



# Avoiding Pitfalls in Promotions and Advertising While Keeping the Peace with your Marketing Department

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# Types of Prize Promotions

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**Lottery** – Illegal under federal and state law, unless you are the state offering a state sanctioned lottery, or a charitable organization offering a raffle that complies with state law.

**Sweepstakes** – Also called “Games of Chance” – generally legal, but every state’s laws have different requirements.

**Giveaways** – Legal but subject to general prohibitions against misleading advertising.

**Contests** – Generally legal, but state laws vary.

**Raffle** – Only for charitable organizations; restricted by state law.

**Gambling** – Defined by state law, generally betting something of value on the outcome of an event determined by chance.

# Regulators to Worry About

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**FTC** – consumer protection

**FCC** – where texting and phones are involved in entries or advertising

**US Postal Service** – Where promotion materials are mailed

**State Attorneys General** – enforcing consumer protection, lottery and gambling statutes

# Sweepstakes 101

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**Lottery** = Prize + Chance + Consideration

A **sweepstakes** is a promotion where consumers are offered the **chance** to win a **prize** through a chance determination (random drawing, scratch off card) ***without purchase or other consideration***, often in connection with the sale of consumer goods or services.

**RISK**: If the promotion includes consideration (purchase, payment or substantial effort) AND chance AND prize, then it is likely an **ILLEGAL LOTTERY or GAMBLING**.

NC General Statutes §§ 14-289 – 14-309.20



# Consideration Issues

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## Monetary:

- A payment of any kind
- Purchase of a product or service required for entry
- Post-consideration = purchase required to redeem prize after winning – can violate NC prize notification statutes

## Non-Monetary:

- “A substantial degree of effort”
- Likely to be Consideration: Touching a car for hours, visiting a location several times, completing a lengthy survey, attendance at a sales presentation, scavenger hunt
- Unlikely to be Consideration: Listening to the radio, watching a TV show, visiting a location one time

# Consideration Issues

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AMOE – Whenever you have a paid entry method, you **MUST** have an alternate free method of entry (can be by mail in, toll free call or online).

“Equal Dignity” -- If purchase-based entries are unlimited, free entries must be unlimited (but you can limit to one free entry per outer envelope for mail-in).

Trade Shows and Fairs: If there is a fee to enter a trade show or a fair, you cannot advertise a sweepstakes outside the trade show/fair unless you will allow consumers to enter for free without attending the trade show/fair.

# Consideration?

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Sweepstakes during December for “12 days of [name a mobile phone maker]”

- Mobile phones given away each day for 12 days
- Mobile phone provider wanted to advertise its “low” cost for monthly service
  - Is it consideration if additional cost may be involved to actually use the prize?
- FIX => Made clear in the rules that the prize is only the phone and the monthly cost for service was not included

QUESTION: What about taking a test drive as a means of entry – is that consideration?

# Iron Man Lottery

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# Just because you've never had a problem before...

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From 1983 -2015, World Triathlon Corp. charged fees up to \$50 for a chance to enter its Iron Man competitions.

The company would randomly select entries for spots in the Iron Man competition.

No refund if your entry wasn't chosen and no credit toward registration for those who were chosen.

Every year, approximately 86,000 people applied for 2,000 spots, and the Company pocketed the profits.

On top of that, the Company took in more money by selling “membership” in the Passport Club, which let athletes “double their chances of winning the lottery” for another \$50.

# What happened?

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In May 2015, World Triathlon Corp. forfeited \$2.8 Million (profits since 2012) to avoid criminal charges.



# Sweepstakes Compliance

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Legal Review of advertising and Official Rules

Registration and Bonding in NY and Florida if total prize value over \$5,000

Registration in RI if offered in retail stores and prizes over \$500

Retention of winners lists for at least 6 months

Provide winners lists for registered promotions to FL within 60 days after winners finally determined



# Rules Requirements

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Abbreviated rules should include:

- NO PURCHASE NECESSARY TO ENTER OR WIN.
- List of eligible states and “Void where prohibited.”
- Eligibility requirements – Age, residency, not employee of Sponsor, etc.
- See official rules for details (and link to or reference to where to find rules).
- Statement of odds (can be “Odds of winning depend on number of eligible entries received”).
- If prizes are mentioned, the number and retail value of each prize.
- Sponsor identification.

