

# Contests, Sweepstakes, & Coupons: Navigating Promotions in the Digital Age.

The digital age brings with it new opportunity for companies to advertise and reach out to a wider audience. It also brings with it new risks. Apps, websites, texting, and social media have changed the landscape of promotions law forever. For those who have not yet jumped on the bandwagon, you're already behind.

Consumer product companies are expanding the ways in which they get out their product message. More aggressive ad campaigns coupled with new digital and wireless marketing techniques, put new pressures on companies to compete and on lawyers to evaluate the legality of new ways to market. Understanding the basic tenets of promotions law can be useful in guiding clients toward successful — and legal — promotions.

## The Landscape

A promotion is any form of advertising that has a product message, from a legal perspective; a “promotion” is the umbrella term for three major categories: sweepstakes, contests and give-aways. These specific terms are often interchanged, particularly by clients, but they do represent very different legal concepts and common sense doesn't always prevail in understanding the distinctions.

A true “give-away” is merely a free gift given to a consumer in exchange for a behavior. For example, a free baseball cap given to fans who show up to the ballpark at a certain time would qualify as a give-away. A “gift with purchase” is another example of a give-away. Give-aways are regulated under state and federal law, which proscribe the type and quantity of a freebie, but generally, the rules surrounding give-aways are limited in scope and easy to follow: have enough on hand to meet your market niche, and make sure the product is not alcohol, a firearm, or (in certain states) an agricultural product.



## Contests And Sweepstakes

Contests and sweepstakes have significant legal restrictions. They are also the darling of the digital age, with marketers utilizing all forms of digital marketing to launch them. Contests and sweepstakes often generate greater buzz around a product or service and offer prizes of greater value. This typically results in more consumers getting to know a sponsor's product, and thus, are the preferred promotion. They are also more readily associated with problems, so it's important to understand their structure.

A legal sweepstakes or contest will contain two of three essential components: (1) a prize, (2) the element of chance, or (3) consideration. In order for a contest or sweepstakes to withstand legal scrutiny in the United States, one of the referenced elements has to be eliminated. That is, a legal promotion cannot contain all three: chance, consideration and a prize. Virtually all promotions have some form of a prize, so the presence of either chance or consideration is what determines the type of promotion.

"Sweepstakes," also called games of chance, eliminate the element of consideration. The winner of a sweepstakes must be allowed to enter the promotion free of charge, and must be chosen at random from a pool of qualified entries. Because the promotion includes the element of chance, companies may not require consideration for an opportunity to win the prize. Any promotion that requires payment in order to be entered into a random drawing is considered an illegal lottery.

Most states have carved out an exception for state governments to generate public income, which is how state LOTTO sweepstakes can have a pay-to-play system. Any other sweepstakes promotion must ensure that no purchase is necessary.

"Contests" measure a contestant's skill, and as such, they must eliminate the element of chance. Contestants enter a contest by either paying an entrance fee, or performing some act that constitutes consideration (such as writing an essay or running in a race), or both. Contestants' entries must be judged and scored by objective measurable criteria. The highest score among all qualified entries must identify the winner. In a contest, the element of chance is eliminated, or at least greatly reduced.

Like contests, "give-aways" eliminate the element of chance, but differ in that no judging takes place and a prize is guaranteed. A classic give-away promotion is the "buy-one-get-one-free" premium. Other common give-away scenarios include a "gift-with-purchase" promotion or a survey promotion that yields a gift on completion of a questionnaire. The term "give-away" does not have legal effect and many sweepstakes promotions are called give-aways, even though they fit a sweepstakes model.

Lawyers should be clear on the distinctions regarding promotions, as well as where to find more detailed information on their particular state laws governing them. From the prize offered, to the target audience, to the method of delivery, each element of a promotion requires consideration of the laws that govern this form of marketing.

Section 5 of the Federal Trade Commission Act ("FTC Act") governs advertising law, generally, and is used to regulate false or misleading advertising claims that may be contained in a promotion, but contests and sweepstakes are primarily state regulated (so, too, are coupons and rebates). Since most sweepstakes are national in scope and the states do not

work to harmonize their statutes, promotion rules are typically drafted to the most stringent state standards. National chain and Internet promotions should be created to be as inclusive as possible.

