

# RUNNING A SWEEPSTAKES OR CONTEST IN THE US



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Companies planning to conduct a sweepstakes or contest to promote their brands must make sure the promotion complies with all applicable laws and requirements. Understanding the relevant rules will help ensure that companies lawfully structure the creation, development and advertisement of the promotion, make all required disclosures and avoid characterization as gambling or a lottery.

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**M**any companies run promotions such as sweepstakes and contests to provide consumers with an incentive to interact with their brands. Although the terms “sweepstakes” and “contest” are often used interchangeably, they are different types of promotions and often subject to different legal requirements.

Sweepstakes and contests are governed by a patchwork of state and federal laws. In general:

- A sweepstakes is a promotion in which prizes are awarded on the basis of chance.
- A contest is a promotion in which prizes are awarded on the basis of skill.

This article examines issues to take into account when conducting sweepstakes and contests in the US, including:

- The laws and requirements governing promotions.
- Considerations for structuring a sweepstakes.
- Considerations for structuring a contest.
- Official rules disclosing the material terms of a promotion.
- Registration and bonding.
- Advertising sweepstakes and contests.
- Contracts with third parties.

Unless otherwise stated, this article focuses on requirements or best practices that generally apply across all states.

>> This article is based on a Practice Note from our website. For the complete, continuously maintained version of this resource, search [Running a Sweepstakes or Contest in the US](#) on our website.

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## LAWS AND REQUIREMENTS GOVERNING PROMOTIONS

With a few exceptions (see below *Consumer-generated Content* and *Direct Mail*), sweepstakes and contests are primarily regulated on the state level, rather than the federal level. The primary laws and requirements that govern promotions are as follows:

- Lottery and gambling laws.
- State sweepstakes and contests laws.
- Advertising laws.
- Laws applicable to certain industries, channels and audiences.
- Consumer-generated content laws.
- Social media platform requirements.
- Mobile Marketing Association (MMA) requirements.

>> For more information on sales promotions, search [Sales Promotions, Contests and Sweepstakes](#) on our website.

### LOTTERY AND GAMBLING LAWS

State lottery and gambling laws generally prohibit companies from running a promotion that combines the following three elements:

- **Prize.** This refers to anything of value.
- **Chance.** This means that winning depends on factors that are outside a person's control. States have different thresholds for determining what constitutes chance (see below *Skill versus Chance*).
- **Consideration.** This generally refers to a requirement that a person pays money or makes a purchase to enter a promotion. Even requiring that a person pays money to a third party, such as a fee to send a text message, can be deemed consideration.

In general, by eliminating at least one of these elements, the promotion can be structured lawfully. Accordingly, eliminating one of the elements is usually the first step in structuring a promotion (see below *Structuring a Sweepstakes* and *Structuring a Contest*).

### STATE SWEEPSTAKES AND CONTESTS LAWS

Many states also have laws that specifically regulate sweepstakes and contests. These laws are often found in consumer protection or deceptive trade practice statutes and are usually enforced by state attorneys general. Most of these laws require companies to disclose the material terms of their promotions.

Although many laws broadly apply to all sweepstakes and contests, some states (and the federal government) have laws that apply only to sweepstakes and contests that are promoted by direct mail (see below *Direct Mail*).

In addition, Arizona, Florida, New York and Rhode Island each require that companies register or post bonds for certain types of promotions (see below *Registration and Bonding*).

### ADVERTISING LAWS

Some states have laws that specifically govern how sweepstakes and contests can be advertised (see below *Advertising Sweepstakes and Contests*). Even if a state does not have laws that specifically address advertisements of sweepstakes and contests, general state advertising laws may still apply. These laws typically require advertisers to clearly disclose all material terms of their offers.

>> For information on advertising regulations in the US, search [Advertising: Overview](#) on our website.

### REQUIREMENTS DEPENDING ON INDUSTRY, CHANNEL AND AUDIENCE

Additional laws may apply to promotions, depending on:

- The jurisdictions governing the promotion.
- The industry of the company running the promotion.
- The channel(s) used to advertise the promotion.
- The intended audience for the promotion.

Examples of additional laws include the following:

- Online promotions directed to children under 13 must comply with the Children's Online Privacy Protection Act. Promotions directed to children under 12 should comply with guidelines set out by the Children's Advertising Review Unit.
- Some states require companies to post rules in brick-and-mortar stores if people can enter in the stores.
- Some states have laws that govern promotions in which instant-win game pieces are incorporated into bottle caps of beverages.
- Some states regulate promotions offered in conjunction with the promotion of alcohol and gasoline.

