

Avoid Corporate Gambling

What to Know for Contests, Giveaways and Sweepstakes



Nettie Downs is an associate in the Salt Lake City office of Snell & Wilmer. Her practice focuses on mergers, acquisitions, corporate & securities laws, and advising on legal compliance.

A new restaurant runs a promotion whereby the ten thousandth customer wins a year's supply of meals. A tech company collects market data by getting internet patrons to fill out lengthy surveys for a chance to win a trip to Hawaii. With every purchase, a sports gear company provides a code that can be entered online for the chance to win free products. Willy Wonka wants to give his business empire to whoever finds a golden ticket in their candy bar wrapping.

What do all of these enterprising businesses have in common? They risk violating anti-gambling laws.

Defining Gambling

The presence of the following three elements constitutes a lottery: prize, chance and any valuable consideration. A prize is something of value (e.g. cash, a trip, free products, etc.) that is given to less than all participants. Chance includes any process whereby selection of the winner is conducted by a random event beyond the entrant's control (e.g. a random drawing). Consideration involves providing something of value, such as a product purchase, payment prior to participation, entrance fee or significant effort to participate. Whether a participant's efforts are significant is often fact-specific and state-dependent. For example, requiring a participant to provide his or her email address is typically insignificant, whereas requiring a completed 50 page questionnaire may constitute a significant effort.

The above scenarios likely contain each element of a lottery, as none of the scenario participants have control over winning and each are required to give something of value.

Each state has its own regulatory framework for regulating gambling. Sweepstakes, contests and other similar promotional activities often fall under a statutory definition of "gambling," "lottery" or "fringe gambling." With all promotional activities, including internet promotions, companies must evaluate the laws of each state in which they are marketing and/or conducting their promotional activities. Many states provide for both criminal and civil enforcement of such regulations, with varying penalties.

Promotional activities may also run afoul of federal law. For example, contests or sweepstakes that do not entirely comply with published contest rules may be deemed "unfair or deceptive acts," in violation of the Federal Trade Commission Act.

Structuring Promotions Legally

It is possible to conduct most sweepstakes, contests and giveaways without violating anti-gambling laws. Some states, like Utah, specifically exempt promotional activities that are "clearly ancillary to the primary activity of a business" from the statutory definition of "fringe gambling." However, whether a promotional activity is "clearly ancillary" depends on the circumstances and considers various factors such as the manner of marketing and any free-play option.

In all states, the easiest way to comply with gambling laws is to remove one of the three elements—although some states still have registration and/or bonding requirements for certain legal promotional activities.

Removing the element of prize. A prize is often what attracts consumers to participate in any promotional activity,

making it difficult to remove and still generate consumer interest. Consequently, most promotions remove either chance or consideration.

Removing the element of chance. Two common ways to remove the element of chance are making the promotional event a giveaway or a contest of skill. Giveaways are often structured as a buy-one-get-one, "gift with purchase" or distribution of a free item to all participants.

Contests generally require use of a bona fide skill, where skilled players have an advantage over non-skilled players, and chance is not otherwise present. For example, a free gym membership given to the fastest runner is likely a contest based solely on skill, whereas estimating the number of beans in a jar retains an element of chance. Whether other activities, such as making a hole-in-one, constitute contests of skill differs among the states. Additionally, contests must be structured carefully to settle ties without an element of chance.

Removing the element of consideration. Because judicial interpretation of consideration differs, removing this element can be tricky. The conservative approach is to comply with the most stringent requirements under the various states' laws. For example, sweepstakes often provide a free-means-of-entry, which permits participants to enter by appearing once in person, calling the sponsor or mailing in a postcard. However, a free-means-of-entry must be equally available, have the same odds of winning and be advertised with a certain level of prominence.

Removing one of the three elements will likely ensure compliance with applicable law, though it is not guaranteed. Before conducting a promotional activity, companies should review applicable state and federal law, carefully draft "official rules," comply with applicable registration and/or bonding requirements, and appropriately advertise. **UB**