



Contracts Corner: Play by the Rules When Advising on Promotional Sweepstakes

Commercial and Contracts



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Promotional sweepstakes can boost brand awareness, increase social media followers, and drive customer engagement. After all, who doesn't get excited about the opportunity to win prizes or free products? For these reasons, corporate marketing teams often want to include a sweepstakes element in a campaign.

As corporate counsel, you'll want to start advising your company's marketing team long before the promotional sweepstakes launches. Why? Because sweepstakes compliance is primarily about the pre-work, including registering in certain states, drafting official rules, researching social media platform-specific guidelines, securing third-party commercial contracts, and adhering to applicable federal and state laws and regulations.

This article provides a framework for corporate counsel to use when advising their company's marketing teams on promotional sweepstakes well before the launch date.

What are the legal basics of sweepstakes?

A sweepstakes is a promotion for which a prize is awarded — based on chance — to a winner who was chosen randomly from all eligible entrants. Engaging with a brand's social media channel or completing an entry form are common sweepstakes entry methods.

There should be no skill requirement for a sweepstakes, and the odds of winning should be solely dependent on the total number of entrants. The entry and winner selection processes should be documented with sufficient evidence to demonstrate compliance with its official rules and applicable laws and regulations. In addition, all entries must be treated equally, including entries via an alternative method of entry (AMOE), and all entrants should have the same chance of winning.

Requiring consideration without an AMOE may trigger FTC scrutiny and possibly a lottery classification.

Importantly, consideration should not be a prerequisite to entering a sweepstakes (e.g., product purchase requirement), unless an AMOE that does not require consideration is also offered. Requiring consideration without an AMOE may trigger US Federal Trade Commission (FTC) scrutiny and possibly a lottery classification. Thus, the phrase “NO PURCHASE NECESSARY” often appears in sweepstakes’ official rules and related marketing materials. Accordingly, if your company’s marketing team intends to require a purchase for entry, for example, in conjunction with a new product launch, the promotional sweepstakes must also include a free, “no-purchase required” AMOE to ensure compliance.

Except for state-run lotteries and, in specific cases, authorized raffles run by charitable organizations, lotteries are illegal under state and US federal laws. A lottery includes the following three elements:

1. consideration;
2. chance; and
3. prize.

For example, the [FTC fined Publishers Clearing House \(PCH\)](#) for using deceptive practices to trick consumers into believing a purchase was necessary to enter a promotional sweepstakes. Ultimately, PCH agreed to a settlement requiring them to pay US\$18.5 million in refunds to affected consumers, make changes to their business practices, and stop misleading consumers about how to enter drawing.

The laws and regulations governing sweepstakes depend on many factors, including the jurisdiction where the promotion is offered and the marketing channel being used. Some states — such as [Florida](#), [Rhode Island](#), and [New York](#) — require the sweepstakes sponsor to register with the state authorities and provide a bond equivalent to the monetary value of the prize.

The Federal Trade Commission Act, codified in 15 U.S.C. §§ 41-58, empowers the FTC among other duties, to prevent unfair methods of competition and unfair or deceptive acts or practices affecting interstate commerce and can fine sweepstakes sponsors for non-compliance as mentioned in the PCH example, above. In addition, the US Postal Service has authority over certain aspects concerning promotions. For example, if the sweepstakes is offered by mail, it must include — in conspicuous font — a disclosure stating that “NO PURCHASE IS NECESSARY.”

Thus, counsel should research and understand the applicable federal statutes and state laws to ensure compliance accordingly. In accordance with applicable laws and regulations, the winner must be contacted, the prize must be awarded, and sweepstakes-related records (e.g., entry materials, prize winners) must be retained.

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Additionally, if the sweepstakes was bonded, the sponsor must send a winners list to the authorities in Florida and New York. Other states may require the posting of winner's lists, evidence that the prize was awarded and related affidavits.



If your company intends to run a promotional sweepstakes outside of the US, counsel must consider balancing transparency, fairness, and consumer protection and research local laws to ensure compliance with applicable international regulatory regimes. Across jurisdictions, sponsors should ensure that participation is free or includes an alternative free method of entry (AMOE), all material terms and odds are clearly disclosed, prize winners are selected and awarded fairly, and marketing communications comply with applicable data privacy and anti-spam laws, **which you should confirm with local counsel** familiar with sweepstakes in that jurisdiction.