### CONSUMER-GENERATED CONTENT LAWS

Companies occasionally run contests in which consumers are asked to create content and submit it to the company for judging. Certain laws apply to this type of contest, such as the Digital Millennium Copyright Act (DMCA) and the Communications Decency Act (CDA) (see below *Consumer-generated Content*).

### SOCIAL MEDIA PLATFORM REQUIREMENTS

Some social media platforms have their own rules. For example, Facebook has a detailed set of requirements for what can and cannot be done on their platform.

### MMA REQUIREMENTS

The MMA is a global trade association representing all players in the mobile marketing space. The MMA has issued various best

practice guidelines for mobile marketing campaigns, including text-to-win sweepstakes (see below *Text-to-win Sweepstakes*). The guidelines are often a compilation of legal requirements, carrier requirements and industry best practices.

## STRUCTURING A SWEEPSTAKES

### WHAT IS A SWEEPSTAKES?

A sweepstakes is a promotion in which prizes are awarded on the basis of chance. For example, sweepstakes include promotions where winners:

- Are selected in a random drawing.
- Scratch off a game piece to see if they have won a prize.

Because a sweepstakes includes the elements of prize and chance, it is essential that consideration is not required. This helps avoid characterization of the sweepstakes as gambling or a lottery.

### FREE ENTRY

If consumers can enter the sweepstakes through a method that involves consideration (such as by purchasing a product), an alternate free method of entry must also be included (such as an online or mail-in entry form).

Companies cannot give any advantage to people who enter through the purchase method of entry. For example, consumers must be able to enter the same number of times for free as they can by making a purchase. Consumers must also have the same amount of time to enter for free as they do by making a purchase. This is particularly important for mail-in entries where companies must allow time for the entries to be received.

Companies should ensure that all sweepstakes advertisements include a clear and conspicuous disclosure about the free method of entry. In recent years, the New York Attorney General has challenged a number of companies for failing to adequately disclose details about how consumers can enter for free.

### TEXT-TO-WIN SWEEPSTAKES

Text-to-win sweepstakes have become popular in recent years. Because there is a cost associated with sending a text message, companies also need to include a free method of entry. Not only is this arguably required by state laws, it is also required by the MMA.

It is generally lawful to offer a text-to-win sweepstakes that is subject to standard rates as long as there is also a free method of entry. However, there are still significant risks associated with text-to-win promotions that involve premium charges. In recent years, plaintiffs' attorneys have challenged a number of text-to-win sweepstakes that included premium charges, even though they offered a free method of entry. For example, in a California suit, plaintiffs argued that a sweepstakes

violated lottery laws because consumers did not get anything of value for the money they paid to enter. The case settled in 2011 without a clear answer as to whether the promotion was lawful. (*Herbert v. Endemol*, No. 2:07-cv-03537-JHN-VBKx (N.D. Cal.) (complaint filed May 31, 2007)).

When running a text-to-win sweepstakes, companies should:

- Comply with promotions laws.
- Consult the guidelines published by the MMA (available at [mmaglobal.com](http://mmaglobal.com)).
- Conduct careful research before offering any sweepstakes that includes premium charges.

## STRUCTURING A CONTEST

### WHAT IS A CONTEST?

A contest is a promotion in which prizes are awarded on the basis of skill. Examples of contests include promotions in which consumers are required to submit an essay, photograph, video or other content for judging.

In a contest, it is often important to remove (or at least significantly reduce) the element of chance in the process of winner selection to avoid characterization as gambling or an illegal lottery.

### SKILL VERSUS CHANCE

Most states have adopted a "predominance test" to differentiate skill games from chance games. Under this test, a court determines whether skill or chance plays a greater role in determining the outcome of a game. If the dominant factor in determining the outcome is skill, then the game is deemed skill-based. If the element of chance predominates in determining the outcome, then the game is deemed chance-based.

To ensure that a promotion is deemed skill-based, companies should generally:

- Establish objective judging criteria.
- Communicate the criteria to the entrants before they enter.
- Use judges that are qualified to employ the criteria and ensure that they evaluate all entries using the criteria.
- Break any ties between contestants on the basis of skill.

Some states have more restrictive requirements for determining whether a promotion is skill- or chance-based.

