

# Complying with New York Sweepstakes Law

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**A Practice Note discussing the key legal issues to consider when planning and advertising a sweepstakes or game of chance in New York. This Note covers the difference between contests and sweepstakes, free alternative method of entry (AMOE), official rules, registration, bonding, and reporting.**

A sweepstakes is a type of promotion awarding some type of prize based on chance, which differs from a contest, which generally involves an element of skill. New York has some of the strictest requirements regarding conducting a legal sweepstakes. Unlike most other states, New York imposes registration, bonding, and reporting requirements on sweepstakes. These requirements begin before the start date of a sweepstakes and continue beyond its end date. All sweepstakes must follow the laws of the jurisdictions in which they are offered to consumers. Even if a sweepstakes is conducted nationwide, New York's law must be followed if the sweepstakes is open to New York residents.

This Note discusses the legal requirements for conducting a legal sweepstakes in New York. Additional rules apply for contests soliciting funds for charitable purposes (N.Y. Exec. Law § 171-a to 177). For related information, see [Cause-Related Marketing by For-Profit Companies: Commercial Co-Venturer Checklist \(7-502-1273\)](#).

Sweepstakes are primarily regulated on the state level. Additional laws may apply at the federal level, even if the sweepstakes is open only to New York residents. These federal laws and regulations may impose restrictions on sweepstakes based on:

- The audience, especially children.
- The sponsor, such as tobacco, gambling, insurance or financial services companies.

- The medium in which the sweepstakes is conducted, such as by telephone, SMS, direct mail or social media.
- The nature of the prizes, including travel, vehicles requiring insurance and annuities.

Absent specific exemptions, these laws and regulations, on both the state and federal levels, also apply to business-to-business trade promotions.

For more information on all the federal laws and regulations governing sweepstakes and contests, see Practice Notes:

- [Running a Sweepstakes or Contest in the US \(7-518-4646\)](#).
- [Sales Promotions, Contests, and Sweepstakes \(1-500-4243\)](#).
- [Advertising and Promotions in Social Media \(1-538-6609\)](#).

## NEW YORK LAWS GOVERNING SWEEPSTAKES

New York has several laws that generally apply to sweepstakes. The primary laws include:

- Gambling and lottery laws (N.Y. Penal Law §§ 225.00 to 225.95 see [Gambling and Lottery Laws](#)).
- The law regarding using games of chance to sell commodities, defined as including goods and services (N.Y. Gen. Bus. Law § 369-e; see [Use of Games of Chance in Selling Commodities Law](#)). A prize award schemes law (N.Y. Gen. Bus. Law § 369-ee; see [Prize Award Schemes Law](#)).

## GAMBLING AND LOTTERY LAWS

Companies seeking to conduct a sweepstakes in New York must abide by state laws prohibiting illegal gambling, including unauthorized lotteries (N.Y. Penal Law §§ 225.00 to 225.95).

**Gambling** occurs when a person stakes or risks something of value on the outcome of one of the following based on an agreement or understanding that the person will receive something of value for a certain event:

- A contest of chance, which is any contest, game, gaming scheme, or gaming device in which the outcome depends in a material

degree on an element of chance, even though skill of the contestants may be a factor (see *Eliminating the Chance Element*).

- A future contingent event not under the person's control or influence,

(N.Y. Penal Law § 225.00(1), (2)).

A **lottery** involves an unlawful gambling scheme in which:

- Participants pay or agree to pay something of value for chances, represented and differentiated by numbers, combination of numbers, or other media, to win.
- Winning chances are determined by a drawing or other method based on the element of chance.
- The holder of the winning chances receives something of value, except in the context of a legal raffle.

(N.Y. Penal Law § 225.00(10); see also *Valentin v. El Diario La Prensa*, 427 N.Y.S.2d 185, 186 (Civ. Ct. Bronx Co. 1980) (summarizing the New York common law definition of a lottery as requiring prize, chance, and consideration).)

Under these definitions of gambling and lottery, the sponsor of any legal sweepstakes or contest promotion must eliminate at least one of the following elements to comply with New York law if they are thinking about running a sweepstakes:

- Prize.
- Chance.
- Consideration.