# Rules Requirements

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Complete Official Rules should also include:

- Details about how to enter (including free entry);
- Disclaimers and releases of liability for Sponsor;
- Winner affidavit and release for prizes over \$600;
- Details about how and when winners will be selected and forfeiture if winner does not respond;
- Details about prizes and prize values (see special disclosures below);
- Advertising consent (except in TN and where prohibited); and
- Winners list details.



# The “Kraft Clause”

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Thanks to Kraft, which botched a 1989 instant win game, when a printing error resulted in 10,000 grand prize winners... and litigation to follow...

**“If due to a printing, production or other error, more prizes are claimed than are intended to be awarded for any prize level, the intended prizes will be awarded in a random drawing from among all verified and validated prize claims received for that prize level. In no event will more than the stated number of prizes be awarded.”**

# The Nuclear Option

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“Sponsor reserves the right to cancel, suspend and/or modify the Promotion, or any part of it, if any fraud, technical failures or any other factor beyond Sponsor’s reasonable control impairs the integrity or proper functioning of the Promotion, as determined by Sponsor in its sole discretion. Sponsor reserves the right, in its sole discretion, to disqualify any individual it finds to be tampering with the entry process or the operation of the Promotion or to be acting in violation of these Official Rules or any other promotion or in an unsportsmanlike or disruptive manner.”

# “Sweepers”

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Diana Coke – Won more than \$375,000 in prizes over 20 years, including cars, Cash, trips, 12 TVs, 5 iPhones, and Flying lessons.

# “Sweepers”

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- Enter 20-300 sweepstakes per day
- Mostly women and many college students and retirees
- Informal poll shows more than half win \$1,250+ per year and more than 25% win \$3,000+ per year in prizes
- Many use “bots” or software to automatically enter sweepstakes

# No Bots Clause

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“Use of any automated system to participate is prohibited and will result in disqualification.”

## **And another favorite:**

“Any attempt by any entrant to obtain more than the stated number of entries by using multiple/different email addresses, identities, registrations and logins, or any other methods will void that entrant's entries and that entrant may be disqualified.”

**MEMBERS ONLY**

# Members Only Promotions

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## Advantages:

- Limits the pool of potential entrants to your target audience (e.g., students enrolled in specific programs, Sirius XM subscribers)
- Depending on the group, you may be able to avoid registration requirements in NY, FL and RI and bonding requirements in NY and FL if it is not a consumer promotion

## Risks:

- If membership has a fee (e.g., Sirius XM subscription fee), you have to be careful to avoid consideration problem

1610



PUBLISHERS  
CLEARING  
HOUSE

2208

October 31, 2010

**YOUR NAME HERE**

Ten Million Dollars

**\$10,000,000,000**

Congratulations

Ed McMahon

# “You May Be a Winner...”

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Publishers Clearing House ruined it for everyone

- Many states have prize notification statutes that require written notices before telling anyone they may have won or have won a prize
- Very detailed requirements about disclosures, size of fonts, using Arabic numerals for number of prizes and prize values
- Clear and conspicuous disclosure of the number of prizes, prize values and odds of winning where prizes are mentioned in advertising
- NC General Statute § 75-33

# Sweepstakes Compliance Review

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- ❑ No consideration/AMOE
- ❑ Full and abbreviated rules that cover all bases
- ❑ Registration and bonding where required
- ❑ Advertising compliance (prize notification statutes)
- ❑ Follow up – affidavits, fulfillment and reporting winners list to FL if applicable

# Giveaways 101

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Promotion where the sponsor gives the same prize to everyone on the same conditions, so there is no chance involved.

First 50 people to enter the store on Black Friday will receive a \$10 gift card.

Free baseball caps on Fan Day at the DBAP while supplies last.

Avoid chance and follow advertising rules – disclose all material conditions and restrictions clearly and conspicuously in all advertising.

