



GLOBAL... AND LEGAL

Making sure **casino promotions** and **sweepstakes**
meet **multi-jurisdictional legal requirements**

BY DAVID WADDELL

In recent years, various types of promotions have become common in the world of marketing. Sweepstakes drawings and other games of chance are frequently utilized by all types of businesses to provide incentives for customers to visit or to buy the product or services being offered.

With the rapid expansion of the gaming industry throughout the United States, casinos are finding the need to hire marketing directors with experience in other industries, many of whom are bringing new concepts and approaches to attract new business.

One such concept is the use of contests or promotional sweepstakes to promote the casino and to attract guests to visit the casino at various times (often coinciding with slow periods in the casino). Although the use of contests and sweepstakes is commonplace in the U.S., there are unique risks that come into play for members of the gaming industry. As with all things related to the industry, compliance with the laws, rules and regulations is key to success.

Why gaming promotions are different

The gaming industry is a so-called "privilege industry," in which casino operators, executives and employees are granted discretionary licenses that require

adherence to the law. In many jurisdictions, there is an absolute prohibition on granting a license to any individual that has ever been convicted of any form of gambling-related offense, including misdemeanors. Since the laws relating to promotions and sweepstakes are often criminal gambling laws, it is critical for members of the industry to comply to keep their licenses in good standing.

If a typical non-gaming business runs afoul of the various laws relating to promotions, the most common result is a letter from a law enforcement official or the state attorney general's office informing them to stop the practice. In contrast, if a casino operator, or a management-level employee of a casino, violates these provisions, there could be some serious licensing consequences. Thus, casino management needs to cautiously approach the use of any type of promotional sweepstakes, and should seek appropriate legal counsel to ensure compliance.

The balancing act: gaming laws and regulations

The compliance standards for sweepstakes and promotional activities are a complicated interwoven set of local, state and federal laws. Most important, from a gaming industry licensing perspective are the various state and local

laws and related rules and regulations that come into play. This is not true in other industries, where the primary focus tends to be on complying with federal laws to ensure any mailings will be delivered and that no Federal Trade Commission standards are violated.

From a gaming compliance standpoint, a starting point for analysis would be a review of the gaming enabling laws to ensure that all appropriate steps have been taken with gaming regulators. However, in many instances, the state and local analysis does not end there.

An examination of the state laws relating to illegal lotteries, gift enterprises, consumer protection and specific types of promotional sweepstakes and prizes are necessary. Although there are many similarities in various state laws, there are also many quirky provisions that could easily be overlooked.

State and local laws

From a broad perspective, virtually every state has some form of law prohibiting private (as opposed to state-run) lotteries, and these laws need to be reviewed with most common forms of promotions. Most states also consider illegal lotteries to consist of the three elements of prize, chance and consideration. A difference between the various states involves the proper interpretation of the term "consideration," and the different interpretations have generally resulted from court decisions.

Thus, a familiarity with each state's case law is important in ensuring compliance. Many states follow the approach taken under various federal standards, and look to see whether something of economic value is being given up in order for there to be "consideration." However, in some states, such as Oklahoma and Michigan, courts have found consideration to exist in the mere act of a customer visiting the sponsoring business.

There is also disagreement among various states on what a game of "chance" is. In some states, the focus is on whether there is any element of chance involved, while others look to determine whether chance predominates over skill. As a result of arguments over whether such games as poker are games of skill or chance, some state statutes have been amended to provide clearly that if any element of chance is involved, the game is considered a game of chance. Thus, some common promotions that may be perfectly acceptable in one state may not be permitted in another. When multi-jurisdictional marketing is occurring, careful consideration has to be given to the laws which might apply.

Beyond the major issue of whether a particular promotion constitutes an illegal lottery, there are numerous unique state law provisions that could create compliance problems. Many states have adopted statutes expressly addressing the standards that must be complied with to run a "game promotion" (a game involving a prize and chance but no consideration) or creating an exception to the illegal lottery statutes for properly run "sweepstakes."

Often, these state statutes have specific requirements that must be met with regard to the specific promotion. Michigan, for example, as part of its criminal penal code, requires disclosure of the geographic area or a number of outlets in which a particular promotion is to be run together with detailed information on the minimum and maximum prizes to be awarded.

Additionally, there are many state restrictions on the type of disclosure that must occur with regard to the rules and types of prizes that may be awarded. Some states, such as New York and Florida, also have various registration and bonding requirements for promotions.