Some schemes that may run afoul of these anti-gambling laws do not always look like traditional wagering operations. For example, New York Road Runners, the organizer and operator of the New York City Marathon, settled a lawsuit in which they were accused of operating an illegal private lottery. To determine who would fill the limited number of available spaces for the race, aspiring runners paid a non-refundable processing fee to enter a random drawing for a spot in the marathon. The plaintiffs claimed the prize was the chance to run, the drawing constituted chance, and the processing fee was consideration; the presence of all three together constituted an illegal lottery. (Legal Update, Updated: the NYC Marathon Class Action Lawsuit: Avoiding the Risks of Running an Illegal Lottery ([W-001-4478](#))).

### Removing the Prize Element

The possibility of winning a prize (something of value) is the main incentive to enter a sweepstakes. Therefore, the option of removing the prize element from a sweepstakes to avoid an illegal sweepstakes is generally not feasible. Something of value is defined as:

- Money or property.
- A token, object, or article exchangeable for money or property.
- Any form of credit or promise directly or indirectly:
  - contemplating transfer of money or property or any interest in money or property; or
  - involving the extension of a service, entertainment, or a privilege of playing a game or scheme without charge.

(N.Y. Penal Law § 225.00(6).)

Companies seeking to eliminate the prize element of a sweepstakes should pay particular attention to eliminating any kind of winner's reward or bonus that is neither cash nor goods. For example, a poker machine that rewards the winner of a card game with the opportunity to continue play without additional charge is considered to be providing prizes (*Plato's Cave Corp. v. State Liquor Auth.*, 68 N.Y.2d 791, 793 (1986)). Note, merely putting winners in the spotlight is not viewed as a prize, even if some consumers view publicity as having value. It does not for these purposes.

### Eliminating the Chance Element

Promotional techniques that depend on random assignment of winning game pieces or a random draw of numbered entries are games of chance, which are core elements of traditional sweepstakes. The only way to avoid the chance element of New York's gambling and lottery laws would be to structure a promotion as a contest. For example, photography contests are generally considered games of skill, and are **not** covered under New York's gambling law (*People v. Turner*, 629 N.Y.S.2d 661, 662 (Crim. Ct. N.Y. Co. 1995); see also *People v. Stiffel*, 308 N.Y.S.2d 64, 64 (2d Dep't 1969) (holding billiards is a game of skill not covered by New York's gambling law)).

Many promotions involve elements of both skill and chance. New York law focuses on whether the outcome or the award of a prize in a contest, game, gaming scheme, or gaming device depends in a material degree on an element of chance, even though skill of the contestants may be a factor (N.Y. Penal Law § 225.00(1)). However, case law also cites an older common-law standard in which chance must be the "dominating element" determining the outcome of the game (see *People v. Li Ai Hua*, 885 N.Y.S.2d 380, 383 (Crim. Ct. Queens Co. 2009) (citing *People ex rel. Ellison v. Lavin*, 179 N.Y. 164, 171(1904))).

Most common promotional sweepstakes, such as scratch-off game pieces and random drawings, are usually unambiguously games of chance. Other games may not be so straightforward. For example:

- A New York court found that the shell game known as "three-card monte" is a game of skill because it pits the observation skills of the player against the hand speed of the dealer (*People v. Mohammed*, 724 N.Y.S.2d 803, 806 (Crim. Ct. N.Y. Co. 2001), but see *People v. Denson*, 745 N.Y.S.2d 852, 855 (Crim. Ct. N.Y. Co. 2002) (declining to follow *Mohammed* on the grounds that the game is one of chance)).
- The game of Mah Jong requires both skill and luck, but the mere presence of luck as a factor does not make it a game of chance (*People v. Jun Feng*, 946 N.Y.S.2d 68 (Crim. Ct. Kings Co. 2012)).

