

Promotion or Illegal Lottery?



Suzanne Gainey

August 2, 2023

Topics We'll Cover Today

- The popularity of sweepstakes
- The three elements that make up a lottery
- How to avoid running an illegal lottery
- Official Rules and Short-Form Rules
- Registration and bonding requirements
- Running sweepstakes on social media
- Ten tips for running successful (and legal) sweepstakes

Nomenclature

- People use the term “sweepstakes”, “contest”, and “promotion” interchangeably – **but they are different.**
- In the U.S., “sweepstakes” usually means the winner is selected at random – a “contest” involves some level of skill.
- Both sweepstakes and contests are considered “promotions”.
- In the UK, sweepstakes are called “competitions” and in Canada, they are called “contests”.

Show of hands...



Why are sweepstakes so popular?

- 61% of marketers say their biggest marketing challenges are getting traffic and lead generation. (*source: HubSpot*)
- 55 million Americans participate in sweepstakes and similar promotions each year. (*source: ABC News*)
- Active promotions have a cost per click of just \$0.25 – much less than the cost per click for ads (e.g., Google Search Network's CPC is \$2.69, Facebook's CPC is \$1.72, and Instagram's CPC is \$1.84). (*source: Giveaway Promote*)

Why are sweepstakes so popular?

- A Twitter contest can grow followers by as much as 1,500% in just 2 weeks. (*source: Gleam.io*)
- Running a contest with a co-sponsor can drive up to 10,000 social media actions in just 24 hours. (*source: Gleam.io*)
- Almost 95% of the time a new participant in a contest shares it as soon as they enter. (*source: Easypromos*)
- A social media photo contest can bring as many as 200,000 participants. (*source: ShortStack*)

Why are sweepstakes so popular?

- They're fun!



Source: The Hustle

Lotteries

- In order to understand sweepstakes, we need to first understand **lotteries** – because when we run sweepstakes, we need to avoid running an **illegal** lottery.
- In the U.S., **only the states** are allowed to run a lottery (with some exceptions).
- Running an illegal lottery could subject you to **civil and criminal** exposure.
 - In North Carolina, running an illegal lottery is a Class 2 misdemeanor (1 to 60 days in prison); may also include fines up to \$2,000.

What is a Lottery?

- Lotteries have 3 elements:
 - the opportunity to win a **prize**;
 - winning based on **chance**; and
 - **consideration** paid to take such chance.



Prize



Some lucky person will

WIN 7 CARS

PLUS A YEAR'S SUPPLY OF DR PEPPER

ONE DODGE CHARGER FOR EACH DAY OF THE WEEK

IN DR PEPPER'S **charge!** GET GOIN' AGAIN SWEEPSTAKES

ENTER FOR YOUR CHANCE TO

WIN 10 MILLION

HHONORS BONUS POINTS!
SPONSORED BY HILTON GRANDVACATIONS

PLUS, YOU'LL BE ENTERED FOR THE MONTHLY DRAWING OF
500,000 HHONORS POINTS

MANILOW

LIVE IN NEW YORK CITY
WITH A 50-PIECE ORCHESTRA

NEWSDAY READER EXCLUSIVE

WIN 2 PREMIUM TICKETS

SUNDAY, JUNE 4, 2023

RADIO CITY

Chance

- The “chance” element means that the selection of the winner is **completely random** (i.e., a random drawing).
- The alternative to a game of chance is a **game of skill** – for example:
 - Instagram photo contest
 - Half-court shot
 - Doritos “Crash the Superbowl” campaign



Consideration

- Typically, “consideration” with respect to a lottery is **not** the same as “consideration” in the context of contract formation.
- Generally, there must be something of **pecuniary value** “risked” or “paid” by the entrant.
 - Many states have noted that formal or technical requirements – such as registering for the sweepstakes, mailing in an entry form, *etc.* – **are not enough** to constitute “consideration”.
- **But** there is case law in which consideration in the context of a sweepstakes has been interpreted **very broadly**.

Illegal Lottery or Legal Sweepstakes?

- To turn an illegal lottery into a legal sweepstakes, we need to **remove** at least one of the three elements that make a lottery:
 - Prize
 - Chance
 - Consideration
- Removing the prize doesn't really make sense, so either chance or consideration **must be removed**.

