

Pitfalls To Avoid In Social Media Sweepstakes Promotion

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The almost limitless access to social media has brought a new age for companies to not only promote their products or services, but to connect with the public, improve customer relations and strengthen their brand.

An array of brands and companies ranging from hospitality to entertainment use "#sweepstakes" on Instagram to offer prizes in exchange for engagement. On the platform, 2.2 million posts have that hashtag.

A recent example: Last month, MTV's Instagram account for its reality competition show "The Challenge" promoted a chance at a free pair of AirPod Pros to Instagram users. To enter, participants had to follow the account, tag three friends in the comment section and use "#TheChallenge38" and "#Sweepstakes."

However, with the availability and convenience of social media to run promotions also comes numerous opportunities to run afoul of the law — e.g., violations of state gambling prohibitions, as well as consumer protection requirements, such as necessary official rules provisions and state registration bonding requirements. This article briefly covers a few of these issues.

Overview of Gambling in the U.S.

The federal government traditionally has not played a major role in the regulation of gambling. Instead, regulation has been viewed as most appropriate for state and local jurisdictions.

Accordingly, with only a few notable exceptions — e.g., the federal Wire Act — rather than preempting state gambling laws, federal laws that govern gambling crimes were designed to aid individual states in the enforcement of state gambling laws. State law is therefore critical when assessing the legality of a sweepstakes.

Most states have commonality in that they typically define gambling as any activity in which the following elements are present:

- The award of a prize;



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- Determined on the basis of chance, including a future contingent event outside of their control; and
- Where consideration is required to be paid.

The removal of any of these elements is an effective way to ensure an activity is legal. However, there is a fine line between lawful and unlawful gambling activities, that hinges upon a series of tests that range across all jurisdictions to determine whether any elements of gaming are missing.

As such, it is vital to be up to date on the varying laws, to ensure compliance and avoid promotions from being classified as an illegal gaming activity.

Removing the Element of Consideration

Removing the element of consideration creates an activity known as a sweepstakes. States have generally adopted a pecuniary and economic value approach to analyzing consideration — some measurable economic value flowing from participants to promoters, e.g., transfer of money.

A promotion requiring a purchase or payment to participate presents a clear example of consideration. A less clear situation exists where participants are required to expend some degree of effort that ultimately benefits the promoter — e.g., completing a questionnaire.

While no definitive standard exists, the rule of thumb is the more effort required, the greater the likelihood it will be deemed consideration.

Sometimes sweepstakes do not require any consideration for the right to participate, and revenues derive from increased sales or fees from third-party sponsors.

More commonly, however, sweepstakes involve participation through a purchase, but provide a free alternative method of entry.

Here, companies must disclose the existence of the nonpurchase method of entry in a clear and conspicuous manner. Often the words "no purchase necessary" are displayed prominently on all sweepstakes materials; the key being that nonpaying participants must have "equal dignity" with purchasers.

This means that nonpaying participants must have an equal opportunity to enter and win the sweepstakes. That is, they should not face lesser odds or greater obstacles and should have an equal chance to win any of the prizes offered.

For example, a person who enters by paying consideration cannot receive a disproportionate number of entries compared to a nonpaying participant.

Moreover, paying customers cannot have the opportunity to win different or more expensive prizes. Any material disparity, actual or perceived, between paying and nonpaying entrants can invalidate the alternative method of entry and render the sweepstakes illegal.

Operators should be cautioned that the "alternative method of entry" sweepstakes model cannot be implemented to merely disguise what in substance constitutes gambling.

Higher scrutiny is applied to "alternative method of entry" sweepstakes because operators may attempt to make money from paying customers desiring to win prizes, as opposed to promoting a product unrelated to the sweepstakes.

This is a very real distinction in some courts, and requires special legal caution and consideration.

Official Rules

Official rules are like any other binding contract, except that instead of contracting with another sophisticated company, your client is potentially contracting with thousands of users.

Detail, clarity and accuracy are therefore crucial in drafting rules. This is evidenced by attorney general enforcement actions and substantial fines levied by the Federal Trade Commission against companies found to be promoting fraudulent schemes and engaging in other forms of false or deceptive advertising on the internet — i.e., official rules that do not accurately reflect the promotion.

At a minimum, official rules should include:

- Promotion start and end date;
- Eligibility restrictions;
- Entry methods;
- Winner selection details, including judging criteria if a skill-based contest;
- Description and retail value of the prize(s);
- Odds of winning;
- Where to obtain a winners' list;
- Limitations of liability;
- Name and address of the sponsor; and
- Dispute resolution provisions.

Consider having entrants check a box affirming they have read the official rules and agree to be bound by such rules.

Moreover, counsel must be careful to avoid any potential misinterpretation of your client's intent and must anticipate foreseeable issues, such as, how to address ties and prize unavailability when preparing official rules.

Social Media

Finally, counsel must be aware of the applicable social media platform's restrictions. Counsel must respect such restrictions and draft the promotion's rules in compliance therewith.

This is important because a promotion could be terminated prematurely for noncompliance with the platform's restrictions, which may lead to a violation of the law because the promotion did not adhere to its official rules.

For example, certain social media platforms, such as Facebook and Instagram, have specific guidelines that must be adhered to when offering a promotion. Facebook does not allow personal timelines or friend connections to be used to administer promotions — such as requiring users to share a post on a

friend's timeline or tagging friends in order to gain entry.

Other guidelines include, but are not limited to, having detailed official rules with eligibility requirements, as well as a release of the social media platform by each entrant and an acknowledgment that the promotion is in no way sponsored, endorsed or administered by the social media platform.

In conclusion, endless examples exist of companies using promotions to market their products and services. Unfortunately, oftentimes, proper credence is not given to the nuances of such marketing strategies.

Counsel for companies utilizing sweepstakes should recognize they are entering an intricate and specialized industry, and must be conscious of the complex legal boundaries in which they must operate.

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