Even in situations where the underlying game is one of skill, if the award of a prize or its amount depends in a material degree on an element of chance, the entire game may be considered a game of chance (see *Pace-O-Matic, Inc. v. New York State Liquor Auth.*, 898 N.Y.S.2d 295, 298 (3d Dep't 2010)). Companies should carefully consider whether elements of chance are present in a promotion, especially in games designed to be based on skill. For more information, see Practice Note, *Running a Sweepstakes or Contest in the US: Skill Versus Chance* ([7-518-4646](#)).

### Eliminating the Consideration Element

The most common issue companies need to consider when structuring a legal sweepstakes in New York is avoiding the requirement that an entrant pay or agree to pay something of value for a chance to enter, participate, or win. This means the sponsor cannot either:

- Charge a fee to participate:
  - directly (for example, an entry fee); or
  - indirectly (for example, sending a text message that incurs a fee).
- Make a purchase of a product as a condition of participation (see *Valentin*, 427 N.Y.S.2d at 186; see also Op. Atty. Gen. (Inf.) 86-27 (machine dispensing a lottery ticket only after the insertion of money to pay for a heart and stress test is an illegal gambling scheme)).
- Require anything else of participants that may be construed as consideration or having value.

While a sweepstakes often involves the purchase of a product to participate (for example, including a game piece in a purchased product), including an entry with a purchase is legal if consumers are also allowed to enter using an alternative method of entry (AMOE) that does not require any form consideration as a condition for participation. The same is true for text-to-win sweepstakes (for best practices, see Mobile Marketing Association Guidelines).

A company using an AMOE must:

- Advertise the AMOE clearly and conspicuously, with substantially equal dignity and prominence as the primary means of entry.
- Make AMOE forms and accessibility and means of entry sufficiently available and, where the company requires the form be mailed in, to allow time for receipt of the entry form.
- Not provide an advantage to paid entries over the AMOE option in any way. For example, a New York court found that a game in which consumers could purchase multiple paid entries at one time but had a limit of one entry per day for the AMOE violated gambling laws (*Black N. Assocs. v. Kelly*, 722 N.Y.S.2d 666, 667 (4th Dep't 2001)).

The New York Attorney General's office (AGO) has been particularly vigilant about ensuring companies follow these guidelines. For example, in 2006, the AGO reached a settlement with CVS over the insufficient availability and promotion of the AMOE to a sweepstakes. The company ran a promotion in which purchasers of certain products were automatically entered into a prize drawing. The AMOE consisted of an entry form, which CVS did not make available at all of its locations. The AGO also claimed the company failed to inform consumers about the AMOE. In addition to paying fines, CVS agreed to:

- Make entry forms available at all participating retail locations.
- Conspicuously post sweepstakes rules.
- Train staff on non-purchase methods of entry and adopt procedures to assure that advertising staff, store staff, and promotion sponsors understand and comply with state sweepstakes rules.

(New York State Office of the Attorney General: CVS Pays Fine For Sweepstakes Violations.)

In a 2004 settlement with the AGO, the manufacturer of Tylenol agreed to stop running print and television advertisements for a sweepstakes in which notice of the AMOE was insufficiently prominent where:

- The print advertisements highlighted the purchase method of entry in large, bold print, but placed the words "No Purchase Necessary" in fine print at the bottom of the advertisements.
- The television advertisements similarly promoted the entry by purchase method with large text and a voiceover, but displayed the words "No Purchase Necessary" briefly, in small type, at the bottom of the screen.

As part of the settlement, the company agreed to give "equal prominence" to the AMOE (New York State Office of the Attorney General: Tylenol Manufacturer To Amend Sweepstakes Ads). The foregoing methodology has typically been upheld as reasonable and meeting the requirements of the AMOE. The key is that the methods of entry must be substantially of equal dignity in two ways:

- They must have the same chance of winning.
- They also must allow the entrant a similarly easy or reasonably accessible mechanism to enter.

While New York courts have not addressed the issue of AMOE accessibility, courts in other jurisdictions have seen this issue arise (see, for example, *Herbert, et al. v. Endemol USA, Inc.*, Case No. 7-cv-03537-JHN-VBKx, U.S. District Court, Central District of California) (case settled prior to a final adjudication)).