Organizers should also avoid misleading representations — such as claiming entrants have already won — and obtain required permits or authorizations where chance-based promotions are regulated (as in parts of Australia). Corporate counsel should carefully review and tailor each promotion to the applicable rules and enforcement standards in the relevant country or jurisdiction and, as needed, consult with local lawyers with subject-matter expertise.

Sweepstakes-related commercial contracts

Before a promotional sweepstakes launches, several commercial contracts must be in place. Specifically, corporate counsel should consider whether the following contracts are applicable to the sweepstakes that the marketing team is considering:

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- **Official rules.** These are the rules of the sweepstakes (e.g., minimum age to enter), and they form the contract between the company running the sweepstakes and each entrant.
 - **Promotional and talent agreements.** If the company running the sweepstakes will be hiring talent or influencers to promote the sweepstakes, there should be a commercial contract in place governing each party's obligations and responsibilities.
 - **Vendor agreement.** If the company running the sweepstakes will be hiring a service vendor to administer the sweepstakes entry process, there should be a commercial contract in place governing each party's obligations and responsibilities.
 - **Prize provider agreement.** If the company sponsoring the sweepstakes will be collaborating with another company to provide the prize, there should be a commercial contract between the parties.

How do you draft official sweepstakes rules?

Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) prohibits “unfair or deceptive acts or practices in or affecting commerce.” In addition, nearly every state has consumer protection statutes that require clear disclosure of sweepstakes terms, also referred to as the sweepstake's official rules.

One of counsel's key roles in advising on promotional sweepstakes will be to draft official rules, which state all material terms, comply with state-specific requirements, and, if applicable, adhere to the specific social media platform's rules. These may include:

- **Eligibility requirements** – age minimum, void jurisdictions, and sponsor-company's employee restrictions
- **Entry process** – “No purchase necessary to enter” language, detailed instructions on entry logistics, AMOE and limits on number of entries per person
- **Data-collection aspects** – how entrants' personally identifiable information (PII) will be collected, handled, etc.
- **Entry dates** – start and end dates, specific to time zones
- **Prize details** – quantity, brand, value and restrictions
- **Winner selection** – draw date, notification process and how a winner's list may be obtained
- **Legal and compliance aspects** – restrictions, governing law, dispute resolution, etc.

The sweepstakes official rules should be viewable at the point of entry and include language indicating that by entering, entrants have read and agreed to be bound by such official rules. An abbreviated form of the rules, including a link to the full rules, should be included with any call to action to enter the sweepstakes. If there is an in-person way to enter the sweepstakes — e.g., while visiting a brick-and-mortar retail store — the official rules should be physically displayed accordingly.

Third-party agreements concerning sweepstakes

Sophisticated sweepstakes promotions may require additional commercial agreements if third parties are involved. For example, commercial agreements will be needed if the sponsor company wants to hire an influencer to promote the sweepstakes on social media or a vendor to perform sweepstakes entry collection.

The following three hypotheticals showcase how third parties may be involved in your company's sweepstakes and how you, as corporate counsel, should consider structuring the commercial terms with each type of third-party. It is important for counsel to advise the marketing team that securing these third-party agreements requires time to draft, negotiate, and finalize them so as to ensure alignment with the timing of sweepstakes launch.

Example 1 - Engaging an Influencer to Promote Sweepstakes

MagicHair is running a sweepstakes where entrants are asked to “like” MagicHair’s most recent Instagram post for a chance to win one of MagicHair’s signature hairbrushes. MagicHair has asked Influencer, a creator they regularly work with, and have a talent agreement with, to make a post on Influencer’s Instagram account highlighting the sweepstakes and encouraging their followers to enter.

Counsel for MagicHair should draft a statement of work (SOW), governed by the pre-existing talent agreement, that outlines Influencer’s obligations as related to this specific sweepstakes. The SOW should address details such as:

- How many posts Influencer must make and on what platforms,
- What content the posts should include to ensure compliance with FTC-required endorsement disclosures and the platform-specific rules or policies,
- When the posts should go live, and
- MagicHair’s usage rights for the influencer’s posts (e.g., whitelisting).

To ensure fairness, MagicHair's official rules for the sweepstakes should stipulate that Influencer is not eligible for entry into the sweepstakes.

Example 2 - Paying Vendor to Manage Sweepstakes Administration

Pa-Kaso Art is a nationwide art supply retail chain. Their internal marketing team would like to run a sweepstakes to promote their new art workshops. The prize will be a high-quality art supply kit and a gift certificate for a workshop. Pa-Kaso's marketing team finds Vendor, a company that specializes in turnkey sweepstakes administration. Vendor will build an online landing page for entrants to submit their entries and the in-store sweepstakes entry forms. The entry form asks entrants for their name and contact information so Pa-Kaso can mail the winner the prize and register them for the workshop.