In addition, some promotions involve specific industry regulations. The alcohol, tobacco, dairy, banking and insurance industries all require special disclosures if the sponsor or the prize involves a product under their purview. Lawyers should advise clients to steer clear of promotions in these areas unless they have a clear understanding of the law. The more unique and complicated the promotion, the more scrutiny and possible registrations will be required.

Online contest and sweepstakes directed at children will also involve the Children's Online Privacy Protection Act, recently updated by the FTC in 2012 and effective 2013. In some cases, if the promotion is offered on television, even the FCC will become involved, particularly if the subject matter is mature.

The landscape of promotions law coupled with the digital means in which most promotions are delivered present numerous opportunities for well-intentioned campaigns to go wrong, but some problems are significantly more common than others. Although complicated promotion campaigns will require special expertise, lawyers can assist clients even without a strong background in promotions law by understanding the areas where most companies get into trouble. Sweepstakes tend to be the focus of the attorneys general, but enough issues arise in contests and give-aways that it is worth noting where companies may falter in those campaigns, too.

*The problem of consideration.* The magic words that must attach to every sweepstakes are no purchase necessary. Though simple in concept, more fines are levied as a result of violation of this proscription than any other contest or sweepstakes provision. No purchase necessary should mean what it says, and any company that offers a chance to win a prize concurrent with a purchase must also offer the same chance without a purchase.

In the case of a packaged good sweepstakes, for instance, where the entry token or winning message is under a bottle cap or inside a box, the rules must contain an alternative method of entry (AMOE) that allows consumers the option to enter the sweepstakes without paying. This AMOE must not only give consumers an equal chance to win, but the format must have "equal parity" with the pay-to-play option; that is, the AMOE process must not be overly difficult or require too many steps. Finally, the AMOE must be reasonably prominent and not buried in fine print.

Equal parity can be a sticky wicket in digital promotions, where the pay-to-play method of entry may be through a mobile phone (buy a ringtone, be entered to win a car), and the free method of entry is via mail. Companies often take the risk that Attorneys General will not bother with regulating such minutia.

No state has yet ruled that requiring an entrant to mail in an entry while a pay-to-play entrant may enter through his or her phone represents an unequal method of entry, but many promotions experts see this on the horizon, especially given the 2011 class action settlement with NBC regarding its premium text messaging sweepstakes (the court seemed to lean toward disallowing a free online method of entry to account for a mobile pay-to-play method, where the pay-to-play entry did not appear to confer anything of value). While

no case law resulted in the NBC matter, it was evident the courts were heavily scrutinizing alternate methods of entry to make sure they afforded entrants truly equal parity on the method.

In a brick-and-mortar example, the New York Attorney General, some years ago made an example of CVS, a drugstore chain was fined heavily for offering a sweepstakes without clearly disclosing that no purchase was necessary. Consumers were mistakenly told that they first had to make a purchase in the photo department, even though the rules provided for a free method. Similarly, Nestle was cited for its candy promotion where children were told in prominent typeface to buy and eat Nestlé candy to see if it turned their tongues “Prankster Purple.” While the “no purchase necessary” language was included in the ad, it was so small in comparison to the rest of the copy that it was ineffective. The maker of Tylenol was fined for telling entrants in large letters “Buy Tylenol” for a chance to win, and making the AMOE language too small to recognize as an option.

In the social media context, it is not “consideration” to require an entrant to register for a free social media account, and sponsors may limit entries only to those people who have that free account. That said, often social media sites have their own guidelines about consideration, and companies will want to make sure to familiarize themselves with guidelines related to each social media site.

In addition to the concerns related to a free-entry method, lawyers must also consider the question of what actually constitutes consideration. While most states define consideration as a monetary payment, some states — Delaware, Florida and Kansas, for instance — interpret the concept of consideration more liberally. Consideration has been found in cases where a visit to a location is involved. From a social media perspective, a “visit” is not likely to mean a quick trip to a URL address, but consideration might be found where a consumer is required to play a social media game prior to entry.

Moreover, some states are now examining the “commercial benefit theory” in deciding if consideration is present; namely, the more benefit the sponsor receives from the requirement, the more likely consideration will be found. Most states have been reluctant to write into law such a standard, but have at least used a “sniff test” to see if it appears that the sponsor is exploiting the consumer in some form. This is particularly true if the exploitation is time-consuming.

In general, with some limited exceptions, asking a consumer to use the Internet, dial a toll-free number, watch television, or answer a short survey are not deemed consideration. Requiring a consumer to answer a longer survey, however, or asking an entrant to provide certain personal identification information (such as disclosure of a Social Security number, or the names of friends) may rise to the level of consideration.

