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Navigating the Legal Pitfalls of  
Using Social Media in Your Organization**

**Conducting Sweepstakes and Contests  
on Social Media Platforms:  
An Overview**

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## A. OVERVIEW OF PROMOTION BASICS

A promotion must be structured to avoid conducting an illegal lottery.

### 1. LOTTERY

A lottery is a promotion in which all three of the following elements are present:

- prize
  - anything of tangible value, no matter how nominal
- chance
  - any random or chance element that determines in whole or in part how the winner will be selected
- consideration
  - purchase
  - payment
  - substantial expenditure of effort

One of these elements must be removed before a promotion can lawfully proceed. Since a prize is awarded in virtually all instances, either chance or consideration must be eliminated.

### 2. GAMES OF CHANCE/SWEEPSTAKES

A sweepstakes is a game of chance, which means that the winner is selected on the basis of chance (*e.g.*, a random drawing or an instant win game).

- no purchase or payment may be required to enter the sweepstakes
  - eliminates the "consideration" element of a lottery
- if there is a purchase or payment required, there must be a free alternative method of entry ("AMOE") (*e.g.*, 3" x 5" card by mail; entry via Internet; or toll-free call)
  - eliminates the "consideration" element of a lottery
  - must be clearly and conspicuously disclosed
  - must be of equal dignity with purchase method of entry:
    - parallel deadline dates
    - equal number of chances to win
    - equal odds of winning -- must be full integration of free and paid entries

➤ must be universally available

### 3. **SKILL CONTEST**

A contest of skill must involve bona fide skill. For instance, essay and photograph contests constitute bona fide skill. Asking consumers to guess how many jelly beans are in a jar is not bona fide skill.

- the skill must be bona fide in order to effectively eliminate the "chance" element of a lottery
- judging criteria must be clearly disclosed
- ties should be broken on the basis of skill
- a payment or purchase to enter is permitted in most states

### B. **REGISTRATION**

New York and Florida:

Must register games of chance (sweepstakes) if total value of prize pool exceeds \$5,000

- in NY, register with NY Secretary of State
  - at least 30 days prior to commencement of the sweepstakes
- in FL, register with Dep't of Agriculture and Consumer Services
  - at least 7 days prior to commencement of the sweepstakes

Must post surety bond or trust account for total value of prize pool

Must file winner's list

- in NY, within 90 days after the sweepstakes completion
- in FL, within 60 days after winner determined

### C. **PROMOTIONS ON THE SOCIAL MEDIA PLATFORMS**

#### 1. **FACEBOOK**

Facebook's promotions guidelines are contained within the Facebook Pages Terms, available at: [http://www.facebook.com/page\\_guidelines.php](http://www.facebook.com/page_guidelines.php) (last revised August 27, 2013).

#### 2. **TWITTER**

For a promotion conducted on Twitter, you must follow Twitter's guidelines for conducting a promotion, available at: <https://support.twitter.com/groups/31-twitter-basics/topics/114-guidelines-best-practices/articles/68877-guidelines-for-contests-on-twitter#>, as well as the Twitter Rules, available at: <https://support.twitter.com/entries/18311>.

### **3. YOUTUBE**

Contests conducted on YouTube are subject to YouTube's Contest Policies and Guidelines, which were last updated on March 15, 2013 and are available at <http://support.google.com/youtube/bin/answer.py?hl=en&answer=1620498>. YouTube contests cannot be run or conducted in a way which conflicts with its Privacy Policy ([http://www.youtube.com/t/privacy\\_at\\_youtube](http://www.youtube.com/t/privacy_at_youtube)), Terms of Service (<http://www.youtube.com/static?gl=US&template=terms>) or Community Guidelines ([http://www.youtube.com/t/community\\_guidelines](http://www.youtube.com/t/community_guidelines)).

### **4. PINTEREST**

In December 2012, Pinterest issued Promotions and Marketing Guidelines that pertain to sweepstakes and contests, available at <http://business.pinterest.com/logos-and-marketing-guidelines/>.

### **5. INSTAGRAM**

Instagram does not currently have promotion guidelines.

### **6. VINE**

Vine does not currently have promotion guidelines.

### **7. FOURSQUARE**

Foursquare does not currently have promotion guidelines.

### **8. TUMBLR**

Tumblr's contest, sweepstakes and giveaway guidelines are available at [http://www.tumblr.com/policy/en/contest\\_guidelines](http://www.tumblr.com/policy/en/contest_guidelines) (as last modified on March 22, 2012).

