

Sweepstakes and Contests

What Healthcare Organizations Need to Know

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Po Yi, Partner
Advertising, Marketing and Media

Randi Seigel, Partner
Manatt Health

Key Terms

- Lottery = Prize + Chance + Consideration
 - *Illegal under federal laws and laws of all 50 states, except for limited exceptions*
- Sweepstakes (a/k/a Game of Chance) = Prize + Chance
 - *Subject to prize promotion laws*
- Contest (a/k/a Game of Skill) = Prize + Skill (+ Consideration)
 - *Subject to prize promotion laws*

The term giveaway is loosely used to refer to any promotion that gives away something of value, but not all giveaways are subject to prize promotion laws.

Prize	Something of value that is awarded to winners.
Game of Chance	Prize promotion where winner selection has some randomness, such as random drawing, pre-selected winning numbers.
Game of Skill	Prize promotion where winner determined on the basis of bona fide skill (e.g., speed, strategy, athletic skill, creativity, musical talent, mental or manual dexterity, knowledge).
Consideration	Something of value (e.g., payment, purchase, substantial effort or time), or that has commercial benefit to the sponsor or is a burden on the entrant, which is required to participate in the prize promotion.
Sponsor	Entity that operates, promotes or conducts the promotion.

Applicable Laws

- Deceptive Mail Prevention and Enforcement Act
- State Prize Promotion Laws
- Civil Monetary Penalties Laws (CMPL)
- Anti-Kickback Statute (AKS)
- Health Insurance Portability and Accountability Act (HIPAA)
- Telemarketing Sales Rules and state telemarketing laws
- FTC Endorsement Guides
- CAN-SPAM Act
- Children's Online Privacy Protection Act (COPPA)

Basic Principles

- **What is the nature of the prize or the item being given away?**
 - Bragging rights are not typically deemed to be prizes.
- **Free gift promotion or prize promotion?**
 - If everyone who participates is getting the same item, then it's a “free gift” promotion because there is no element of chance.
 - If everyone is getting something, but the value of the item may not be the same, then the promotion would generally be considered a game of chance.
 - If there is a limited number of “free gifts,” then such promotion could be considered a game of chance.
 - Limited supply promotions are not necessarily deemed to be prize promotions – key is to ensure that the supply meets the anticipated demand



- If winner is **selected based on skill**, then the promotion is **generally** considered a contest or a “**game of skill**”
 - e.g., puzzle, essay contest, trivia game.
- **Judges and judging criteria** must be **disclosed**.
- **Popular voting contests** could be problematic.
- Where there is an **element of chance** involved at some point during the winner selection process, states generally apply one of the following **three common tests**:
 - ① Dominant factor test (is chance or skill the dominant factor in determining the outcome?)
 - ② Material element test (is chance a material element in determining the outcome?)
 - ③ Any chance test (is there any chance in determining the outcome?)

Avoid introducing chance or randomness in the event of a tie
– e.g., tiebreaker should not be a random drawing.

- Method of **entry can include purchase**, payment or substantial effort as long as the following requirements are met:
 - Provide a free alternate method of entry (AMOE)
 - *Mail-in entry, online entry, in-store entry*
 - Free **AMOE** must be **clearly** and **conspicuously disclosed**, generally in equal prominence with the payment/purchase method
 - *Footnotes in a print ad or brief recitations at the end of a radio commercial are not sufficient*
 - *Must be disclosed prior to purchase*
 - Free **AMOE entry** and **payment/purchase** entry must have “**equal dignity**”
 - *Each entry regardless of method of entry must be treated the same way*

Sweepstakes cannot require consideration to avoid being deemed illegal under state gambling laws; however, contests can require consideration (with a few exceptions).

- Prize **description** should **include**:

- **Number of prizes**

- Approximate **retail value** (ARV) of each prize, and the approximate retail value of all prizes

- ARV should not be based on how much it cost the sponsor to obtain the prizes

- **Disclose prize limitations/exclusions**

- Avoid requiring payment/purchase to use prize (i.e., coupons)

- If prize is a ticket to an event and travel is not included, clearly disclose that travel is not included

- Unless only local travel is provided, it's better to provide travel as part of the prize package

- Payment of **taxes** is **winner's responsibility**

- **Verification** of winner and **receipt** of **signed Affidavit of Eligibility/Liability Release**