Requiring a store visit can also be problematic, depending on the state, and the type of visit. In Ohio, if the primary purpose of the store visit is to enter a sweepstakes, such a visit is considered consideration and sponsors must provide a method of entry that does not require a store visit. In California, store visits are not consideration, but sponsors must make special advertising disclosures about the store visit in the rules.

In the social media realm, each site has its individual requirements. Facebook, for instance, allows contest and sweepstakes sponsors to require an entrant to “like” a corporate page

prior to entry, but strictly forbids the “like” to actually be the entry. Once a consumer has liked a page, sponsor companies are required to provide a digital entry form that takes a consumer’s information.

From a practical, rules-drafting perspective, special provisions may be put into the rules that carve out alternative means of entry to accommodate those states that have special consideration requirements. Alternatively, those stringent states may be excluded altogether, though clients frequently are reluctant to remove states from their marketing strategy.

Once the consideration question is resolved, lawyers should consider whether other elements of the promotion will affect its legality. These may include the sponsoring company, the nature of the promotion, and the prize involved. Each time an element of a promotion changes, the potential for a problem increases.

For instance, until 2013 California prohibited liquor manufacturers from sponsoring sweepstakes that have valuable prizes. It remains to be seen whether the Alcohol Beverage Control (“ABC”) board will interpret the new law, which includes interesting provisions (like no promotion may involve the collection of cork). Accordingly, California companies will want to carefully review the law and its idiosyncrasies before launching into a promotion. Other states have their own unique alcohol laws. If the liquor promotion is online, then Tennessee must also be excluded (or consumers must be allowed a mail-in option), since Tennessee doesn’t allow liquor companies to have in-store promotions, and over half the states require ABC approval before launching a promotion.

*Registration, bonding and beyond.* Many lawyers are aware that Florida and New York require bonding and registration for sweepstakes that have an aggregate prize value of \$5,000 or more, but other states require registration under certain circumstances, too. Accordingly, lawyers should query their client on exactly how the promotion will be conducted. In Rhode Island, for instance, if a sweepstakes is offered at a retail location, then the sponsoring company must post the rules at those participating locations.

Numerous other quirky state rules may affect a promotion. West Virginia’s attorney general has ruled, informally, that sponsors of bottle-cap promotions must provide free bottle-cap liners to retail outlets so that consumers do not have to mail away for them. Montana prohibits certain dairy promotions. Wisconsin requires that a retailer be allowed to request entry forms for on-pack promotions and further, that milk may never be given away as a premium. Alabama notes the age of majority as 19 for promotions involving digital prizes. The list goes on.

*Contests and give-away promotions.* Contests and give-aways have their own unique set of problems. Most important, Sponsors must eliminate the element of chance in a contest, and sponsors must have on hand sufficient product for a give-away. A well-drafted set of rules will provide a sponsor with some protection in case of trouble, but there must be specific language that addresses these special problems.

*The problem of chance.* A common pitfall of many contests is that the rules will state that in the event of a tie, the winner will be chosen by random drawing. Such a provision adds back the element of chance to a skill promotion and, thus, creates an illegal lottery. Rules should contain a rescoring provision to eliminate this problem. Often, sponsors will create a contest that is really not a measure of skill. Guessing the number of beans in a jar, dog

racing, predicting the outcome of an athletic event, or creating a contest with nonobjective judging criteria have all been held not to be measures of skill. The sponsor should clearly state — and then follow — rules that lay out an objective measure.

Give-away promotions should always state “while supplies last” in the ad copy, and clients should be advised that they must have on hand a reasonable number of the gift offered to account for the response rate. Having too few gifts can constitute a “bait-and-switch” unfair business practice in most states.

Rhode Island and Connecticut have special restrictions involving rebates. In both cases, if the sponsor advertises the “after” price rather than the amount of the rebate, consumers must receive the rebate as an “instant rebate” at the check-out.

*Other legal issues.* Lawyers should also be mindful of the ancillary legal issues that can affect the smooth operation of a promotion, such as intellectual property and false advertising concerns. Clients should be advised that the promotion should not create a false sense of sponsorship by a third party. This often happens if the prize is related to a third-party brand, like an airline, hotel or pop star, and give rise to an infringement suit. Worse, sponsors might have to cut short the promotion, upsetting customers and creating a difficult public relations problem.