Removing Chance

- Instead of running a game of chance, consider a game of skill (*i.e.*, a contest).
- This works well on photo platforms, such as Instagram – a social media photo contest can bring in as many as 200,000 participants. (*source*: ShortStack)
- There are lots of ways to get creative with a game of skill – essays, poems, videos, photos, short stories, sports skills (*e.g.*, half-court shot), answer-a-question, *etc.*

Removing Chance

- Some sweepstakes use a **combination** of chance and skill, and it can be difficult to determine whether the overall sweepstakes is really a game of chance or a game of skill.
- States generally use one of three tests to determine whether a sweepstakes is a game of chance or skill:
 - Predominant Factor Test
 - The Material Element Test
 - The Any-Chance Test

Removing Consideration

- Removing consideration is the most common approach to running a sweepstakes.
- What constitutes consideration?
 - **Florida** – the entrant does anything legal he/she is not bound to do or refrains from doing anything which he/she has the right to do, **whether there is any actual loss or detriment to the entrant or actual benefit to the sponsor.**
 - **Michigan** – consideration does **not** need to involve a specific payment of money. The Michigan AG has previously found consideration where credit union members became eligible for a sweepstakes by either depositing funds into their account or opening a new account.

Removing Consideration

- Make entry into the sweepstakes **as easy as possible**.
- Consider an alternative or free form of entry (e.g., mailing a notecard to the sponsor with the entrant's information or entering such information via an online form).
- **"No purchase necessary to enter or win"**.

Official Rules

- The Official Rules set forth the details of the sweepstakes:
 - sponsor;
 - odds of winning;
 - sweepstakes period;
 - eligibility requirements;
 - process for entry;
 - how the winner(s) will be selected and notified;
 - prize details;
 - territory;
 - tax considerations;
 - publicity rights;
 - termination/modification of the sweepstakes; and
 - list of winner(s).

Short-Form Rules

NO PURCHASE NECESSARY TO ENTER OR WIN. A PURCHASE WILL NOT INCREASE THE CHANCES OF WINNING. LIMITED TO LEGAL RESIDENTS OF THE UNITED STATES WHO ARE AT LEAST 18 YEARS OLD. VOID WHERE PROHIBITED.

Sweepstakes ends December 31, 2023, at 11:59 PM EST. One (1) winner will be selected from all eligible entries. By entering, you agree to receive marketing emails from ABC Company. The official rules, prize description, and odds are available [here](#). Sponsor: ABC Company, 123 Main Street, Charlotte, NC 28202.

Registration & Bonding

- Three states currently have registration and/or bonding requirements for sweepstakes:
 - Florida
 - New York
 - Rhode Island

Registration & Bonding – Florida

- If the value of the prize(s) exceeds \$5,000 must:
 - file with the Dept. of Agriculture and Consumer Services at least **7 days prior** to the sweepstakes;
 - establish a trust account with a balance sufficient to pay or purchase the prize **or** obtain a surety bond in the amount of the total prize value; and
 - within **60 days** of the end of the sweepstakes, provide the state with a certified list of the names and addresses of all the winners, plus the value of the prize and the date on which the prize was won.

Registration & Bonding – New York

- If the value of the prize(s) exceeds \$5,000 must:
 - file with the Secretary of State at least **30 days prior** to the sweepstakes;
 - establish a trust account with a balance sufficient to pay or purchase the prize **or** furnish a bond in the amount of the total prize value; and
 - within **90 days** of the end of the sweepstakes, provide the state with a list of the names and addresses of all the winners, plus the value of the prize and the date on which the prize was delivered.

Registration & Bonding – Rhode Island

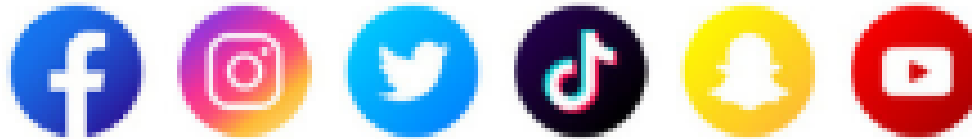
- If the value of the prize(s) exceeds \$500 and the sweepstakes involves a retail establishment and a game of chance, must file with the Business Services Division of the Dept. of State.
- No requirement to establish a trust account or post bond.
- Must post the Official Rules in a prominent location in every participating retail store.
- Once the contest has ended, must keep records of each prize winner for at least 6 months, but there is no requirement to file a winners list.