### PRIZE AWARD SCHEMES LAW

Prize award schemes are a subset of sweepstakes often used by sellers of real estate timeshares or membership-based discount purchase clubs. It is unlawful in New York for any person, firm, or corporation to offer a consumer a prize as part of any prize award scheme without proper written disclosure (N.Y. Gen. Bus. Law § 369-ee(1)(a)). For example, any solicitation for timeshare offering plans must contain this specific language conspicuously: "THIS ADVERTISEMENT IS BEING USED FOR THE PURPOSE OF SOLICITING TIMESHARE SALES. THE COMPLETE OFFERING TERMS ARE IN AN OFFERING PLAN AVAILABLE FROM SPONSOR" (13 NYCRR § 24.6).

A "prize award scheme" is limited to a promotion, solicitation, or advertisement either oral, written, or otherwise for the purchase or lease of:

- A product.
- Real estate.
- An investment.
- Services.
- A membership.
- Any other item (for example, health care coverage, participation in auction sales, and franchise opportunities, although all are rare).

(N.Y. Gen. Bus. Law § 369-ee(1)(b).)

Because the following do not typically involve random drawings or selective giveaways only for winners, prize award schemes laws do **not** apply to:

- The use of promotional materials, gifts, or prizes:
  - distributed without charge or expense to any person, firm, or corporation; or
  - by a retail store primarily engaged in the retail sale of goods or services for which this type of promotion is incidental and which requires the customer only to travel to the merchant's regular place of business to receive the gift, prize or award.
- The solicitation or representations offering a consumer a prize in connection with:
  - the sale or purchase of books, recordings, videocassettes, periodicals, and similar goods through a membership group or club which is regulated by the FTC;
  - the sale or purchase of goods ordered through a contractual plan or arrangement (for example, a continuity plan, subscription arrangement, or a single sale or purchase series arrangement) under which the seller ships goods to a consumer who has consented in advance to receive the goods and after receipt of the goods is given a reasonable opportunity to examine the goods and to receive a full refund of charges for the goods, upon return of the goods undamaged; or
  - sales by a catalog seller.

(N.Y. Gen. Bus. Law § 369-ee(3)(d)-(f).)

Where the prize schemes law does apply, the promotion, solicitation, or advertisement must also involve a scheme where:

- The outcome of the promotion depends in a material degree on the element of chance, whether or not consumer skill or performance is an element.
- Consumers are told they have won, may win a prize, or may already be a winner (or similar language which would lead a consumer to believe that he or she has won or may win a prize or award (for example, reasonable inference, implication, or express language of the promotion, solicitation, or advertisement that they have been selected, even if randomly, to participate in a limited offering, to the exclusion of the general public)).
- To win or collect the prize, the consumer must do something, such as:
  - travel to a location to collect the prize;
  - listen to a sales presentation;
  - submit a credit card number;
  - allow a sales person into one's home; or
  - respond orally or in writing.

(N.Y. Gen. Bus. Law § 369-ee(1)(b).)

If a sweepstakes satisfies all of the above criteria, a company must provide disclosure to the consumer:

- At the time the consumer is notified of the prize.
- In a writing or in print in a size equal to at least that type used for the standard text on the front of the first page of the offer.

(N.Y. Gen. Bus. Law § 369-ee(1)(c).)

The disclosure must consist of all of the following:

- A full description of the exact prize won by the consumer including a list price which does not appreciably exceed the highest price at which substantial sales are made in the offering area.

- All material terms and conditions attached to the prize.
- A statement, where applicable, that the consumer must submit to a sales presentation.
- A full description of the product, real estate, investment, services, membership or any other item to be offered for sale, including the price of the least expensive and the most expensive item or parcel.
- A notice that if the consumer decides to purchase any item offered for sale, the consumer has three business days in which to cancel such sale.
- The odds of winning each prize must be conspicuously disclosed in the same type face, size, and boldness and adjacent to the most prominent listing of the prizes on the front of the first page of the offer, with the odds stated in Arabic numbers and identify the total number of prizes to be given away and the total number of offerings to be distributed.

(N.Y. Gen. Bus. Law § 369-ee(1)(c).)