If the promotion collects personal information, then clients should be reminded to either use that information consistent with their privacy policy or to include the necessary exceptions in the rules. Clients should also consider whether they will be opening the promotion to children and, if so, whether they need to comply with the Children’s Online Privacy Protection Act, recently updated.

Offering promotions through mobile applications (“apps”) has recently caught the attention of marketers, and caught the ire of lawmakers. Using mobile apps to administer contests can provide sponsors with a goldmine of information that desktop entries do not, including telephone numbers and other unique information about a consumer, including specific time-and-location data about the entrant. Largely unregulated, the makers of Apps have been taking advantage of what some refer to as a “privacy loophole” to gather information about consumers without disclosing what is taken or how it’s used.

Change, however, is afoot. California has been on the forefront of this issue and has enacted a law requiring app makers to have a privacy policy that is either specific to the mobile app or has contained in the standard online policy mobile provisions. Apple recently changed its app policy, prohibiting the taking of certain information that can be accessed automatically, unless the company requests permission from the mobile device holder. This year, representative Hank Johnson introduced HR 1913 introduced the Application Privacy Protection and Security (APPS) Act to increase consumer privacy on mobile devices. Companies should begin looking for increased scrutiny in this area.

## Drafting The Rules

### **No matter what form a promotion takes, certain disclosures are universally necessary.**

Consumers need to know who is sponsoring the promotion and where the sponsor is located. Many states require a physical address rather than a P.O. box. The rules should have a start and end date, and it is a good practice to include a start and end time, too, particularly with Internet promotions. If the promotion provides for mail-in entries, the rules should note a postmark date for those entries, as well as a “received-by” date (typically seven days after the close of the promotion). Mail-in entries are not required for Internet-only advertised promotions, but if offered, they must have equal parity with the online entry process.

As will be discussed in further detail below, social media adds a new element of disclosure requirements as dictated by the particular social media website on which the promotion is offered. Lawyers will want to fully review the specifics of a promotion site and include language in the rules that is specific to the medium. For text promotions where the entrant is entering via mobile phone each carrier has specific disclosure language requirements that must be followed.

The digital age has also created a desire for companies to use the same promotion on a worldwide basis. It's important to note that all countries are sovereign nations with their own restrictions and guidelines. It's not advisable to bootstrap a U.S.-legal promotion without seeking guidance from local counsel. Many countries do not allow sweepstakes at all and where sweepstakes and contests are legal, there may be significant restrictions relating to the manner in which they are offered. Moreover, many countries have extremely restrictive privacy laws that prohibit the collection of email addresses for purposes other than operating the promotion. For more U.S. company, the collection of the email address for later marketing purposes is the primary motivation for the promotion in the first place.

Sponsors should reduce their international exposure in foreign jurisdictions and in locations where they would not like to promote by clearly stating where the promotion is valid. For instance, if the promotion is really only valid in the United States, the client should consider whether that includes U.S. military bases overseas. Also included in this paragraph should be eligibility requirements for the entrant. A minimum age is a standard practice, but requirements may also include other conditions, such as being a college graduate or owning a home. Unlike consideration, a condition precedent does not create an illegal lottery because, presumably, the condition was met before the start of the sweepstakes.

Prize details are important. Lawyers and clients should look carefully at what the prize being offered is, and then outline any and all restrictions that might attach to it. If the prize involves air travel, then black-out dates should be listed, as well as appropriate origination locations (can the person fly from Mammoth, Calif., or must travel originate in Los Angeles?). The rules should state what elements of a prize are not included, or else the sponsor may be on the hook for more than it expected.

If a promotion is advertised as “all expenses paid,” the entrant can reasonably expect that all expenses are paid, unless the rules make clear restrictions. If there is a chance that the

prize may not be available, then a provision should be included in the rules that provides for substitution of a prize of equal or greater value. The retail value of a prize must always be listed.

The rules should inform consumers what steps they will have to take to claim the prize, and whether there is a time limitation on collecting the prize. As a general rule, prize declarations are encouraged unless the prize is of negligible value. Declarations can also double as liability and publicity releases. For accounting reasons, lawyers should advise clients to limit the prize-redemption period.