## **D. A HIGHLIGHT OF SOME POTENTIAL LEGAL ISSUES AND BEST PRACTICES**

### **1. ADEQUATE DISCLOSURES**

- space and character limitations
  - preclude disclosure of full material terms or rules
    - use abbreviated rules with a link to complete rules
    - use tiny URL to link to rules

- be mindful of the FTC's updated "Dot Com Disclosures", issued on March 12, 2013<sup>1</sup>
    - provide specific guidance for making clear and conspicuous disclosures on mobile and social media platforms, including:
      - ✓ when evaluating whether a disclosure is clear and conspicuous, consider its placement and proximity (i.e. "as close as possible") to the relevant claim
      - ✓ disclosures that are integral to a claim should not be communicated through a hyperlink; they should be on the same page or immediately next to the triggering claim and sufficiently prominent such that the claim and disclosure are read at the same time
      - ✓ hyperlinks should be obvious (for example, different colors, underscored)
      - ✓ hyperlinks should be labeled to convey the importance, nature and relevance of the information to which they link
      - ✓ display disclosures prominently so that they are noticeable to consumers (size, color, graphics)
      - ✓ avoid distracting factors (such as graphics, sound, text, other links) that could result in consumers not noticing or reading the disclosure
      - ✓ if necessary, repeat disclosures
      - ✓ use clear language and syntax so that the disclosures are understandable; avoid legalese or technical jargon
      - ✓ consider the technical limitations of users' browsers and devices
        - for example:
          - certain devices do not support Adobe Flash Player so it may not be appropriate to display the disclosure in Flash
          - disclosures should not be communicated in a pop-up window that can be blocked or simply closed by a consumer without reading it
- disclosure of the data that is being captured through use of an app or QR code
  - pricing disclosures, such as:
    - message and data rates apply
    - standard or premium rates
    - charges for messages sent and/or received
    - whether consumer will receive messages and how often
    - how consume can opt out of receiving messages
    - carrier restrictions, if any

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<sup>1</sup> <http://www.ftc.gov/os/2013/03/130312dotcomdisclosures.pdf>

## 2. CONSIDERATION

- monetary consideration, such as:
  - text message and data charges incurred in connection with mobile check-ins, text messaging sweepstakes, and scanning a QR code
  - purchase of an app
  - if only a QR Code is offered as a means of entry, an entrant must have a smartphone to enter, which may arguably constitute consideration
  - requiring sign-up for membership or a subscription
    - use an AMOE
    - if promotion is multi-channel, all entry mechanisms should be of equal dignity, unless any differences are clearly disclosed
- non-monetary consideration, such as a store or location visit
  - entry by "checking in"
    - text message and data charges incurred to "check in" will constitute consideration and require an AMOE
- non-monetary consideration, such as downloading an app:
  - unlikely to be deemed consideration so long as the app is free and does not require a purchase or download of a "free trial" which will incur charges unless cancelled by the consumer
- non-monetary consideration, such as "liking" a page or "following" a sponsor:
  - unlikely to be deemed consideration

## 3. COPPA

- in December 2012, the FTC adopted final amendments to the Children's Online Privacy Protection Act ("COPPA")<sup>2</sup>, which went into effect on July 1, 2013<sup>3</sup> and include:
  - the definition of "personal information" that cannot be collected without parental notice and consent now includes:
    - ✓ geolocation information

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<sup>2</sup> Children's Online Privacy Protection Act, 15 U.S.C. § 6501 *et seq.*

<sup>3</sup> See <http://ftc.gov/opa/2012/12/coppa.shtm> and <http://www.ftc.gov/os/fedreg/2013/01/130117coppa.pdf>

- ✓ photos
  - ✓ videos and audio files that contain a child's image or voice
  - ✓ persistent identifiers that can recognize users over time and across different websites or online services, such as IP addresses and mobile device IDs
- a streamlined, voluntary and transparent approval process for new ways of getting parental consent, such as electronic scans of signed parental consent forms; videoconferencing; and use of government-issued ID
  - updates to the definition of "operator" to make clear it covers an operator of a child-directed site or service that allows outside services, such as plug-ins or advertising networks, to collect information from visitors (this revision covers only operators that design and control the child-directed content, such as the app developer or site owner, and does not extend liability to platforms, such as Google Play or the App Store, which just offer access to child-directed sites or services)

#### 4. **PRIVACY**

- potential privacy issues with location-based apps
  - obtain user consent: use opt-in versus opt-out
  - user notification: users should know what data is getting captured (for example, the user's precise geolocation, phone number, call logs, list of contacts, unique identifiers and other information stored on the mobile device)
  - user notification: users should know how the data is collected and used
  - give users the option to deactivate location-tracking features
  - put measures in place to secure data: how is it stored or encrypted? who sees it? when is it destroyed?
- if mobile app is directed to children under the age of 13, COPPA applies

#### 5. **INTELLECTUAL PROPERTY**

Brands face potential liability for the content of user-generated content submissions:

- trademark infringement
- copyright infringement
- violation of rights of publicity or privacy

To mitigate risk:

- avoid claiming ownership
- take a license only for the rights you want and need
- determine whether you need/want a license for all submissions or just the winner
- in the promotion rules, include clear content submission guidelines
- in the promotion rules, reserve strong discretionary rights to disqualify and remove material at any time
- put measures in place to screen, monitor and filter submissions
  - take note that Pinterest boards are not private and may be viewed upon creation
  - in developing a Pinterest promotion, consider what images an entrant may connect to your brand, including images that the entrant does not own
  - for Pinterest promotions, consider providing consumers a library of images to pin from that you own or have licensed
- avoid promotion concepts that arguably induce infringement
- avoid taking action that will make you a content provider by participating in the creation or development of the content

*The information contained in these materials is in summary form and is intended only as a resource and to provide only a general overview of sample legal issues. The statutes and promotion guidelines referenced were current as of the date of this presentation on October 16, 2013 and are subject to change. These materials are not intended to be exhaustive, nor are they intended to serve as legal advice or opinion and should not be a replacement for specific advice of counsel.*



## **SWEEPSTAKES & CONTESTS CHECKLIST**

When structuring a sweepstakes or contest, give thought to the following questions:

- \_\_\_ Is a purchase or payment required to enter?
- \_\_\_ If a purchase or payment is required to enter, is the winner selected based on chance or skill?
- \_\_\_ If winner is selected based on chance:
  - \_\_\_ Is a free AMOE offered?
  - \_\_\_ Is the free AMOE clearly and conspicuously disclosed in all advertising?
  - \_\_\_ Are participants who enter by the free AMOE on equal footing as the purchasers?
  - \_\_\_ Is the free AMOE universally available?
  - \_\_\_ Do both the purchase entry and free AMOE share the same deadline dates?
  - \_\_\_ Will both the purchase and free entries be combined in the same prize pool?
  - \_\_\_ Is there a sufficient number of free entry vehicles?
  - \_\_\_ There is no disadvantage to those who enter for free, correct?
- \_\_\_ If winner is selected based on skill:
  - \_\_\_ Is the skill bona fide?
  - \_\_\_ Does skill determine and control the final result?
  - \_\_\_ Will the element of chance affect either the selection of the winner or the amount of the prize the winner will receive? (It should not.)
  - \_\_\_ Are potential ties broken by skill?
  - \_\_\_ Is the judging criteria objective and clearly disclosed?
  - \_\_\_ Are the judges qualified to apply the judging criteria?
  - \_\_\_ Are all entrants on the same playing field?
  - \_\_\_ Are states that prohibit a purchase or payment in a skill contest properly voided?
- \_\_\_ What platform is being used to offer the sweepstakes or contest?
  - \_\_\_ Internet
    - \_\_\_ Does the participant have to purchase proprietary software to participate?
    - \_\_\_ Who is the promotion open to?
      - \_\_\_ U.S. residents only?
      - \_\_\_ Multiple countries?
        - \_\_\_ Is it legal to operate sweepstakes in those countries?
        - \_\_\_ What is required to make it legal?
    - \_\_\_ Does the AMOE offer the same opportunities as online entry?
  - \_\_\_ Social Media Platform
    - \_\_\_ Which platform?
    - \_\_\_ Does the platform have promotion guidelines?
      - \_\_\_ Is the promotion compliant with the guidelines?

- Are the official rules compliant with the guidelines?
- Is the total prize package valued over \$5000?
  - If so, New York and Florida require registration and bonding for games of chance.
- Do your rules include all of the following?
  - If sweepstakes, include "No Purchase Necessary" clearly and conspicuously.
  - List any states that must be voided for any reason.
  - Start and end dates/times (with time zone).
  - Entry instructions/requirements.
  - Free AMOE instructions, if applicable.
  - Limit on entries - Specify per person, per household, per e-mail address.
  - Eligibility Requirements (i.e., age/residency eligibility requirements, employees ineligible).
  - Date of random drawing or judging, whichever may be applicable.
  - Method and estimated date of winner notification (i.e., telephone, email).
  - Odds of winning (If random draw determines winner, odds of winning depend on number of eligible entries received.)
  - Prize description/number available/approximate retail value (Special disclosures required for certain prizes, such as a trip or a car.)
  - Limitation on sponsor's liability regarding participation in Sweepstakes and use of prize.
  - Disclaimer of liability for lost, late, misdirected mail.
  - Void where prohibited or restricted by law.
  - All taxes are the sole responsibility of the winner.
  - Winner must complete Affidavit of eligibility and Publicity/Liability release.
  - Available date for Winners list and how to obtain.
  - Entries property of sponsor.
  - Judges decisions final.
  - If entry allows minors to enter, include that legal guardian must sign releases/affidavit on behalf and travel with minor, if applicable, as well as accept prize on behalf of minor.
  - Travel companion Releases, if applicable.
  - Sponsor name and street address.
  - Include "Consumer Disclosure" if direct mail promotion.
  - For On-line Games, add the following Internet liability limitations:
    - Fraud clause (virus or other system malfunction).
    - Faulty transmission.
    - Entry deemed made by holder of e-mail account.
    - Time zones.
    - Right to amend, modify or terminate promotion.
    - Right to select winner as of termination date.
    - Link to sponsor's privacy policy and/or disclosure of use of information.