# When is a Giveaway not a Giveaway?

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When it's a sweepstakes.

If everyone gets the same prize on the same terms (e.g., everyone gets a baseball cap), there is no CHANCE, so the promotion is a giveaway, not a sweepstakes.

**BUT:**

If consumers get different prizes, with different values (e.g. fishing in a pond for prizes), then it is a SWEEPSTAKES because chance determines the prize value.

**SO:** All sweepstakes requirements apply.

# No Good Deed Goes Unpunished

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Draper James (Reese Witherspoon's clothing line) April 2020  
Instagram Giveaway:

“Dear Teachers: We want to say thank you. During quarantine, we see you working harder than ever to educate our children. To show our gratitude, Draper James would like to give teachers a free dress.”

\*While supplies last.

# The Aftermath

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Wow. 😂 @draperjames clearly doesn't know how much teachers make. "We love teachers! Here's 30% off our ridiculously expensive dresses." If I'm spending over \$100 on an "everyday dress," it better also grade essays.

6:05 PM · Apr 7, 2020 · Twitter Web App

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**5** Retweets   **1** Quote Tweet   **54** Likes

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# 2017 Cleveland Indians Promo

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Universal Windows Direct – If the Cleveland Indians win 15+ games in a row from August 1 to the end of the season, the retailer will refund all purchases made in July (windows, roofing, siding).

Indians streak started August 24, and the team won its 15<sup>th</sup> game in a row on September 7<sup>th</sup>.

The retailer (through its insurance policy) paid out \$1.7 million in refunds, including to one customer who paid \$34,000 for roofing, siding and windows.

# A Note About Agencies

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Even if an advertising or marketing agency recommends a particular promotion, and even if they say the promotion is legal, **your company** as the Sponsor must perform its own legal review. If the promotion does not comply with applicable state or federal laws, it is the Sponsor that will be liable, not the advertising or marketing agency that recommended it. Best to get legal review at the concept stage to avoid problems.

# Other Considerations

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## Easter egg drop at Durham Bulls Athletic Park

- Thousands of candy-stuffed eggs dropped onto the DBAP outfield by a helicopter –  
WHAT COULD POSSIBLY GO WRONG?



# CONTESTS

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# Contests 101

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Removes chance in order to avoid an illegal lottery.

Winner determined by skill and not chance (e.g., essay contest, photo contest).

Judging criteria disclosed in rules (e.g., For essay contest, 50% creativity, 25% supports contest theme, 25% writing skill).

Qualified (or at least impartial) judges.

Tie breaker determined by skill, not chance.

Consideration can be a problem – need to check individual state laws (CO, MD, NE, ND) and AG opinions.

# Contest Judging

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Judges must be qualified and identified in rules;

Judges must apply the judging criteria described in the rules;

Judges decisions are documented and final; and

Judges must follow tie-breaker rules and alternate winner rules described in contest rules.



# Special Contest Issues

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Copyright issues in essay, video and photo contests:

- Essay must be original and written by entrant;
- Entrant must be the photographer/videographer or have permission from the photographer/videographer to use the photo in the contest and grant rights in the photo to the Sponsor

Exclusions – For photo and video contests, prohibit certain content, including other manufacturers' brands, obscene content, infringing content, music, etc.

Rights – Obtain a license to use the winning submission, in all forms, for marketing purposes.

DMCA Copyright Agent for User Generated Content

# Follow Your Own Rules

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“My Fish Friday” contest

Contest where the entry to win was to submit a photograph of the entrant catching a fish

Prize = “tackle box” of assorted beer from Sweetwater Brewing and associated Sweetwater swag

- Rules specified that the winner had to be over 21
- Winning entry was a photo of someone under 21
- Prize not awarded even though mom willing to pick up the beer in lieu of her daughter



# Other Considerations

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- ❑ Avoid unsafe activities that lead to headlines, like “Man Hospitalized After Eggnog-Chugging Contest.”
- ❑ Think ahead – a video contest showing “Your favorite thing to do in our hotel rooms” is not a good idea.



# When is a Contest not a Contest?

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When it's a sweepstakes.