The rules should also outline when a consumer can expect to hear from the sponsor, and how the consumer can get a copy of the rules and a copy of the winners' list. These are required in all 50 states. If the requesting method involves mailing in an envelope to the sponsor, Vermont residents need to be excluded from this requirement, as a self-addressed stamped envelope is deemed consideration in that state. As practical matter, companies should consider having a location on their websites where a copy of the rules and a winners list may be found without writing.

Fraud by unscrupulous entrants is prevalent in the promotions world and companies contend with the problem repeatedly. A good set of rules can also help companies avoid problems associated with scammers, spammers, crammers and other criminals. One common practice is cramming: entering more than once under numerous e-mail addresses. A provision limiting entries to one per natural person can easily remove this temptation.

Another common cram-scram is using a computer-generated entry method so the entrant does not have to hand-enter his information. That is popular when the sponsor does not limit the number of entries because it wants to encourage multiple visits to its Web site. The rules can include a provision that would disqualify anyone attempting to use a machine to enter. In the alternative, the sponsor may use an entry form that requires the entrant to hand enter text that is not machine readable. In promotions involving social media sites such as Facebook (where a third party app is required to enter), companies reduce their risk of having auto-entries.

Sweepstakes are big business in the world of con artists. There are usenet groups dedicated to pointing out weaknesses in rules and outlining how to get around certain rules. One company created a web site that provided a mathematical angle that could be used to determine if a Snapple bottle cap promotion had a winning cap without first purchasing the bottle. If sponsors are finding strange entries or unpredictable sales problems, they would do well to police the Internet and sleuth the problem. If a problem is found, a rule provision suspending the sweepstakes may allow the prize to be awarded to legitimate entrants without keeping the promotion open for the entire time.

Fraud hits promotions that are Internet-based most often, but it can happen with any promotion, including on-pack sweepstakes, or those involving game pieces. Employees in packing plants or other centralized distribution centers have been known to gather up the winning (rare) pieces and sell them on the black market. Companies who want to do in-pack promotions may wish to invest in security during the packing process.

Avoiding false winners can stave off a bad PR campaign. A false winner is someone who believes he or she has a winning game piece or number, but in fact it is the result of a typographical error. Language, commonly known as “The Kraft Language,” providing for this possibility should always be included in the rules.

## Coupons In The Digital Age

Digital coupons have been in use for some years. The garden variety buy-one-get-one-free promotion, or the 50% coupon are still widely used in print and electronic media outlets. The digital age has allowed companies some distinct advantages and also presented some very real challenges.

Marketers are always looking for demographic information that will lead them to the most effective use of their marketing budget. Digital coupons allow companies to use different bar codes for different digital outlets so they can easily determine who is taking advantage of their offers. While this can be done in the paper world, the re-printing costs alone may be prohibitive.

Similarly, digital coupons allow customers to use their smart phones and handheld mobile devices to carry coupons rather than stuffing them in a purse or car visor (and subsequently forgetting them). The FTC, AGs and state regulators also like digital coupons because they are less likely to be used by advertisers as a bait-and-switch.

Digital group coupons, put out by companies like Living Social, Groupon, and Extole, allow companies to offer a promotion only if it's going to be exploited by enough people to pay for the proposed discount. By allowing a “deal” to trigger only when enough consumers are willing to pay for it, companies do not have to guess about consumer preferences.

The foregoing notwithstanding, digital coupons can get companies into trouble if rules are not set in place to account for potential problems.

*Always put an expiration date on the coupon.* It may be possible, and even advantageous, to extend a coupon past its expiry date, but an expiry date for downloadable coupons is an important consideration. First, it alleviates the problem of FTC false advertising claims for pretending to offer a product at a retail price while having a permanent discount on it. Second, companies can no longer rely on removing a digital coupon from the world wide web. With one finger, consumers can screen print a coupon, re-post it on another site, and make it available for download long after the promotion is over.

Domino's experienced just such a problem. It ran a limited time coupon with no expiry date for a free pizza in a small delivery area. When the promotion was over, it believed it had taken down the site. In reality, the Domino's employee had merely hid the site, and savvy internet customers found it and continued to download the coupons.

*Group coupons should only expire the premium.* Companies should also read the fine print when it comes to group-based coupons. Many states do not consider a group coupon an actual “coupon,” that can expire and have other limitations. Most states classify group coupons as gift certificates or gift cards. In most states, gift certificates may not expire. Accordingly, companies selling group coupons will still be required to honor the actual price paid for the coupon, even if the premium has expired.