### CONSUMER-GENERATED CONTENT

In recent years, a growing number of companies have run contests in which consumers are asked to create content and submit it through a website posting or by e-mail. In addition to risks associated with structuring the contest itself, companies face risks associated with the content posted by consumers.



The more control a company gives to consumers, the more creativity the company is likely to see. However, this increases the likelihood of submissions containing content (including music, images and shots of other people) that could violate a third party's rights. If a third party finds that its intellectual property or publicity rights have been violated by content posted on a company's website, or that the content is otherwise unlawful, that party may take action against the company.

The first line of defense against third-party claims is to include disclosures in the contest rules and advertisements. Companies should clearly disclose that entrants may not submit content that contains, for example, any elements that violate a third party's copyrights or trademark rights and that content should not depict any individuals that have not granted permission to be featured.

In some cases, it may make sense to get signed releases from entrants in which they represent, for example, that:

- They have complied with the rules.
- Their content does not infringe any third-party rights.
- Their content does not violate any laws.

Additionally, laws such as the DMCA and CDA may offer some protections against lawsuits related to content posted by others.

>> For information on protecting online service providers from copyright infringement liability based on the actions of their users, search [Digital Millennium Copyright Act \(DMCA\): Safe Harbors for Online Service Providers](#) on our website.

### CONSIDERATION IN SKILL CONTESTS

Most companies offering contests allow consumers to enter without making a payment or purchase. However, because the element of chance is missing from a properly-structured skill contest (that is, the contest will not constitute gambling or a lottery), in some cases, it may be permissible to require a purchase.

Although requiring a purchase may be lawful in most states, some states restrict or prohibit this requirement in certain circumstances. Contests that require a purchase or payment should be examined on a case-by-case and state-by-state basis.

### OFFICIAL RULES

Each promotion should be governed by official rules that disclose the material terms of the promotion, including:

- Who is eligible to participate.
- How to participate.
- How winners will be selected.
- The description of the prizes available.

Many of these provisions are required by state laws.



The official rules form a contract between the sponsor and entrants. Therefore, provisions must be designed to protect the company in case things do not run as planned.

### SWEEPSTAKES DISCLOSURES

The exact terms and conditions that need to be included in a set of sweepstakes rules depend on the nature of the promotion but, in general, should include the following disclosures:

- **Eligibility.** Specify any geographic, age or other restrictions, as well as whether anyone is ineligible to enter (such as company employees).
- **Timing.** Specify the start and end dates of the entry period, as well as the dates on which winners will be selected.
- **Entry instructions.** Include clear entry instructions for each method of entry. The more complicated the methods of entry, the more detailed this section must be.
- **Prize description.** Include a detailed description of the prizes, including the approximate retail value of each prize. The more complicated the prize, the more detailed this section should be.
- **Odds.** State the odds of winning. In an instant win promotion, the odds will be a fixed number, such as 1 in 100. In a random drawing, the odds depend on the number of eligible entries received.

### CONTEST DISCLOSURES

The terms and conditions that must be included in contest rules depend on the nature of the promotion. In addition to the usual sweepstakes disclosures, companies should also include the following disclosures in contest rules:

- **Entry instructions.** Specify exactly what a person must submit, as well as whether a specific format is required. For example, if entrants have to submit a video, specify any length or size limits.
- **Judging criteria.** Specify the criteria against which entries will be judged. The criteria must be clear and objective so that entrants can understand what is expected.

Companies should also consider whether they want any intellectual property rights to the entrants' submissions. If so, they may want to include in the contest rules a license to use the submissions.

### PROTECTIVE PROVISIONS

Companies should include certain provisions in the contest rules to protect against liability. The protective provisions that should be included largely depend on the specific details of the promotion. Common provisions that courts have upheld include:

- **Right to cancel or modify.** Reserve the right to cancel, suspend or modify a promotion if any problem prevents the promotion from running as planned.

- **Release.** State that entrants agree to release and hold the company harmless from and against any claim associated with the promotion.
- **Limitation of liability.** State that the company is not responsible and cannot be held liable for technical errors or other things that may prevent the promotion from running as planned.
- **Right to substitute.** Reserve the right to substitute any prize with another prize of equal or greater value if the advertised prize is not available.
- **Forum selection.** State that the official rules are governed by the laws of a specific state.

## REGISTRATION AND BONDING

Some states require companies to register a promotion with a state agency before the promotion starts. In addition, some states require companies to post bonds before they run certain types of sweepstakes. The bonds are presumably required so that if a company fails to award the prizes, the states can cash in the bonds to award the prizes. Current state registration and bonding requirements are examined below.