Further, a company cannot:

- Represent that a person is a "winner" or has been "selected," or use similar words when all or a substantial number of those solicited receive the same prize or opportunity.
- Deliver, or cause to be delivered, a prize notice or offering, which either:
  - simulates or falsely represents that it is a document authorized, issued or approved by any court, official, or agency of the US or any state, lawyer, law firm, or insurance or brokerage company, or which creates a false impression as to its source, authorization, or approval; or
  - which is in the form of, or a prize notice or offering which includes, a document which simulates a bond, check or other negotiable instrument, whether or not that document contains a statement or some other indication which suggests that it is non-negotiable.

(NY Gen. Bus. Law § 369-ee(1)(d).)

A company also cannot offer a consumer a prize, if in order to claim the prize, the consumer must call a pay-per-call service where the charge for such pay-per-call service is greater than the service charge authorized by the appropriate regulatory commission (NY Gen. Bus. Law § 369-ee(2-a)).

These statutes codify the general principle that a company may not escape liability through disclaimers if the express claim being made is either untrue, illegal or knowingly confusing.

A company violating the provisions regarding prize award schemes may be subject to an injunction and civil penalty of not more than \$1,000 (NY Gen. Bus. Law § 369-ee(4)).

The prize award schemes are subject to requirements more expansive than those required of a traditional sweepstakes (see Use of Games of Chance in Selling Commodities Law). For example, the prize schemes law requires a detachable "notice of cancellation form" (NY Gen. Bus. Law § 369-ee(3)). Failure to include a detachable "notice of cancellation form" explaining authorized methods of cancelling the membership underlying the prize award scheme entitles the consumer to cancel in any manner and by any

means (N.Y. Gen. Bus. Law § 369-ee(3)(a)(iii); *Nikolich v. Direct Buy of Brooklyn & Queens, Inc.*, 973 N.Y.S.2d 902, 904 (2d Dep't 2013)).

Companies may use prize award schemes in New York, but should do so with additional caution as these promotions are subject to significant additional requirements and restrictions beyond those discussed here. For more information, see 62 N.Y. Jur. 2d Gambling § 101.

### USE OF GAMES OF CHANCE IN SELLING COMMODITIES LAW

The law regulating the use of games of chance in selling commodities is the New York law that impacts most companies sponsoring or operating a sweepstakes. It applies to any game of chance that:

- Promotes consumer products or services (referred to in statute as “commodities”).
- Has a total prize value in excess of \$5,000.
- Determines a winner by chance.
- Requires no consideration for entering the game of chance.

(N.Y. Gen. Bus. Law § 369-e(1).)

Where these four criteria apply, a company must file a disclosure form with the Secretary of State at least 30 days in advance of the commencement of the game or contest (N.Y. Gen. Bus. Law § 369-e(1); see New York Secretary of State: Games of Chance). Failure to file the form is a class B misdemeanor. Not only must a company properly register, but it also must maintain a special trust account or furnish a bond, with sufficient sureties, to assure the payment of prizes. The law also requires a company to keep complete records and report sweepstakes winners. (N.Y. Gen. Bus. Law § 369-e(1), (4), and (5); see Registration, Bonding, and Reporting Requirements.)

When the value of individual prizes vary over the course of a promotion, sponsors use an approximate retail value (ARV) that takes into account approximate average retail prices close to the start of the promotion. These figures should be listed not only for total prize value, but also for each individual prize if different types of prize are available.

Under this law, a company may **not**:

- Manipulate or rig a sweepstakes by disbursing prizes to:
  - predetermined individuals; or
  - specific retail establishments.
- However, a company may distribute prizes of equal value to retail establishments in a uniform ratio to the number of participating objects (such as game cards or tickets) distributed to the retail establishments (N.Y. Gen. Bus. Law § 369-e(3)).
- Publish or circulate advertising material or literature about the sweepstakes that is:
  - false;
  - deceptive; or
  - misleading

(N.Y. Gen. Bus. Law § 369-e(6)).

