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Sweepstakes, Contests and Giveaways 101

Avoiding Illegal Lotteries

Sweepstakes and other promotions are great marketing tools; however, they are highly regulated by both federal and state law. The most basic rule in promotion planning is to avoid having your promotion be deemed a lottery since only state governments can hold lotteries. A promotion is considered a lottery (and thus, illegal) if the following three elements are present: (1) Prize - anything of value is awarded in the promotion; (2) Chance - random selection of winners (vs. selection based on adherence to defined criteria); and (3) Consideration - any value given by entrant to enter the promotion; “value” can be monetary (making a purchase) or non-monetary (attending a sales presentation, supplying personal information, filling out a form) with the definition of “consideration” varying by state.

Sweepstakes, Contests and Giveaways – The Three Most Common Types of Promotions

Sweepstakes. A sweepstakes is the most common as well as the most regulated type of promotion. Since a sweepstakes requires no skill and each winner is selected at random, the element of consideration must be absent. However, many sweepstakes are conducted in connection with a purchase, such as McDonald’s Monopoly sweepstakes. To comply with the “no consideration” requirement, sweepstakes sponsors must offer an alternative method of entry where consumers can enter the sweepstakes without making a purchase (typically by a consumer mailing in an entry request). All participants must have the same chance to win regardless of method of entry.

Contests. Unlike a sweepstakes, a contest requires skill to win, and the element of chance is absent. Contests vary widely, but some examples are (a) an essay contest to determine a company’s biggest fan, (b) sports-oriented activity such as game result picking challenges or player picking ‘fantasy’ challenges, (c) the best sunset photograph, and (d) the best hashtag to describe a new product. In a contest, it is essential that judging criteria be clearly defined.

Giveaways. Winners aren’t selected at random, no skill is required to win, and the element of chance is absent. A giveaway “winner” simply satisfies defined criteria (for example, Chick-fil-A’s popular “First 100” giveaway).

Additional Legal Requirements and Considerations

In addition to ensuring your promotion is not an illegal lottery, there are a host of issues to consider when planning and conducting a promotion. Here is a partial list: (1) compliance with agency guidelines for specific industries such as alcohol; (2) compliance with the Children’s Online Privacy Protection Act’s (“COPPA”) parental consent and other requirements if your promotion targets children; (3) adherence to your website’s Privacy Policy (which must make clear with whom consumer participant information will be shared) for online promotions or entries; (4) registration and bonding in certain states depending on the total prize value; (5) drafting Official Rules; (6) preparing an appropriate and enforceable Winner’s Affidavit and Release; (7) compliance with social media websites’ rules governing promotions; (8) appropriate monitoring, releases, and rules for promotions that involve user-generated content or use of third-party intellectual property; (9) issuance of IRS forms depending on the prize value; and (10) retaining local counsel if your promotion will be conducted outside of the U.S. Additionally, when the promotion involves e-mail, telephone, or text contact, compliance with laws such as the CAN-SPAM Act and Telephone Consumer Protection Act, which often require

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affirmative opt-in from recipients, is essential. Also, depending on your financial situation and likelihood of awarding a prize (such as golf 'hole in one' contests), insurance to cover obligations to winners may be appropriate.

Which promotion is right for me?

That depends on your objective. If you are a restaurant launching a new product, a giveaway could be your best option, as this would attract customers and allow them to try your new product for free. Alternatively, if you want to engage more with consumers, you may want to consider a contest, requiring entrants to submit a photograph or other personal creation concerning a subject matter tied to your business. Finally, with their big and sometimes showy prizes, sweepstakes can be great ways to garner attention and create buzz about your company.

Promotions are valuable tools to market your company and interact with your customers and fans, but they must be conducted properly. FisherBroyles attorneys are familiar with ever-changing promotions laws and guidelines and can work with you to minimize your time commitment for the above steps so that your planned promotion is efficiently deployed and compliant.

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