### REQUIREMENTS FOR SWEEPSTAKES IN FLORIDA, NEW YORK AND RHODE ISLAND

Florida, New York and Rhode Island each require sponsors of certain chance-based consumer promotions to register and post a bond as follows:

- **Florida.** If the prize pool is more than \$5,000, regulations require that the sponsor register the sweepstakes with the Florida Department of Agriculture and Consumer Services and post the bond at least seven days before the start of the sweepstakes. When the promotion ends, the sponsor must file a list of winners with the state within 60 days of final determination of winners. (*Fla. Stat. § 849.094 (2011).*)
- **New York.** If the prize pool is more than \$5,000, regulations require that the sponsor register the sweepstakes with the New York Secretary of State and post the bond at least 30 days before the start of the sweepstakes. The sponsor must file a winners list with the state within 90 days of the promotion's conclusion. (*N.Y. Gen. Bus. Law § 369-e (2011).*)
- **Rhode Island.** If the prize pool is more than \$500, the sponsor of a sweepstakes offered by a retail establishment must register the sweepstakes with the Rhode Island Secretary of State. No bond is required. (*R.I. Gen. Laws § 11-50-1 (2011).*)

### REQUIREMENTS FOR CONTESTS IN ARIZONA

Arizona broadly defines the term "gambling" as the act of "risking or giving something of value for the opportunity to

obtain a benefit from a game or contest of chance or skill” (*Ariz. Rev. Stat. § 13-3301(4) (2011)*). However, the statute exempts from this definition certain types of skill-based promotions in which a purchase is required.

To take advantage of any of the statutory exemptions to the definition of “gambling,” companies in Arizona must register a promotion with the Arizona Attorney General. No bond is required.

## ADVERTISING SWEEPSTAKES AND CONTESTS

Below is a summary of some of the key disclosures required by state statutes governing how companies can advertise sweepstakes and contests.

### ADVERTISING REQUIREMENTS

Advertisements for sweepstakes and contests are subject to the traditional rules of truthfulness and clarity. They are also governed by unique regulations that are specially targeted at promotions. In general, an advertisement for a promotion must disclose the material terms of the promotion, such as:

- A statement that no purchase is necessary.
- The eligibility requirements.
- The start and end dates of the promotion.
- The name of the sponsor.
- Instructions on how to obtain the complete official rules.

### DIRECT MAIL

The federal Deceptive Mail Prevention and Enforcement Act imposes a number of requirements on sweepstakes and contests that are promoted through direct mail, such as:

- Any company that mails sweepstakes or contest materials must provide recipients with a free mechanism through which they can request the removal of their names from the sponsor’s mailing list for future sweepstakes and contests. Sponsors have 60 days to comply with removal requests.
- Mailings that include entry materials must also include the following disclosures:
  - a disclosure that no purchase is necessary;
  - a disclosure that a purchase will not improve a person’s chances of winning; and
  - the complete official rules.

Many states have statutes that regulate the types of disclosures that must be made in solicitations that are sent through the mail. These requirements vary by state. Under some of the more common state statutes, a sponsor must disclose:

- Restrictions on eligibility or on receiving a prize.
- Entry requirements.

- Deadlines.
- A description of each prize, including its approximate retail value, and the odds of winning.

In addition to these disclosure requirements, many state statutes prohibit sponsors from making certain representations. For example, under many statutes, sponsors are prohibited from representing or implying that:

- A person’s chances of winning will be improved by purchasing a product.
- A person is a winner, finalist or has been specially selected, unless that is true.
- A solicitation is urgent or time-sensitive, unless that is true.

>> For more information on direct mail promotions, search [Direct Marketing](#) on our website.

## CONTRACTS WITH THIRD PARTIES

Many promotions involve the efforts of multiple parties. For example, a sponsor may hire an agency to run a promotion or may team up with other companies who will provide prizes. Before working on the rules or the advertisements for a promotion, companies should execute contracts with the appropriate parties.

The contract must clearly state which party is responsible for each step. If the responsibilities are not clearly allocated, certain steps may be skipped. In that case, the sponsor will likely be legally responsible for any errors.

>> For a collection of resources designed to assist companies to structure their advertising and marketing campaigns to comply with applicable law, minimize the risk of legal challenges and overcome potential regulatory obstacles, search [Advertising and Marketing Toolkit](#) on our website.