Affidavit of Eligibility

- The winner(s) of the sweepstakes should sign an Affidavit of Eligibility **before** being given the prize.
- The Affidavit of Eligibility should (at a minimum):
 - release and discharge the sponsor (and its related companies and their advertising/promotional agencies) from all causes of action related to the sweepstakes and the prize;
 - confirm the individual's compliance with the Official Rules;
 - acknowledge that the individual is responsible for all taxes; and
 - include a disclaimer of any warranties related to the prize.

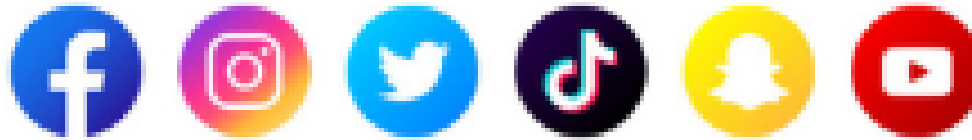
Social Media & Sweepstakes

- A large majority of sweepstakes are run partially or entirely on social media – why?
 - 56% of social media users are worried about missing events, important updates and news if they are away from social media. (*source: OptinMonster*)
 - 48% of consumers say that user-generated content is a great way to discover new products. (*source: OptinMonster*)



Social Media & Sweepstakes

- Each social media platform has its own requirements and rules for running sweepstakes.
- Typically, the applicable rules are set forth in the terms of use applicable to the platform or the platform's help center.
- Always review these rules before using any social media platform in connection with a sweepstakes, as these rules do change from time to time.



Instagram & Sweepstakes

- May **not** inaccurately tag content.
- May **not** encourage users to inaccurately tag content (e.g., don't encourage people to tag themselves in photos they are not in).
- Official Rules must include a complete release of Instagram by each entrant.
- Must include an acknowledgement that the sweepstakes is in no way sponsored, endorsed or administered by, or associated with, Instagram.

Twitter & Sweepstakes

- May offer prizes for Tweeting a particular update, for following a particular account, or for posting updates with a specific hashtag.
- Cannot set rules for entry that encourage duplicate updates (e.g., the person that retweets a message the most wins).
- Ask entrants to mention you in their update so you can see all the entries.
- Ensure any hashtags you require for entry are relevant – encouraging people to add a hashtag that is unrelated to the update may be a violation of Twitter’s rules.

YouTube & Sweepstakes

- Must clearly state that YouTube is not a sponsor of the sweepstakes and require entrants to release YouTube from any liability related to the sweepstakes.
- Must include a compliant privacy notice in Official Rules.
- Cannot ask entrants to give all rights for, or transfer the ownership of, their entries to you.
- Must be free of charge to enter.
- Cannot manipulate metrics on YouTube to misrepresent genuine viewer engagement.

Facebook & Sweepstakes

- Sweepstakes cannot be administered behind a paywall or through content that must be paid for.
- Cannot facilitate or promote online gambling, online real money gambling or online lotteries.
- Cannot offer incentives, compensation or other benefits for any behavior that artificially boosts engagement in breach of the Terms of Service.
- Must include an acknowledgement that the sweepstakes is in no way sponsored, endorsed or administered by, or associated with, Facebook.

Facebook & Sweepstakes

- Cannot require an entrant to take actions on Facebook in exchange for entries – in other words, **cannot ask for likes or shares** on Facebook as a means of entering.
- Can lead participants off Facebook to ask for additional action from the entrant.
- Cannot require that people tag friends in order to enter – **but** that doesn't prohibit individuals from sharing the sweepstakes on their own.
- Cannot administer the sweepstakes on a personal profile.
- Must include a release of Facebook by each entrant.

Pinterest & Sweepstakes

- Cannot require an entrant to save a specific image.
- Cannot allow more than one entry per person.
- Cannot suggest that Pinterest sponsors or endorses you or the sweepstakes.
- Must follow Pinterest's brand guidelines in connection with the sweepstakes, as applicable.

10 Tips for Running Sweepstakes

1. Have a clear vision and goal for the sweepstakes.
2. Make entry easy.
3. Ensure the Official Rules are easy to understand.
4. Follow the Official Rules.
5. Confirm that you have an eligible winner (and a signed Affidavit of Eligibility) **before** announcing anything on social media or otherwise.

10 Tips for Running Sweepstakes

6. Comply with state-specific requirements (or exclude those states).
7. Consider which social media platforms will be most beneficial to the goal of the sweepstakes.
8. Consider a co-sponsor.
9. Make sure you can measure success.
10. Don't rush it!

Questions?

SUZANNE K. GAINNEY

Member, Intellectual Property

t 704.331.3559

suzannegainey@mvalaw.com