Mix 101.5 Christmas Choir Competition

The public at large are not “qualified judges” for purposes of a contest, and in “any chance” states, public voting introduces chance into the promotion.



Best practice: If the promotion includes ANY chance elements, treat it like a sweepstakes, with rules, registration (where required), and NO CONSIDERATION.

# Kiss the Kia

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# Contest Compliance Review

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- ☐ Skill based – no chance involved in determining winners
- ☐ Qualified judges
- ☐ Judging Criteria
- ☐ Consideration issues in some states
- ☐ Vet and secure IP and publicity rights for re-use of entries

# Raffles 101

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May be conducted ONLY by charitable organizations.

The United Way raffle you run in your office is **illegal** if your company is not a charitable organization.

Must comply with applicable law (varies by state, so multi-state raffles can get complicated).

# Raffles 101

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NC General Statute § 14-309.15:

- Limit 4 Raffles per organization per year
- Max prize value of \$125,000 per raffle and \$250,000 per year, except real property prizes for which the maximum is \$500,000 per raffle and per year
- 90% of proceeds must be used for charitable, religious, educational, civic or other nonprofit purposes
- Winner must be choosing by “random drawing”

# The Duck Race!

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# Problematic Prizes

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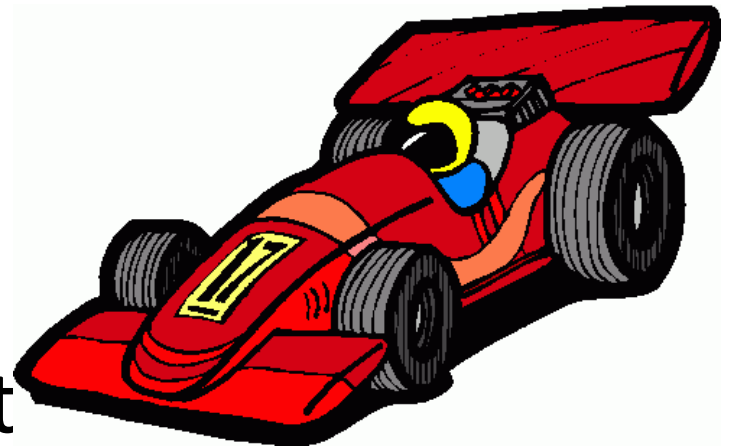
## Event Tickets

- “This ticket may not be used for advertising, promotion or other trade purposes without the written consent of issuer.”
- *NCAA vs. Coors* settlement in 2003 left many questions unanswered.
- Don’t forget the trademark issues – “the final 3 games of the tournament run annually in March and April.”

# Problematic Prizes

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- Trips — Flights, hotels, releases, exclusions
- Event Tickets
- One-of-a-Kind prizes
- Man Cave
- Medical procedures
- Alcohol/CBD product



# The Man Cave

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“Tailgate Takeout” sweepstakes where winner would receive all the fixings for a “man cave” valued at \$2500 (couch, big TV, etc.)

- Winner of the grand prize did not want to claim the prize due to not wanting to pay the taxes on the prize
- Sponsor of sweepstakes still wanted to award the prize
- Rules stated that “the grand prize will be forfeited if not claimed by 5:00 pm ET on 1/26/2018 and an alternate winner will not be selected.”
- Because the forfeiture date/time had not yet occurred when the grand prize winner refused the prize, a new winner was chosen from the remaining entries in the same manner as the first winner won and we got the prize to that winner before the forfeiture date.

# Taxes

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Issue a 1099 for any prize over \$600

Add cash to high value prizes to help the winner pay the taxes



# Social Media Guidelines

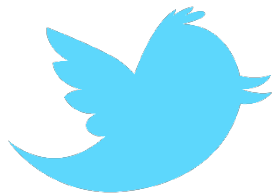
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In addition to FTC guidelines, each social media site has its own guidelines

Guidelines for sites vary, but Facebook, Twitter, Instagram and Pinterest all require sponsors to post rules that include:

- Acknowledgement that promotion is not sponsored, endorsed or administered by, or associated with the social media site; and
- A release by the entrant of the social media site