- If prize includes travel for guest in addition to winner, require guest to sign travel release

- FL and NY require registration and bonding if total value of prizes exceeds \$5,000
 - Only applies to consumer sweepstakes (not contests and trade promotions)
 - Registration and bonding required at least 7 days prior to promotion start date in FL and 30 days prior to promotion start date in NY
 - NY usually accepts late registrations, but FL does not
- RI requires registration if total value of prizes exceeds \$500
 - Only applies to consumer promotions conducted by retailers
 - No specified advance registration requirement:

**To avoid registration and bonding for sweepstakes,
keep the total prize value (not individual prize value) no more than \$5,000**

Official rules are a contract between the participants and sponsor.

- Make official rules easily available to entrants
- Official rules should not be amended once the promotion starts

Official rules should include at least:

No Purchase Necessary	Eligibility requirements	How to enter
Start and end dates	Limit on entries (if any)	Prize description
Odds of winning	Winner selection/ verification	Prize fulfillment
Disclaimers/ Releases	Sponsor's name/ address	Winner's list info

- Advertisements should include:
 - No purchase necessary (for sweepstakes)
 - Void where prohibited
 - Material eligibility requirements
 - How to enter
 - Name of sponsor and a means to contact sponsor
 - Description of prize, including ARV
 - Odds of winning
 - How to obtain official rules
- For Internet ads, key material terms should be disclosed in a prominent manner (no scrolling or clicking through multiple pages to get info)
 - What information is provided and where depends on nature and content of ad

Health Care Laws: Civil Monetary Penalties Law (CMPL); Anti-Kickback Statute (AKS) & HIPAA

- Prizes offered to Medicaid or Medicare program beneficiaries or to referral sources implicate federal fraud and abuse laws.
 - Civil Monetary Penalties Law (CMPL)
 - Anti-Kickback Statute (AKS)
- Violations can result in civil and criminal penalties



- The CMPL is a federal statute that **prohibits providers** from **offering** or **transferring remuneration** to a Medicare or state healthcare program **beneficiary** that the **provider** knows or should know is **likely** to **influence** the **beneficiary's selection** of a **particular provider**.
 - “Remuneration” is defined as any transfer of items or services for free or other than fair market value.
- **Violation** of the CMP's beneficiary inducement provision may result in a **civil fine** of up to **\$15,024 per item** or **service**. In addition, the HHS OIG may initiate administrative proceedings to **exclude** the offending party from federal healthcare programs.

In short, the CMP prohibits giving gifts, freebies and other discounts to Medicare or Medicaid beneficiaries.

Source: 42 U.S.C. § 1320a-7a

The OIG excepts from this prohibition items of nominal value.

- Nominal value means the items must have a **retail value of no more than \$15 per item or \$75 in the aggregate** per patient on an annual basis.
 - However, the items **cannot be cash**. The CMP **prohibits giving cash or cash equivalents** to a beneficiary, i.e., no checks
 - Gift cards are permitted.
- The OIG believes that nominal value items pose limited risk under the CMPL.



Source: <https://oig.hhs.gov/fraud/docs/alertsandbulletins/OIG-Policy-Statement-Gifts-of-Nominal-Value.pdf>

- A **sweepstakes** where the **prize** when **divided by** all of the **participants** is **worth \$15 or less**.



The prize in a sweepstake is worth \$100. There are 20 beneficiaries who participate. Each participant has an equal chance of winning. This would be permissible because OIG would consider each chance to be worth only \$5.00.

Note: Benefits must be made available to everyone in a given class, not provided selectively to only certain beneficiaries.

Source: 81 Fed. Reg. 88,395.

- The AKS is intended to protect patients and federal healthcare programs from fraud and abuse
- The **AKS makes it illegal** to
 - **Offer or pay remuneration** to anyone **to induce** them to **refer a patient** or **order a service** paid for by Medicare, Medicaid or other federal healthcare program; or
 - **Solicit or receive remuneration in return for referring a patient** or **ordering a service** paid for by Medicare, Medicaid or other federal healthcare program
- “**Remuneration**” is defined to include **anything of value, directly or indirectly, overtly or covertly, in cash or in kind.**
- Safe harbors are available to protect certain types of relationships.