Vendors offering sweepstakes solutions are becoming increasingly common in the industry. They are a great resource, especially for small or busy marketing teams. This example poses a particularly important issue: data sharing.

Pa-Kaso and vendor should enter into a services agreement that includes terms concerning the sweepstakes administration aspects. If PII about the entrant will be collected, then the data sharing and related aspects between the companies would generally be set forth in a data processing agreement (DPA), including: data processing instructions and purpose limitations, data minimization and retention terms, and data deletion and security obligations.

Pa-Kaso's official rules should clearly disclose this data sharing relationship with vendor and include a link to Pa-Kaso's data privacy policy. A best practice is to have entrants — at the point of entry — tick a box indicating they have read and agree to be bound by the official rules and agree to the collection, use, and sharing of their PII with vendor as described in the official rules and Pa-Kaso's privacy policy (with a link to the privacy policy).

Example 3 – Third-Party Prize Providers

Shaft Carpet and Falcon Carpet Cleaners are in related industries with similar audiences. They would like to join forces and collaborate on a sweepstakes to promote their respective carpet products. Entrants will enter on Shaft's website. Shaft will draft the official rules and ensure they are displayed properly (online and in stores), collect entries (online), select a winner from all eligible entrants, and send the prize to the winner and notify authorities in accordance with applicable law. For the prize, Shaft will contribute a US\$100 gift card for Shaft's carpet products and Falcon will contribute a US\$50 gift card for Falcon's carpet cleaning product. Both parties will promote the sweepstakes on their respective social media accounts.

Both parties have an obligation as co-sponsors to ensure this sweepstakes is compliant with law. Whether you are counsel for Shaft or Falcon, you should work to ensure there is a marketing collaboration agreement in place between the two prior to the sweepstakes launch that defines:

- Each party's responsibilities (e.g., which one manages entries, provides prizes)
- Marketing commitments (e.g., number of posts, budget, channels)
- Creative control and intellectual property ownership
- Mutual licensing of logos and trademarks
- Indemnification and liability allocation

Additional legal considerations when running sweepstakes

While the most important tasks for corporate counsel associated with advising their company's marketing team on running a sweepstakes are drafting the corresponding official rules, advising on state and federal compliance aspects and, if needed, negotiating any related contracts with third parties, there are other non-contractual legal aspects that corporate counsel should collaborate on with the marketing team and other business partners like the tax team:

- **Prize selection.** Scan for prizes that have the potential to present any significant risks of harm to the winner. For example, you will often see brands giving away prizes that include airfare. Consider how you can leverage your official rules and third-party contracts to limit liability for your company.
- **Registration and bonding.** Registration and bonding are required in certain states for promotional sweepstakes with prizes that exceed specific monetary values. For example, New York and Florida require pre-registration and bonding for sweepstakes prize pools that exceed US\$5,000. Rhode Island requires sweepstakes registration when the total prize pool exceeds US\$500 and the promotion is conducted through a retail establishment in the state. Bonding means the sponsor must put up a monetary guarantee (a bond) to ensure the prizes are actually awarded and file the necessary paperwork with the state departments within certain timeframes prior to the launch date. As you establish an internal system for legal review of sweepstakes, communicate to stakeholders that sufficient lead time for registration and bonding may be needed.
- **Social media platform policies.** Each social media platform has its own rules and guidelines for sweepstakes so counsel will need to review those to ensure compliance if the promotional sweepstakes her company runs will be promoted on social media. Instagram, for example, requires an acknowledgement that the promotion is in no way sponsored, endorsed or administered by Instagram and that it must comply with applicable laws. Failure to comply

may result in account suspension or “shadowbanning.” It is important to advise your marketing team that your company and any influencer collaborators include proper disclaimers in their Instagram posts concerning the sweepstakes.

- **Tax implications.** Under the US Internal Revenue Code, if the prize is over US\$600, the sponsoring company typically must file a Form 1099 and the winner will need to report the prize as income on their tax return. If your company’s stakeholders would like to offer a high-value prize, be sure to consult with your tax advisors before finalizing the launch of the sweepstakes.

Conclusion

Sweepstakes can be an effective way to engage consumers and boost brand awareness. As corporate counsel advising your company’s marketing teams about promotional sweepstakes, the key is collaborating early to balance that team’s creativity and zest with the legal and compliance requirements as we outlined in the article.

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