiring entrants to expend excessive personal effort or endure unreasonable inconvenience has been held illegal.³

For these reasons, it is crucial that entrants have a free, easy method of entry, such as mailing standard index cards or calling a toll-free number. The modicum of effort and expense required by these methods of entry is generally permissible.⁴ Of course, free entries must have the same chance of winning as entries submitted by persons who make purchases. Moreover, it is a violation of most state consumer protection laws to give potential entrants the impression that they will have a greater chance of winning if they make a purchase.

² See *Glick v. MTV Networks*, 796 F. Supp. 743, 747 (S.D.N.Y. 1992) ("the sweepstakes' official rules did not require that participants risk something of value because alternative cost-free means of entry were reasonably available").

³ See *Carney, Ltd. v. Brzezczek*, 453 N.E.2d 746, 761 (Ill. App. 1983) ("in our judgment, the obstacles to obtaining a free entry blank are so formidable, the publisher's offer of a free entry blank must be regarded as chimerical").

⁴ See *Albertson's, Inc. v. Hansen*, 600 P.2d 982, 986 (Utah 1979) ("to find that the effort required to pick up or obtain a [free entry] alone is valuable consideration would invalidate any distribution-by-chance scheme ... where the participant is required to expend the slightest effort").

Although most sweepstakes regulation occurs on the state level, federal law can also apply. For instance, the Deceptive Mail Prevention and Enforcement Act,⁵ which was enacted in 1999, prohibits the mailing of sweepstakes materials unless certain disclosures are made. These include, among others, clear and conspicuous disclosures of the odds of winning, the official rules and the fact that no purchase is necessary to win. While this act is not applicable to purely "Internet" sweepstakes (i.e., contests that are not also distributed by the use of the mails), the disclosure standards set in this federal statute should be considered as a benchmark to which any Internet sweepstakes should seek to comply.

Likewise, the Children's Online Privacy Protection Act applies to regulate the information collected by any sweepstakes targeted at children under the age of 13. The notice and consent provisions of this act should be consulted before sponsoring any sweepstakes targeted at children or the official rules should exclude participation by children.

State Registration and Other Requirements

New York, Rhode Island and Florida require sponsors to register their sweepstakes and impose registration fees.⁶ Florida and New York both require that the sponsor place in a trust account an amount of money sufficient to cover the prizes or obtain a surety bond equivalent to the total prize amount. Any Internet-based sweepstakes must comply with all state registration requirements or it must be void in those states where it is not in compliance.

States may also have conflicting requirements regarding the conduct of the sweepstakes. For example, state laws

⁵ 39 U.S.C. §3001, *et seq.*

⁶ See Fla. Stat. Ch. § 849.094 (2000); N.Y. Gen. Bus. Law § 369-e (2000); R.I. Gen. Laws § 11-50-1 (2000).

vary on whether it is necessary to award all prizes at the conclusion of a contest and whether a winners list needs to be provided upon request. It is imperative that the official rules be reviewed by counsel to ensure compliance with all applicable state laws.

Promoting Your Sweepstakes

As mentioned, when advertising or promoting your sweepstakes, any indication that a purchase would affect the chances of winning will be viewed as consideration, rendering the contest illegal. Advertisements must not be deceptive or misleading and must accurately describe how the sweepstakes will be run. Specific requirements vary from state to state, but most states require at a minimum the following information:

- No purchase necessary to enter or win
- Making a purchase will not affect your chances of winning
- Void where prohibited
- Void in any states where registration laws were not complied with (name states)

- A toll-free telephone number to request a copy of the official rules
- Odds of winning
- All taxes are the responsibility of the winner.

In the interest of full disclosure, it is also advisable to post official rules via Web site and, if print media will be used to promote the sweepstakes, it is also a good idea to print a full copy of the official rules there as well.

Conclusion

As set forth above, a sweepstakes should be promoted and administered in a fair and straightforward manner, consistent with applicable laws and the official rules. Although the regulations and restrictions on sweepstakes promotions may seem daunting, by combining the traditional sweepstakes with the modern Internet you can design a cost-effective promotion that will achieve your marketing objectives.

IF YOU WOULD LIKE TO LEARN MORE ABOUT THIS ISSUE, OUR FIRM OR OUR PRACTICE IN THIS AREA, PLEASE CONTACT:

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