The AKS is broadly drafted and establishes **penalties** for individuals and entities on **both sides of the prohibited transaction.**

RESULTS-BASED CONTRACTING: WE NEED TO RECONSIDER THE ANTI-KICKBACK STATUTE

Despite the benefits of results-based contracts, there are several barriers, including a lack of clarity in the Anti-Kickback Statute (AKS). The AKS is a federal law that prohibits the offering of anything of value with the intent to induce the purchase of items or services paid for by federal health care programs. The terms of the statute are broad, which can cause hesitation for biopharmaceutical companies and plans interested in pursuing these results-based contracts.

LACK OF CLARITY LIMITS UPTAKE OF RBCs

For prescription medicines, the AKS draws into question the ability of innovator companies to work with a health plan on RBCs, including partnering on things like company-sponsored patient education, medication adherence assistance or data analysis. And violation of the AKS could result in steep fines, prison and exclusion from federal health care programs, including Medicare and Medicaid, for both parties involved. As a result, interested innovator companies and plans exercise extreme caution when considering RBCs.

SAFE HARBORS AND EXCEPTIONS HELP PROTECT BENEFICIAL ARRANGEMENTS

Given potential ambiguity in the statute's broad language, Congress created exceptions to the AKS and directed the Secretary of Health and Human Services (HHS) to create safe harbors for the AKS. To date, Congress has created ten exceptions and HHS has created 28 safe harbors to protect certain warranties, discounts, equipment rental, electronic health records and payments made to bona fide employees. HHS has not yet provided clarity about the inclusion of RBCs within existing safe harbors and exceptions, nor has the agency created a RBC-specific safe harbor.

The AKS has had a dampening effect on the uptake of RBCs; current contracts must be written with an eye toward ensuring every variable strictly avoids even the possibility of violating the AKS. Therefore, it is fair to say that current RBCs don't offer the same level of protection or patients that could be had if the threat of overhanging...

THE AKS IS A FEDERAL LAW that prohibits the offering of anything of value with the intent to induce the purchase of items or services paid for by federal health care programs.

“The [Anti-Kickback Statute] on its face prohibits the offering or acceptance of remuneration, inter alia, for the purposes of “arranging for or recommending the purchasing, leasing, or ordering of any [...] service or item” payable under Medicare or Medicaid. Thus, we believe that many marketing and advertising activities may involve at least technical violations of the statute.” (OIG Adv. Op. 10-23).

AKS applies to anyone who can refer business, including, providers, patients, marketers or others.

- **Sweepstakes do not fit with any safe harbor.**

Sweepstakes where patients are the participants are protected under the CMPL. Activities protected by the CMPL are thought to be at low risk of violating the AKS.

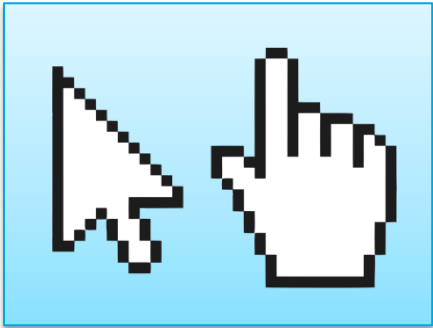
There is no CMPL protection for raffles and sweepstakes where providers are the participants.

- Compliance with a safe harbor is not mandatory and **failure to fit within a safe harbor is not a per se violation of the AKS.**
- If a safe harbor is not satisfied, the **government's inquiry** will focus on the **facts and circumstances** involved in order to **analyze the intention** of the parties and whether one purpose of the arrangement was to improperly induce referrals.

If designing a raffle or sweepstakes aimed at providers, the following factors are seen as mediating factors that reduce the risk of violating the AKS:

- ① Items are of a nominal value
- ② Items are made available to all, and not given out based on the volume or value of potential purchases/referrals
- ③ Items will not increase the number of services billed to federal health programs
- ④ Items are not tied to, or received only after, purchases

- The HIPAA Privacy Rule **protects** patients' protected health information (**PHI**) from **unauthorized use, access** and **disclosure**
 - PHI is **any information** relating to an **individual's health status, treatment or payment** for health services that is **created or received by a covered entity** and that may **identify the individual**
- PHI generally may only be used or disclosed pursuant an authorization.
- PHI used for marketing purposes is subject to HIPAA. Marketing is defined as
 - “A **communication** about a **product** or **service** that **encourages recipients** of the communication **to purchase or use** the product or service”
 - **Patient authorization is generally required**
 - “An **arrangement** between a **covered entity** **and** **any other entity** whereby the covered entity discloses **PHI** to the other entity, **in exchange for direct or indirect remuneration**, for the **other entity** or its affiliate to **make a communication** about **its own product or service** that encourages recipients of the communication to purchase or use that product or service.”
 - **This is called a subsidized communication. Patient authorization is *always* required.**



Will a person's personal information submitted to a provider as part of a sweepstake or contest be considered PHI?

