

Did Sweepstakes, Contests And Promotions Win In 2015?



Law360, New York (December 17, 2015, 3:14 PM ET) -- The past year has been an eventful one in the field of promotional sweepstakes and contests, with developments of

interest to marketing departments and legal departments alike. This article addresses some of the year's key developments and offers a few suggestions for 2016.

Is a Social Media Promotion Entry an Endorsement?

Perhaps the biggest "promotions" development in 2015 was in the area of endorsements and testimonials in social media promotions. Taken generally, the question is "When must a promotion entrant disclose that a social media posting is a sweepstakes or contest entry?" The question came to the fore in 2014, when the Federal Trade Commission issued a letter to shoe retailer Cole Haan taking the position that a promotion on Pinterest requiring entrants to "pin" Cole Haan products constituted an endorsement of the products by the entrant and therefore required a disclosure of affiliation between the entrant and the sponsor, such as a hashtag including "contest" or "sweepstakes."

The FTC followed up in July 2015 with updated literature about its endorsement guides, making clear that they apply broadly to social media, including entries into promotions. The FTC materials state that the guidelines apply wherever a gift or

incentive "would affect the weight or credibility" of a product review, or even where the gift or incentive merely results in the posting of a photo of a product. The FTC materials also explain that the use of the word "contest" or "sweepstakes" as part of a hashtag is sufficient disclosure of a promotional connection to a social media posting.

Changes to FCC Contest Rule Approaching

On Sept. 17, 2015, the Federal Communications Commission issued a report and order amending its "contest rule" to permit broadcast stations to disclose material terms and conditions of promotions in writing on a website, rather than only over the air.[2] While this amendment has not yet become effective, it ultimately will provide more flexibility to broadcasters and advertisers, who can simply identify a website rather than stating terms and conditions on the air. Under the revised rule, a broadcaster:

- Must still broadcast the relevant website address periodically with information sufficient for a consumer to easily find material contest terms online
- Must establish a link or tab to material contest terms on the website's home page
- Must maintain contest terms online for a period of at least 30 days after the contest has ended

- Must, when applicable, announce on air that the material terms of a contest have changed since the contest was first announced and direct participants to the website to review the changes

According to the FCC's report and order, "[W]e believe that broadcasters should be given flexibility to meet their disclosure obligation either through broadcast announcements or the Internet, and we will defer to broadcasters' discretion in selecting between those means of disclosure."

The Office of Management and Budget has not yet approved the revised rule, but it is anticipated that it will become effective in early 2016.

Essay Contests Bring Opportunity and Headaches for Business Sellers

"Win a Business" essay contests became a popular promotion during 2015. In these contests, entrants pay a significant fee (up to \$200) and submit an essay explaining why the entrant should be awarded the business or property (examples include farms, movie theaters, inns and bed and breakfasts). The structure allows the sponsor to obtain full price for his or her property or business, while giving individual entrants a chance at the business for far under market price. While these promotional structures are, generally speaking, legal if disclosure requirements are met ("consideration" is permitted in contests where the outcome is through the bona fide demonstration of a skill (such as writing) rather than

a random drawing), they can create a variety of headaches for sponsors and winners.

Several of the contests were canceled due to a lack of entries, leaving sponsors with the cumbersome process of returning entry fees. Other sponsors were faced with questions about the contest's operation, with allegations of rigging, falsified entries, unfair play, bias and noncompliance with the rules. The extensive publicity of these promotions during the year frequently proved a double-edged sword, with some sponsors receiving false negative online reviews of their businesses by jilted or unhappy entrants or other business difficulties after a contest failed to attract a sufficient number of entries. Even successful promotions of this nature require careful planning and thought with respect to the actual mechanics of transferring the prize and both sponsors and entrants must consider the potential for undisclosed liabilities.

Federal Enforcement is Still Possible

In May 2015, the World Triathlon Corporation (WTC), operator of the popular Ironman triathlon race series, paid a \$2.76 million penalty to the federal government to resolve a claim that it operated an illegal lottery. WTC charged some potential entrants for the Ironman World Championship, held in Hawaii, a fee to enter a drawing for the limited number of race spots. Entrants could also pay another fee for a club membership that provided an added chance to win, and for some years, additional entries were provided

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to those who continued to participate in the lottery in sequential years. WTC retained the entry fees for the drawings and those selected in the drawing also paid the entry fee for the Ironman World Championship. Alleging that WTC's drawing system structure constituted a lottery under Florida and federal law and contained the combined elements of prize, chance and consideration, the United States Attorney for the Southern District of Florida sought forfeiture of \$2.76 million in claimed profits received by WTC from the operation of the drawings. While WTC did not admit wrongdoing, it agreed to forfeit the funds to resolve the matter.

Competitors are Watching

In October 2015, the National Advertising Division (NAD), part of the Advertising Self-Regulatory Counsel of the Better Business Bureau, addressed a dispute between The Scotts Company LLC and United Industries relating in part to a sweepstakes promotion in which Scotts awarded \$25 gift cards to some individuals who posted online reviews of Scotts products. While the official rules for the promotion required entrants to include a disclosure in submitted reviews that the review was part of a sweepstakes entry, this requirement was not clearly identified in the email sent to consumers regarding the promotion and did not appear in the sample or template review.

In responding to the NAD complaint, Scotts noted that once it became aware that consumers were not including the disclosure in submitted reviews, it

tagged each of the reviews as a "sweepstakes entry," enhanced the discussion of the necessary disclosures in subsequent emails about the promotion and added a disclosure of the requirement on the review portion of the promotion website.

The NAD ultimately concluded that Scotts' remedial actions were sufficient and took no further action, but the complaint stands as a warning that a promotion sponsor should consider not only the applicable laws, regulations, guidelines and terms and conditions, but also the potential for a competitive response in the case of a potentially controversial promotion.

Lessons for 2016 and Beyond

While government enforcement is relatively uncommon, penalties for infractions can be significant. The events of 2015 reveal that enforcement interest in promotions continues (though infrequently encountered) and that the FTC remains intensely interested in the interaction of promotions operated on social media platforms. Sponsors should take care to conspicuously require entrants in social media promotions to make clear that their postings are part of a promotion entry.

The sudden popularity of essay contests with real estate or a business as a prize, and the difficulties encountered by some of these promotions, highlights the need to continue to vet not only the legal consequences of a promotion, but also the practical considerations of prize identification and delivery. Remember that not all publicity arising from a

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promotion is good — if consumers are unhappy, a promotion can damage a brand and its hard-won goodwill.

Announcing and advertising broadcast promotions may become a little easier, but it remains important to consider both the legal and practical implications of any contest or sweepstakes promotion.

The old saying is true: An ounce of (legal) prevention is worth a pound of cure.

—By Matthew E. Liebson, Thompson Hine LLP

Matthew Liebson is a partner in Thompson Hine's Cleveland office.

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