- Coerce a retail dealer to participate in a sweepstakes. Coercion includes, but is not limited to, situations where a course of business conduct extending over a period of one year or longer between the dealer and the supplier materially changes, for no legitimate business reason, coincident with the dealer failing or refusing to participate in the sweepstakes (N.Y. Gen. Bus. Law § 369-e(7)).

Violating the laws against rigging, deceptive advertising, or coercion of dealers are all class B misdemeanors (N.Y. Gen. Bus. Law § 369-e(3), (6), and (7)). Even when a contest does not meet the dollar threshold for mandatory registration and bonding, the statutes prohibiting tampering, coercion and deception are still applicable.

### REQUIRED SWEEPSTAKES OFFICIAL RULES

The official rules of a sweepstakes form a contract between the sponsor and entrants and establishes the terms governing the relationship between the parties (see *Sargent v. New York Daily News, L.P.*, 840 N.Y.S.2d 101, 103 (2d Dep't 2007)).

New York law requires sweepstakes rules to include:

- The official rules and regulations of the promotion.
- The minimum number and value of prizes to be won over a stated period of time and geographic area.

(N.Y. Gen. Bus. Law § 369-e(2).)

New York has also adopted a regulation related to sweepstakes rules, requiring the sponsor to include the address where persons may obtain a copy of the list of winners once the sweepstakes is over (19 NYCRR § 132.5).

The official rules and regulations of a sweepstakes typically cover:

- Eligibility, including:
  - age;
  - residency;
  - geographic;
  - membership in a particular group; and
  - presence at a particular location at a particular time.
- Exclusions to eligibility, including:
  - officers and directors;
  - anyone employed at the sponsor’s company;
  - anyone employed by an advertising or promotional agency involved in the sweepstakes;
  - anyone employed by another enterprise that contributed promotional consideration, such as prizes, administrative or hosting services;
  - family of employees; and
  - people living in the same household as individuals otherwise excluded.
- Time period for the sweepstakes, including:
  - the start date and time if applicable;
  - the end date and specific time, expressed to the second and with the correct time zone (including Standard or Daylight Savings, whichever is applicable); and
  - the approximate date or dates when the winner will be selected or announced.
- Methods of entry, including AMOE.
- Number of permissible entries by a person or member of a household, which generally may not be different or discriminatory between eligible entrants.

- Prize:
  - descriptions, including the value (or ARV) of the prize or prizes;
  - restrictions;
  - odds of winning or a dependency statement relating to the number of eligible entries; and
  - sponsor's right to substitute prizes of equal or greater value.
- How winners will be:
  - selected;
  - announced;
  - individually notified (for a sample notification to sweepstakes winners, see Standard Document, Prize Winner Notification Letter ([W-011-0720](#))). New York does not prescribe how companies must notify winners. However, sponsors at minimum should contact prospective winners using the same method the winners used to enter the sweepstakes (for example, using the phone, email, or postal mailing address provided on the entry form) and allow a reasonable amount of time for a prospective winner to respond; and
  - in case of a winners' disqualification or failure to respond, the procedure by which an alternate winner may be selected from the remaining pool of qualified entrants.

To avoid confusion, companies should write sweepstakes rules in a clear, straightforward manner that discusses the material terms using plain language understandable by an average non-attorney participant.

For most sweepstakes, an abbreviated "short form" disclosure is used in advertising that indicates only that no purchase is necessary, the material eligibility requirements, the odds of winning and a reference to the sweepstakes being void where prohibited or restricted by law.

If a sweepstakes involves businesses with retail locations, the rules and disclosures must be posted in a conspicuous and prominent location in every retail establishment offering the opportunity to participate. It is generally good practice to also have additional copies available should a consumer want to read them on paper. For all sweepstakes, the material portions of all rules and disclosures and where the full official rules may be obtained must also be included in all advertising, marketing and promotional copy (N.Y. Gen. Bus. Law § 369-e(2)). The official rules should also clearly and prominently explain the nature and availability of the AMOE (see [Eliminating the Consideration Element](#)).

For an example of rules for a mail-in in a national US sweepstakes, see Standard Document, Mail-In Random Draw Sweepstakes Rules ([W-015-0499](#)).

