

# NAVIGATING SOCIAL MEDIA SWEEPSTAKES AND CONTESTS

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Companies are increasingly turning to social media as a marketing tool, including by hosting sweepstakes and contests to boost brand recognition and purchasing, to increase social media engagement, and to gather data on consumers. The legal requirements related to these promotions are complex, frequently changing, and vary from jurisdiction to jurisdiction. Companies hosting online promotions must be cognizant of a variety of rules and regulations, including those from federal entities such as the Federal Trade Commission (FTC) and Federal Communications Commission (FCC), state, and local laws. Failure to comply with these laws can be a costly mistake. This article presents ten suggestions to consider before hosting a social media sweepstakes or contest.

## 1. Review Social Network Terms of Use.

Social media promotions require utilization of a third-party platform, so it is necessary to review and comply with the specific social network's terms of use when conducting promotions on them. Facebook and Instagram require the official rules to expressly release the social network from liability and acknowledge that the promotion is in no way sponsored, endorsed or administered by, or associated with, the social network. There are additional regulations against requiring specific user behavior, like tagging friends or sharing the promotion, as a condition to entry. Since these terms can and do change often, promoters would be wise to review them before each promotion.

## 2. Identify the Type of Promotion.

It is necessary to identify the type of promotion being hosted to ensure it complies with applicable law. There are three general elements of promotions—prize, chance, and consideration. Sweepstakes are free-to-enter giveaways where winners are selected at random. Sweepstakes involve prize and chance elements. Contests involve a winner being selected based on skill or merit. Contests involve the prize element and potentially the consideration element, but not the chance element. Lotteries are similar to sweepstakes in that winners are selected at random, but the entrants are charged a fee in exchange for a chance to win. Lotteries include all three elements. Lotteries are heavily regulated and in most instances will be found to be illegal.

**3. Clearly Disclose Official Rules.** Promoters must conspicuously post official rules identifying the material terms of the promotion. Required terms include identifying the promoter, eligibility requirements (including



any age and residency restrictions), an explanation of the methods of entry, the opening and closing dates for submitting entries, when and how the winners are selected, chances of winning, judging criteria (if a contest), and a description of the prize. Every social media post related to the promotion should state the material terms. As the official rules may not fit entirely into the post, a link to the complete rules should be included. Once the rules are posted and the promotion has been announced, the rules must not be changed.

**4. Eliminate Consideration in Sweepstakes.** A sweepstakes must not charge entrants any consideration in order to participate. The precise definition of consideration varies by jurisdiction and must be carefully considered by looking not only at the cost to the entrant, but also at the benefit to the promoters. Whether a promotion requires consideration generally depends on how easy or difficult it is for entrants to participate in the promotion, and consideration need not be monetary in nature. If entrants are required to watch online ads, share personal data, endorse products or services, or provide other valuable information to a company as a requirement of entry, an otherwise legal sweepstakes may be deemed an illegal lottery. Therefore, a business should always include a (conspicuously posted) free alternative means of entry option for sweepstakes, such as an online or mail-in entry form, that is given equal integrity to other forms of entry.

**5. Eliminate the Element of Chance in Contests.** Generally, contests seek to eliminate the element of chance and instead award prizes based on a contestant's skill. A contest should be based on demonstrable merit and include clear and objective judging criteria. Qualified judges should select a winner based on criteria specified in the official rules. Promoters who place the determination of a winner in the hands of the social media public, i.e., by gathering "likes" or re-posts, threaten the legality of the contest by reintroducing the element of chance.

**6. Include Eligibility Restrictions and Void Where Prohibited.** For any type of promotion it is advisable to include eligibility restrictions and "void where prohibited" language in the official rules and advertisements. Some states have bond and registration requirements dependent upon prize value, while others ban specific types of promotions altogether. To bypass these requirements, the general rules may prohibit residents from these states from participating in the promotions. Including a proper "void where prohibited" provision is necessary to navigate the

mishmash of state regulations while offering a nationwide promotion.

**7. Avoid Deceptive or Misleading Advertising.** Social media promotions are a form of advertisement and therefore must comply with consumer protection and advertisement laws. Social media posts related to a promotion must be honest and not misleading. If a sweepstakes or contest requires entrants to endorse the promoter or its products in any

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way, such as by posting on their social media accounts, the official rules must require the entrants to disclose that they are posting as part of the promotion. This may be accomplished by including hashtags, such as #sweepstakes or #contest, if applicable.

**8. Obtain Releases and Affidavits of Eligibility.** Each entrant should provide a release to the promoter, permitting the use of their name and likeness in the event the entrant wins the promotion. Depending on

the type of prize and contest, the promoter may also need to obtain a liability release. Promotion entrants should also provide an affidavit of eligibility confirming that the entrant complies with the eligibility requirements set forth in the official rules.

**9. Consider Privacy Laws When Using Entrant Data.** Data privacy is currently at the top of regulators' minds, so promoters must be aware of how their promotions trigger privacy rights obligations. For example, the upcoming California Consumer Privacy Act gives Californians broad but not unlimited rights to delete their personal information and opt-out of the sale of their data. Since nearly all promotions require the collection of personal data in some form, careful scrutiny must be placed on how data is collected, used, and shared.

**10. Awarding the Prize.** The IRS requires prize winners to report a prize as gross income. If the value of a prize is equal to \$600 or greater, the promoter should issue a Form 1099 to the IRS and send a copy to the winner. The official rules should inform entrants that they are liable for taxes related to accepting the prize, and offer winners the option to either accept or deny the prize. Additionally, depending on the value of the prize, promoters may be required to withhold federal or state income tax.

Sweepstakes and contest regulations are complex, nuanced, and frequently changing. This brief overview is intended only to help spot legal issues applicable to online promotions; it is not a comprehensive review of all applicable laws governing online promotions. Any business engaging in promotions should consult with competent legal counsel before wading into these murky waters.



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