The guidelines also require disclosure of advertisements, sponsorships and endorsements



# Social Media Platform Guidelines

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Facebook: [https://www.facebook.com/page\\_guidelines.php](https://www.facebook.com/page_guidelines.php)

Twitter: <https://support.twitter.com/articles/68877-guidelines-for-promotions-on-twitter>

Instagram: <https://help.instagram.com/179379842258600>

Pinterest: <https://business.pinterest.com/en-gb/brand-guidelines>

# Facebook Concerns

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Page owners CANNOT require entrants to share a post on their timelines, share a post to a friend's timeline or tag a friend to enter a sweepstakes.

You CAN ask entrants to like your page, comment on a post or upload photos to enter.

You CAN ask consumers to “like” your Facebook Page without offering incentive to do so.



# Instagram Concerns

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Do NOT inaccurately tag content or encourage users to inaccurately tag content (ex: don't encourage people to tag themselves in photos if they aren't in the photo).

You CAN ask entrants to like your post, comment on a post or upload photos to enter.

Make sure participants include  
"#contest" or "#sweepstakes" in their  
comments when they post or comment  
for a promotion.



# Pinterest Concerns

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Do NOT require users to pin a specific item.

Do NOT allow more than one entry per person.

You CAN ask entrants to pin their favorite item from a selection in order to enter.

You CAN ask entrants to pin more than one item, as long as you give only one entry per person.

Make sure participants include “#contest” or “#sweepstakes” in their comments when they post or comment for a promotion.



# Twitter #Ad

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Can use tiny URL to house promotion rules and other details (due to space limitations)

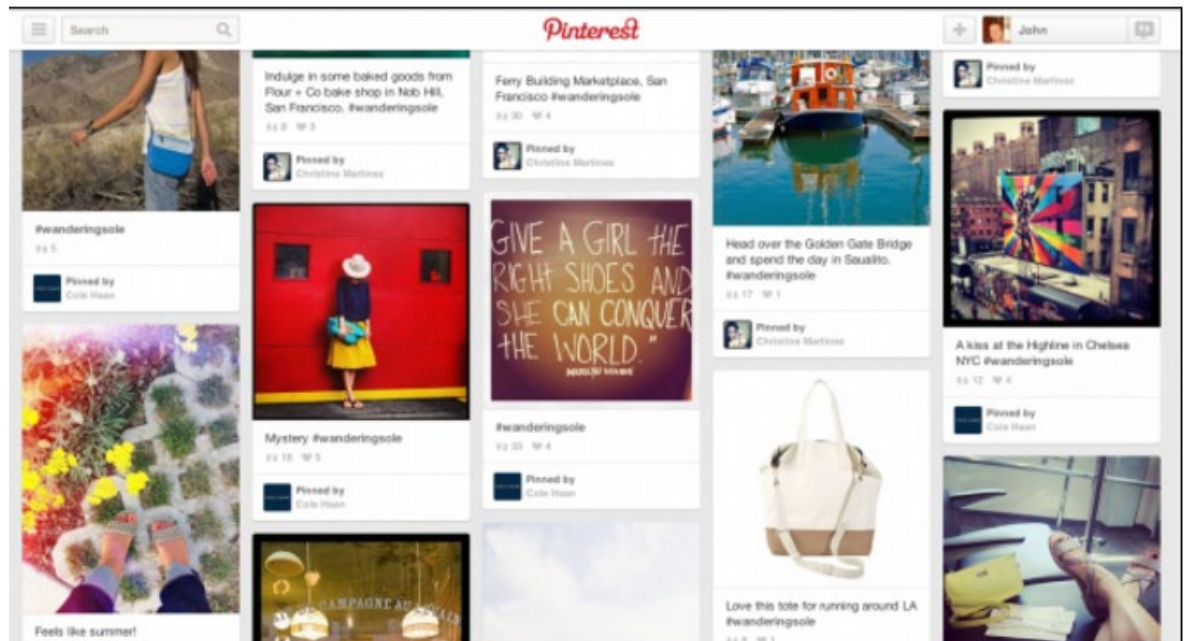
If sweepstakes entries are offered for “retweeting” a positive message about the product, connection should be disclosed in body of tweet with hash tags such as “#SPONSOR/AD/PAID/SWEEPSTAKES