#### ADDITIONAL PROTECTIVE PROVISIONS TO CONSIDER

The rules and regulations form a contract between the company and a sweepstakes participant. Although not required under New York law, it is common for companies, for example, to include provisions in the official rules and regulations that protect them against liability. Other additional provisions to consider relate to:

- **Intellectual property.** For example, some sweepstakes involve an entrant submitting some sort of material, such as artwork or writing. In these scenarios, the official rules should cover:
  - who owns the content submitted;
  - if it was submitted in physical form, whether entries will be returned;
  - if entrants represent that the materials don't infringe anyone else's rights and have the sole right to submit the materials; and
  - what rights the sponsor and/or its agents may have to use or exploit any such materials.

- For more information, see Practice Note, [Running a Sweepstakes or Contest in the US: User-Generated Content Laws \(7-518-4646\)](#) and [User-Generated Content \(7-518-4646\)](#).

- **The right to cancel, suspend, or modify.** The sponsor should always reserve the right to cancel, suspend, or modify the operation and conduct of the sweepstakes and the official rules if any suspicion or belief arises that the sweepstakes has been subject to:
  - tampering;
  - possible fraud, or
  - other irregularities.

- For example, one of the most important provisions involves shielding a company from liability for a printing, production, or other error. For this provision, the rules should state what a company will do if there is an error causing more prizes to be claimed than are intended to be awarded. New York courts have upheld the validity of this type of clause (see *Diop v. Daily News, L.P.*, 819 N.Y.S.2d 847 (Sup. Ct. Bronx Co. 2006) (contest rules disclaiming liability for printing errors were enforceable when a newspaper published the wrong winning sweepstakes numbers)). Contests utilizing digital technology should include disclaimers for:
  - transmission;
  - communications; or
  - other technical errors.

- While the right to cancel is important, often a sponsor will not want to simply abandon the promotion and disappoint all participants if circumstances are such that a portion may be salvaged. Sweepstakes rules often reserve the sponsor's right to do anything it chooses within the bounds of law to either remedy the situation or discontinue the sweepstakes.

- **Information and security breaches.** The collection and use of personally identifiable information related to a sweepstakes may trigger certain privacy laws and obligations. For an overview of US data privacy and security laws, see Practice Note, [US Privacy and Data Security Law: Overview \(6-501-4555\)](#). For data breach notification laws specific to New York that a sponsor of a sweepstakes or contest promotion must address, see State Q&A, [Data Breach Notification Laws: New York \(8-577-6346\)](#).

- **Indemnification.** Sweepstakes rules often include some form of indemnity protecting the sweepstakes' sponsor from third-party claims. While it may not be particularly valuable when viewed in the context of the financial capabilities of a sweepstakes entrant if a claim or action covered by the indemnity arises, some individuals may have insurance that applies to their liability and it is better including such a provision than not. For an example of an indemnification clause under New York law, see Standard Clause, [General Contract Clauses: Indemnification \(NY\) \(W-000-0702\)](#).

For more on common protective provisions, including additional items to consider, see Practice Note, *Running a Sweepstakes or Contest in the US: Protective Provisions* ([7-518-4646](#)).

## REGISTRATION, BONDING, AND REPORTING REQUIREMENTS

New York requires sponsors of chance-based consumer promotions to:

- Register and post a surety bond or trust account at a national or state chartered financial institution sufficient to the total ARV of the prizes (see *Registering with the New York Department of State and Bond or Trust Account Requirement*).
- File a report listing sweepstakes winners (see *Reporting Requirements After the Sweepstakes Ends*).

The registration, bonding and reporting requirements of the law only apply when a sweepstakes prize pool exceeds \$5,000 (N.Y. Gen. Bus. Law § 369-e(4)).

### REGISTERING WITH THE NEW YORK DEPARTMENT OF STATE

At least 30 days before the start of any sweepstakes in which the total value of prizes offered exceeds \$5,000, a sweepstakes sponsor, or agency on behalf of a sponsor, seeking to hold a sweepstakes in New York must file a Games of Chance Registration (form DOS-0255-f) with the New York Department of State. The fee for filing the form is \$100, made payable to the New York Department of State. Failure to register a sweepstakes with the state is a class B misdemeanor (N.Y. Gen. Bus. Law § 369-e(1)).