*Rain checks are still in fashion.* Coupons are often used to liquidate a product line. In cases where the possibility of full liquidation will mean many consumers do not get the deal, companies should consider a rain check or some other offering. This avoids the FTC from considering the original offer a false advertising bait-and-switch, but also placates consumers.

*Limitations are important.* Companies often forget to limit their coupons. As a result, savvy consumers may group together 3 coupons and receive a product for free. Common limitations are “one coupon per customer” and “coupons and multiple offers may not be combined.”

## The “Thing” About Social Media

All the rules of the promotions world apply to social media, and social media has cemented itself as a permanent fixture in advertising. In 2010, virtually 100% of all Fortune 500 companies had secured Facebook fan pages, and today most are well on their way to launching major advertising campaigns on various social media sites.

In addition to the rules set forth above, social media’s success has given rise to a few changes in the law at both the federal and state level, particularly in the area of online endorsements and testimonials. State and local laws surrounding contests, sweepstakes, and giveaways, however, have largely been left untouched since the boom of social media. That doesn’t mean social media and the digital technology boom haven’t drastically altered the manner in which contests and sweepstakes are offered. Because the viral effect of social media has increased the risk that something can go wrong, companies have to pay careful attention to what they do in these venues. Companies have changed the manner in which they launch a campaign and have shifted their focus to accommodate a potentially fertile marketing landscape, that nevertheless, has significant mine fields.

## The Viral Effect

Virality is generally the goal of the sponsor in launching a sweepstakes through social media outlets. Virality, however, can present challenges that might have gone unnoticed in smaller promotions. Thus, the importance of fully vetting a promotion prior to release, and accounting for various eventualities in the rules is paramount to a successful campaign. Whether an ad campaign launched on Facebook, Twitter, FourSquare, or other social media outlets involves a contest, sweepstakes, coupon or campaign, the viral effect of social media should be considered whenever public decisions affecting a brand are made.

In 2012, the Susan G. Komen foundation saw the effects of a hastily made decision backfire when it sought to remove its funding for breast exams at Planned Parenthood. Millions of Facebook and Twitter account holders launched an all-out attack against the fundraiser for putting in jeopardy the health of millions of women’ based upon what were largely considered questionable accusations by a Congressman about Planned Parenthood’s practices. Komen lost donations and garnered heavy criticism for putting politics before lives. Ultimately, it was forced to reverse its decision and its director resigned in disgrace. Similarly,

Congress itself felt the backlash of social media when it tried to quickly pass SOPA and PIPA laws that would severely limit consumers' abilities to post images and music on the Internet.

In 2011, Microsoft experienced the sting of social media virality when it attempted to promote its BING search engine on Twitter by offering to donate money to Japan quake victims -- up to \$100,000 -- for every retweet of its Bing trademark using hashtags. Fans were so immediately incensed that they waged a twitter campaign that forced the software giant to immediately cancel the promotion and donate the money out of embarrassment. In 2012 and 2013, other companies made similar "hashtag" mistakes.

The foregoing reminds us that while virality is often crucial for businesses, its potential must be carefully weighed, and caution is advised when launching a program using social media tools.

## Something To Think About

**Because the viral component of social media is so prevalent, marketing teams will want to carefully script out their plans.**

### **Plan for the "Rush!"**

Social Media moves ideas quickly and often targets a broader audience than a Sponsor of a promotion may intend. A company seeking to reward loyal customers with a free cup of coffee may end up attracting free-loaders who saw a friend's online posting. Consumer companies looking to liquidate a warehouse of product may receive an unintended deluge of buyers, now frustrated because company cannot fulfill their order. The foregoing may seem an innocuous problem, but consumers who are upset enough to report their frustration to a government entity may force an unprepared company to answer to a state attorney general.

The FTC, for instance, requires companies that promote a particular deal have enough of the product/service on hand to accommodate a reasonable number of people. This avoids the potential for companies to offer a "bait-and-switch." Promoting products online, therefore, requires some careful thought and planning; and companies should have enough product to accommodate the likely number of respondents.

In 2010, Kentucky Fried Chicken became the subject of a class action suit for refusing to honor coupons it advertised on the Oprah Winfrey show. Not realizing the influence and virality of Oprah's endorsement, the company received such a tremendous number of coupon redemptions it refused to accept them. The settlement required KFC to provide "chicken checks" to anyone who downloaded the original KFC coupon and was denied a meal. The foregoing suggests companies should not merely guess at the potential number, but have done their homework.