Tweets that contain a product endorsement or review trigger disclosure guidelines under FTC’s Testimonial and Endorsement guidelines. #Ad or #Paid Ad



# Cole Haan and the 2014 Wandering Soles Contest

win a \$1,000 shopping spree from [@colehaan](#) ! share where your sole's are going to wander – <http://t.co/m4cK5RCcDM>  
– Jennifer Chong (@jchongstudio) May 26, 2013



# Text Promotions

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When consumers are asked to text the Sponsor to receive a code to receive a giveaway item, the Sponsor must follow all texting requirements:

- do not keep the consumers' text information for use with future marketing efforts above and beyond the sweepstakes entry or giveaway code retrieval

# Text Promotions – cont.

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- Consent to receive text messages in connection with a sweepstakes may NOT be treated as consent to receive other promotional messages or information.
- TCPA allows companies to respond to consumer-initiated text messages (e.g., text “discount” to shortcode to receive a coupon; text “giveaway” at State Fair to receive code for a free item at the booth) without liability, holding that these are “fulfillment messages, not telemarketing.”

# Endorsements

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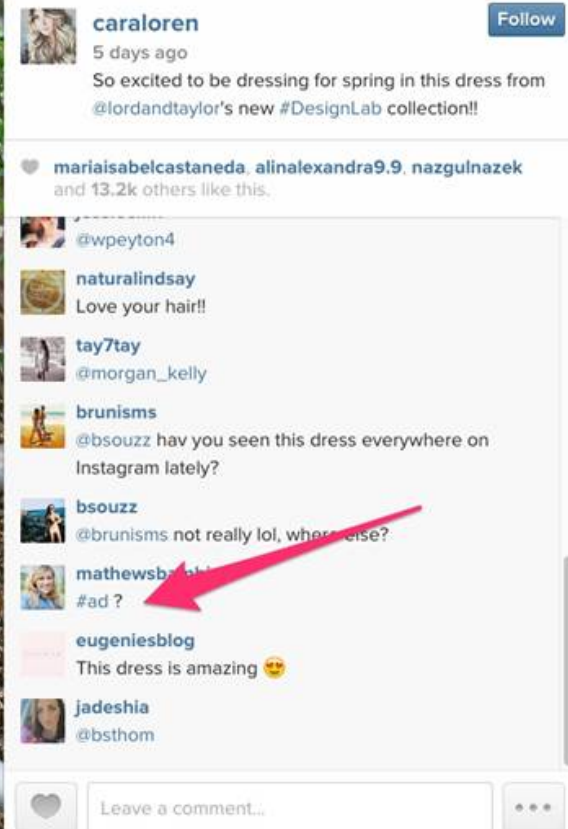
Big issue in Social Media but applies to all endorsements

Endorsers and “Influencers” must disclose their relationship to seller and whether they were paid or given free products

See FTC Endorsement Guidelines and publications

[https://www.ftc.gov/system/files/documents/plain-language/pdf-0205-endorsement-guides-faqs\\_0.pdf](https://www.ftc.gov/system/files/documents/plain-language/pdf-0205-endorsement-guides-faqs_0.pdf)

# Lord & Taylor



# Lord & Taylor

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Lord & Taylor paid 50 online fashion “influencers” to post Instagram pictures of themselves wearing the same Lord & Taylor dress, but failed to disclose they had given each influencer the dress, as well as thousands of dollars, in exchange for their endorsement. The Company also placed a paid article in *Nylon* magazine, although the article did not disclose that it was paid advertising.

Lord & Taylor settled FTC charges that it deceived consumers. As part of the settlement Lord & Taylor is required to ensure that its influencers clearly disclose that they have been paid for endorsements, and Lord & Taylor is prohibited from misrepresenting that paid ads are from an independent source.

# Endorser Liability

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“Bruh.. i’ve won like \$8,000 worth of CS:GO Skins today on @CSGOLotto. I cannot even believe it!”