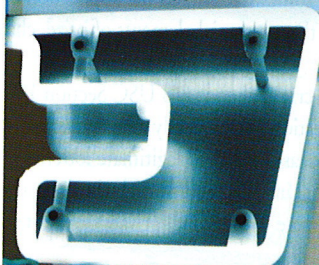
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U.S. case law and federal law

Beyond the applicable state and local laws, any sponsor of a promotion or sweepstakes is required to comply with numerous federal laws. Special care needs to be taken to ensure compliance with various laws applicable to the use of the U.S. mail.

By statute, federal law makes it a crime to knowingly deposit or send in the mail any newspaper, circular, pamphlet or publication containing any advertisement of a lottery, gift enterprise or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of game or lottery prizes.

Read literally, Section 1302 of the U.S. Code would almost seem to prohibit any use of the mail in connection with a promotional sweepstakes. Various court decisions over time, however, have somewhat limited the application of this provision to situations in which the three essential elements of prize, chance and consideration are present.

Notably, however, both the federal criminal code (18 USC Section 1307) and the Postal Service Code (39 USC Section 3005) clearly allow advertising in interstate commerce by mail, or by broadcast media, all legitimate lotteries and gambling activities if the activities are legal in the state in which they originate, regardless of whether such activities originate with public, private or charitable organizations.

Thus, the key focus from a federal level needs to be on ensuring the promotional activity involved does not constitute an illegal lottery applying the three essential elements of prize, chance and consideration.

It is important to note, however, that federal interpretations of all three elements are sometimes different than the interpretation the state courts may give to the same terms.

A common mistake made by those sponsoring such promotions is to assume that compliance with the federal standards for all three elements will constitute compliance at the state or local level. This is not always the case, and can create a real trap for the unwary. At the federal level, for example, it is clear that providing a free method of entry goes a long way toward negating the element of "consideration."

In some states, offering a free method of entry does not necessarily ensure that no consideration is present. Again, the key point is that when sponsoring a promotional sweepstakes, a sponsor should not just assume that compliance with the federal standards will be enough to ensure compliance at the state level. Federal law does not pre-empt any existing state laws on this topic.

In general, the interpretation of the elements of prize, chance and consideration has been developed through federal case law and the adoption of standards by the Postal Service with regard to non-mailable matter. The non-mailable matter statute (39 USC Section 3001, et seq.) has been amended in the past decade to provide detailed requirements for sweepstakes and skill contests.

The law also provides standards for how such mailings need to be drafted, to ensure the sponsor is not engaging in any type of deceptive practice.

In addition to regulation under the postal statutes, sweepstakes sponsors need to be aware that the Federal Trade Commission Act empowers the FTC with the necessary authority to prohibit unfair and deceptive acts and practices in commerce. Thus, it is important to review the FTC standards in connection with any proposed sweepstakes or broad-based marketing scheme.



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Also, if any broadcast medium is going to be used in connection with any promotion, the Federal Communications Commission rules and standards come into play. A federal statute (18 USC Section 1304) makes it a criminal offense to transmit, by means of any licensed radio or television broadcast station, any advertisement for, or information concerning, any illegal lottery.

Notably and somewhat confusingly, a separate statutory provision specifically allows the broadcast of legal activities. (18 USC Section 1307.) The FCC has adopted regulations providing detailed standards and requirements that must be met with respect to the broadcast of such information.

Numerous other issues arise when promotional activity is advertised on the internet. The international range of the internet makes it an excellent marketing tool, but at the same time it opens up a whole new set of rules, regulations and precautions that must be taken into account. The mere fact that a promotion is being advertised on the internet may pose some problems. This raises a whole host of compliance issues for a casino operator from a regulatory perspective.

Importance of an independent promotional analysis

A complete discussion of all the various requirements and provisions that may come into play with respect to a particular marketing promotion or sweepstakes is beyond the scope of this article. From a big-picture perspective, it is important to note the potential governmental officials who are technically involved in such promotions.

From a casino operator's standpoint, this list of potential government agencies involved includes: (1) gaming regulators; (2) local district attorneys; (3) state attorneys general; (4) the Department of Justice and assistant federal attorneys general; (5) the United States Postal Service; (6) the Federal Trade Commission; and (7) the Federal Communications Commission. From a regulatory standpoint, when there are this many layers of review, it is important to ensure that all steps have been taken to comply with all applicable laws.

Casino marketing directors, compliance directors and company lawyers should make sure that a thorough and detailed analysis is conducted before any such promotion is approved by the casino. The best course of action for casinos is to obtain appropriate legal counsel before engaging in any widespread promotion to eliminate the risks of non-compliance. To a casino marketing director, general manager or general counsel, this might seem like a brave new world. It is.

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