## **Match The Promotion to Your Needs and Abilities**

Social media and digital technology have given rise to new ways to promote products and services to consumers. The rush to get in front of these technologies should be tempered with common sense about the abilities of the marketing departments and the ultimate target.

Geocaching contests may be all the rage, but if your target audience is over 50, it's not likely to be a success. Failed promotions cost companies in financial outlay and PR. And because many states have laws that do not allow a company to cancel a promotion in the event it doesn't have the desired outcome, sponsors may be left on the hook to award big prizes for weak turnouts. Moreover, geocaching typically involves cameras. Companies that frown on their customers bringing cameras into their establishments (art museums, for instance), may want to think twice about sending a double message, particularly in cases where the flash of a camera could damage a product.

Even when the audience is appropriate and the company has the human capital to launch the promotion, the environment may be wrong. An onsite text promotion may be doomed to fail if the location has limited cellular coverage, or blocks certain customer signals. Loyalty programs -- including frequent visitor programs -- are generally more effective when consumers are saving significant money, but may be less effective for inexpensive items. This is because the payoff to the consumer is not sufficient enough to warrant a change in behavior. Land O' Lakes butter discovered that offering points in exchange for purchasing its butter didn't work because it took too many purchases to yield something of value, and most consumers are not brand loyal to butter.

## **If You Build It, They May Not Come**

Optimism is infectious. Except when it's not. Marketing departments often believe contests will generate significant interest, only to be disappointed. If the contest is one that involves social media, the result can be a significant PR problem, with the brand being damaged more than if no promotion had been offered in the first place.

Consider the user-generated content promotion. Marketing departments typically want to reward customers who patronize them and/or are familiar with their products. Moreover, with tight budgets, many companies believe that UGC promotions will allow them to populate their websites or Facebook pages with contestant entries that will attract more consumers after the contest is over.

Marketing departments often fail to accurately predict the amount of time they are requiring their contestants to devote to their entry. Essays, software programs, and videos take time and resources. If the prize is not sufficiently valuable, turnout is likely to be low. Moreover, those who do enter are less likely to submit the quality entries most marketing departments are hoping for. Finally, even if the prize is appropriate to the effort, the submissions of average consumers are not likely to rise to the caliber of professional content for which most marketers are hoping.

Companies can avoid these issues by making certain the rules establish that, in the event of fewer than a threshold number of entries, the contest may be cancelled and entrants will receive a consolation prize. Another best practice is to note in the rules that the sponsor is not bound to display the winning entries and no prize will be awarded if no entry receives a score below a threshold number.

### **Avoid Unintended Consequences with a Test Run**

Because marketing teams often dream up promotions without fully vetting them, the risk is high that the promotion may have detrimental consequences. The best promotions are those that have been played before. Companies should be advised to always play their own games, particularly if they are unfamiliar with the technology.

In 2011, Starbucks launched a promotion on FourSquare, without fully understanding how “mayorships” worked. The promotion allowed people who were “mayors” of a particularly Starbucks to receive a free coffee beverage. Because mayorships can change hourly, Starbucks franchises were deluged with free coffee requests, rather than the one a day it predicted. Moreover, it failed to properly communicate the promotion to its franchisees so many baristas refused to honor the mayorships, creating a public relations fiasco that resulted in even more free beverages being handed out.

## **The Future Of Promotions**

There is no question promotions will remain an active and viable marketing tool. There is also no question technology will continue to play a heavy role in the promotions world. The genius of marketers, the increasing pressure to attract new consumers, and the advent of new technologies will continue to present significant challenges and rewards, and the law will morph and change to go with it.

It’s not entirely clear what the future holds. Globally speaking, we have seen trends toward increasingly international promotions and promotions that may be entered and monitored through the vehicle of smart phones and other mobile devices. We note an increasing propensity to deliver coupons and rebates digitally, or to force consumers to gain in-depth knowledge of products and services before they will be rewarded with a prize.

In short order, the law will have no choice but to make accommodations for international reach (without global expense). Privacy laws must be harmonized and movement is being made in that area. Even for brick-and-mortar companies, prize delivery – including coupons and contest winnings – must be largely digital. Increased harmonization of laws is likely to take a front seat. Finally, social media, once thought to be a passing fancy of millennials, is going to take a starring role in the promotions world.