# New FTC Guidance

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Disclosures 101 for Social Media Influencers

[https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508\\_1.pdf](https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf)

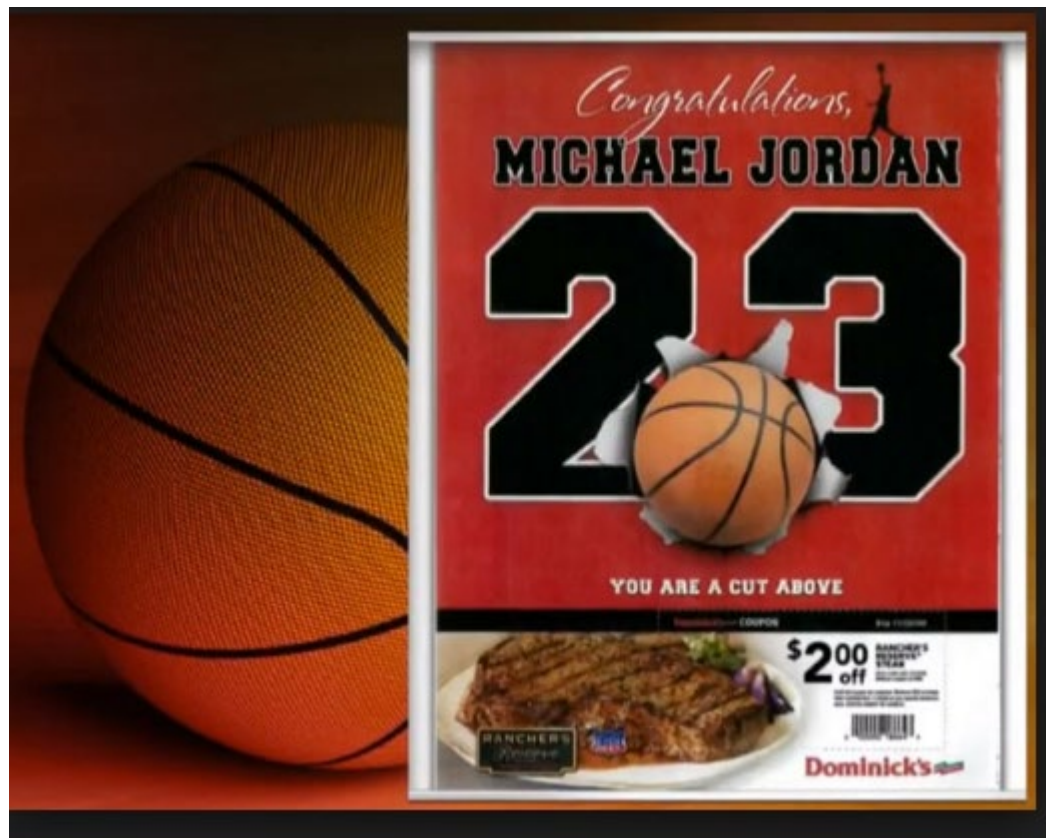
#Ad #sponsored

# No Implied Endorsements Using Unauthorized Images



# Or A Celebrity's Name and Jersey Number...

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# Posting Photos and Videos of Events

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Rights of publicity and privacy vary by State:

## **Virginia:**

- Recognizes statutory right of publicity
- Civil and criminal penalties for using someone's name, portrait or picture for advertising purposes without their consent
  - Damages – compensatory, exemplary and punitive
  - Injunctive relief
  - Misdemeanor and fine of \$50-\$1,000

**North Carolina:** Does not recognize rights of publicity... yet.

# More Fake News

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Actually, fake reviews.

Must disclose payment, free product or other consideration for endorsement.

New fake review scam – company sends product to random person who doesn't order it, then posts fake review in recipient's name.

# Mail Order Rule

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Meet shipping promises

Notify consumer of shipping delay and offer consumer the choice of refund or delayed shipment.

Refunds must be made in cash within 7 days (no gift cards)

April 2020 Settlement – Fashion Nova will pay \$9.3 million for consumer refunds

**QUESTIONS?**