The required disclosures in the form include:

- A description of the sweepstakes indicating material entry requirements.
- Rules and regulations of the sweepstakes (see *Required Sweepstakes Official Rules*).
- A list of prize levels, prizes and the proportionate opportunity to win each prize.
- The minimum value of prizes, ARV if applicable, and minimum number of prizes in each level, if applicable.
- The geographic area within New York covered by the promotion. For example, sponsors can limit entries to residents of particular cities, counties, or other geographic areas.
- The time period of the sweepstakes as specifically and clearly as stated in the official rules.
- The number of entries to be made available in New York, or if unknown or dependent on unknown factors, state the factors that apply (for example, limited only by the number or residents or legal entrants of a geographic area).
- The number of prize winning chances to be made available in New York, or if dependent on the number of eligible entries, state as the odds of winning, but up to the limit of the prizes identified.

(N.Y. Gen. Bus. Law § 369-e(1).)

This form should be mailed to: New York Department of State, Division of Corporations, State Records and Uniform Commercial Code, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231.

### BOND OR TRUST ACCOUNT REQUIREMENT

A surety bond is a financial instrument that guarantees payment of the prizes offered. These bonds are offered through insurance companies or agents. Before issuing the bond, an insurance company will review:

- The official rules of the sweepstakes.
- The size and number of prizes.
- The creditworthiness of the party seeking the bond and whether another surety or guarantor will be required.
- The company's ability to pay the maximum prize value.

This review may include more documentation for larger prize amounts. The amount of the surety bond is calculated by a formula incorporating the total number of entries projected or sweepstakes entries distributed in New York and the total value of the prizes (19 NYCRR § 132.4).

Alternatively, a company may opt to establish a special trust account at a financial institution. The account balance must be sufficient to cover the total value of all prizes offered. The up-front cost of a trust account is higher, but the process is faster than obtaining a surety bond.

Many large companies that conduct, operate and sponsor sweepstakes frequently, often find it more efficient and easier to maintain a separate trust account and use that for all their sweepstakes. Sponsors with cashflow requirements or infrequent promotions that exceed the \$5,000 threshold will often opt for bonding.

A copy of the certificate of deposit from the trust account or a copy of the surety bond must be filed with the New York Department of State, accompanied by either"

- Form DOS-0260-f (Certificate of Deposit).
- Form DOS-0261-f (Games of Chance Surety Bond).

These forms must be filed simultaneously with registration, at least 30 days before the start of the sweepstakes (see *Registering with the New York Department of State*). If changes to a surety bond are required during the course of the sweepstakes, a rider may be obtained.

If the sweepstakes promoter is unable to deliver the prizes after the sweepstakes ends, the bond or trust will be used to pay the winners. In at least one case, a New York court found that a bond must be used to pay out-of-state winners where the geographic area covered of the sweepstakes included areas outside the state (see *Rich v. N. Am. Specialty Ins. Co.*, 809 N.Y.S.2d 68, 69 (1st Dep't 2006)).

### REPORTING REQUIREMENTS AFTER THE SWEEPSTAKES ENDS

Within 90 days of the end of the sweepstakes, the business engaging in a sweepstakes with a prize pool worth over \$5,000 must file the Certification of Winners form (DOS-0262-f) with the New York Department of State. A completed form includes:

- The name and address of each winner.
- A description of each winner's prize over \$25, based on actual retail cost (19 NYCRR § 132.3).

- The amount or value of each prize.
- The date when the prize was delivered.

A copy of this list must be retained and furnished to anyone on request for six months after the contest. Complete records of the sweepstakes must also be maintained for that period. Violation of the record-keeping or reporting requirements is a class B misdemeanor (N.Y. Gen. Bus. Law § 369-e(5)). Though far longer than the statutory requirement, it is best practice for a sweepstakes sponsor to keep records of winners well after the end of the promotion. Best practices suggest retention for four to six years.

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