

# Running a Legal Sweepstakes or Contest in the Esports and Online Gaming World

Article

04.12.2022

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With the explosion of online sweepstakes in recent years, many marketing companies promote sweepstakes and online contests as an attractive way to gain users and customers. Many companies will adopt rules from a current promotion without considering the potential liability and regulatory risks. Even with 50 states and the federal government enforcing sweepstakes' law violations, not to mention consumer litigation, the sheer volume of sweepstakes and contests being promoted online means that there is a lot of non-compliance flying under the radar. Taking the position that if an X, Y, or Z company is running a promotion in a particular manner that it must be okay, is a recipe for potential regulatory fines, negative publicity and even costly class action litigation claims.

Sweepstakes are regulated by state illegal lottery laws which typically have criminal and civil penalties. Because these laws are focused on the participant, any U.S. sweepstakes conducted online must comply with all 50 states' illegal lottery laws unless participants from particular states are excluded. The general rule is that an illegal lottery consists of three elements: (1) a prize, (2) a chance, and (3) consideration. Because there is always a prize, to make a sweepstakes legal the sponsor must remove either the element of chance or consideration.

Chance is removed by making the promotion a true skill contest. In the esports world, this often takes the form of an esports tournament where prizes are awarded to the winner. However federal laws such as the Illegal Gambling Business Under the Organized Crime Control Act, the Unlawful Sports Gambling Act, and the Unlawful Internet Gambling Enforcement Act of 2006 make it a crime to bet or wager on the outcome of a contest. While an entry fee to an esports contest is generally permissible, allowing bets or wagers is not. Another risk to consider is the fact that esports competitions are relatively new compared with traditional gambling. States have consistently held that traditional casino games, such as Poker and Blackjack, are

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illegal gambling. Even though these games involve skill, they also involve an element of chance. It is possible that a regulator could find that esports competitions also involve an element of chance based on the elements of the game that the player cannot control. Promoters of esports competitions should keep abreast of new developments in this field. Also keep in mind that a random tie-breaker mechanism introduces an element of chance into a skill contest, making it an illegal lottery.

Consideration is removed by including an alternative method of entry (AMOE). This often takes the form of a mail-in entry, typically on a 3x5 card. This type of AMOE has been used for years. GEN X'ers will remember the character Lazlo Hollyfeld, played by Jon Gries of the *Napoleon Dynamite* fame from the 80's movie *Real Genius*. Lazlo lives in the closet of the main character, played by Val Kilmer, and spends the entire movie filling out sweepstakes entries. In 2022 many people don't have or typically use stamps, let alone 3x5 index cards, so the likelihood of a Lazlo Hollyfeld participating in your promotion is fairly slim, particularly if the number of entries is limited. However, there is a risk that even though this method has been used for years, a regulator could at some point find it to be unreasonable given the declining use of snail mail. Again, this is an area that promoters should monitor.

Regardless of the type of promotion or the AMOE, promoters also need to avoid false advertising, misrepresentations, and deceptive trade practice claims. Coinbase recently learned this lesson the hard way with its global \$1.2 Dogecoin Sweepstakes. In *Suski v. Marden-Kane, Inc.*, a class action lawsuit was filed against Coinbase by individuals who opted into the Dogecoin Sweepstakes in June 2021. Coinbase included the tried and true alternative method of entry by allowing individuals to participate in the sweepstakes without trading Dogecoins by mailing in a 3x5 index card. However, Coinbase buried the alternate method of entry in the official rules and used a number of marketing pieces that led individuals to believe that trading Dogecoins was the only way to enter. The court in *Suski* found that Coinbase did not promote an illegal lottery because it offered an alternative method of entry. However, the court denied Coinbase's motion to dismiss claims for false advertising and misrepresentations. The court found that, even though the alternative method of entry was disclosed in the official rules, the plaintiffs' claim stated that the sweepstake's advertising materials were likely to deceive a reasonable consumer into believing they were required to make Dogecoin trades in order to participate in the sweepstakes.

Sweepstakes laws and deceptive trade practice laws require the sponsor of a promotion to disclose the material terms and conditions. In general, the following information should be included in the terms and conditions:

- A statement that “No Purchase is Necessary” and that a purchase will not increase your chances of winning. The phrase “Many will enter, few will Win” is also helpful.
- Eligibility Requirements – any age, geographic or other restrictions on participants.

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- Entry Instructions – specific instructions on how to enter, including the alternative method of entry.
- Odds of Winning – typically this is expressed as X winners divided by the total number of entrants; however, some statutes such as the Deceptive Mail Prevention and Enforcement Act governing lotteries conducted through the mail, require an estimate of the odds.
- Important Dates and Deadlines – the start and end date of the entry period, and the date the winner will be selected.
- Selection Details – if using a third-party vendor to conduct the random drawing, the sponsor must indicate so,
- Details of the Prize – a description of the prize and its retail value.

In some specific situations, state laws may have further requirements regarding conducting sweepstakes. For example, most states require that records be kept and that a winners' list be made available. Some states, such as Florida and New York, require that the sponsor post a list of the winners, post bond for the prize, or register the promotion with the state. Also, promoters should prepare a short abbreviated list of the rules to use in the advertising copy which includes the basic material elements of the sweepstakes and clearly states that no purchase is necessary and that there is an AMOE. Promoters must also comply with the "equal footing" rule meaning that participants using the AMOE must have the same chance to win as those who pay an entry fee or purchase a product. In the *Suski* case, participants were required to open a free account to receive their prize, although the court did not opine on that issue. To be safe, promoters should limit any actions required by AMOE's entrants to receive the prize. States also have restrictions on the use of certain phrases such as "You Are a Winner" or "Enter to Win." Marketing pieces must clearly disclose that sweepstakes' entrants only have a chance to win.

If conducting a sweepstakes through social media, the sponsor will need to comply with the rules of the particular platform or platforms it chooses to use. If a participant is asked to make a specific post on a social media site for entry in a promotion, a sponsor may be required by the Federal Trade Commission's Endorsement Guidelines to disclose to the participant that the post is related to a promotion. In the terms and conditions of the sweepstakes, a sponsor should release the social media platform from liability and state that the platform is not sponsoring, endorsing or affiliated with the promotion. Specific platforms have rules on which methods of entry are permitted, such as commenting on a post or following a certain account.

Additionally, charitable organizations often engage in sweepstakes tied to sports in the form of a charitable raffle. While state laws typically prohibit raffles that involve consideration, many states have created exceptions for charitable raffles and often include further requirements. Some states require that the organization sponsoring the raffle obtains an exemption from the Internal Revenue Service under Section 501(c), and several states require that the non-profit be registered or licensed under state law. Ordinarily,

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all proceeds from the raffle must go towards the purpose of the charitable organization. In some instances, there is a limit on the gross proceeds allowed from the raffle or on the retail value of the prizes offered. Some states require that the members of the non-profit organization conduct the raffle and that third-party vendors cannot administer the raffle.

While there are many potential pitfalls in conducting a sweepstakes or raffle, these types of promotions will continue to be a valuable marketing avenue for companies, including those in esports and online gaming. Companies should have their rules and marketing materials reviewed by experienced counsel in order to keep current with new developments in this ever evolving field.

## CONTACT

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