It depends.

- Is the provider a covered entity?
- Is a person's eligibility to participate in the sweepstake related to the person's status as a patient?
- Is a survey deployed? If so, what type of information is collected?
- Do the terms regarding the sweepstake address how participant's information will be used?

Social Media Promotions

- FTC's Endorsements and Testimonial Guides require disclosure for sweepstakes or contests that are conducted on social media
 - Acceptable disclosures include #[company]sweepstakes and #contestentry
 - Abbreviations such as #sweeps or just the company's name are not acceptable
- Social media platforms have their own specific rules for conducting promotions



- Promotions

1. If you use Instagram to communicate or administer a promotion (example: a contest or sweepstakes), you are responsible for the lawful operation of that promotion, including:
 - The official rules;
 - Offer terms and eligibility requirements (example: age and residency restrictions); and
 - Compliance with applicable rules and regulations governing the promotion and all prizes offered (example: registration and obtaining necessary regulatory approvals).
2. You must not inaccurately tag content or encourage users to inaccurately tag content (example: don't encourage people to tag themselves in photos if they aren't in the photos).
3. Promotions on Instagram must include the following:
 - A complete release of Instagram by each entrant or participant.
 - Acknowledgement that the promotion is in no way sponsored, endorsed or administered by, or associated with, Instagram.
4. We will not assist you in the administration of your promotion and cannot advise you on whether consent is required for use of user content or on how to obtain any necessary consent.
5. You agree that if you use our service to administer your promotion, you do so at your own risk.

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



Communicating a Promotion

If you use Facebook to communicate or administer a promotion (ex: a contest or sweepstakes), you are responsible for the lawful operation of that promotion, including:

- The official rules;
- Offer terms and eligibility requirements (ex: age and residency restrictions); and
- Compliance with applicable rules and regulations governing the promotion and all prizes offered (ex: registration and obtaining necessary regulatory approvals).

Required Content

Promotions on Facebook must include the following:

- A complete release of Facebook by each entrant or participant; and
- Acknowledgement that the promotion is in no way sponsored, endorsed, administered by or associated with Facebook.

Administration of a Promotion

Promotions may be administered on Pages, Groups, Events, or within apps on Facebook. Personal Timelines and friend connections must not be used to administer promotions (ex: “share on your Timeline to enter” or “share on your friend's Timeline to get additional entries,” and “tag your friends in this post to enter” are not permitted).

Assisting Promotions

Facebook will not assist you in the administration of your promotion, and you agree that if you use our service to administer your promotion, you do so at your own risk.

Source: https://www.facebook.com/promotions_guidelines.php.



Discourage the creation of multiple accounts

If people create a lot of accounts in order to enter a contest more than once, they're liable to get all of their accounts suspended. Please be sure to include a rule stating that anyone found to use multiple accounts to enter will be ineligible.

Discourage posting the same Tweet repeatedly

Posting duplicate, or near duplicate, updates or links is a violation of the [Twitter Rules](#) and jeopardizes search quality. Please don't set rules to encourage lots of duplicate updates (e.g., "whoever Retweets this the most wins"). Your contest or sweepstakes could cause people to be automatically filtered out of [Twitter search](#). We recommend setting clear contest rules stating that multiple entries in a single day will not be accepted.

Ask people to mention you in their update so you can see all the entries

When it comes to picking a winner, you'll want to see all the contestants. If the updates mention you, you'll be able to see all the updates in your Notifications timeline (learn more about [replies and mentions](#)). Simply running a public search may not show every single update, and some contestants may be filtered from search for quality.

Source: <https://help.twitter.com/en/rules-and-policies/twitter-contest-rules>

Encourage the use of topics relevant to the contest



You might decide to have people include relevant hashtag topics along with the updates (e.g., #contest or #yourcompanyname). Keep in mind that hashtag topics need to be relevant to the update; encouraging people to add your hashtag to totally unrelated updates might cause them to violate the Twitter Rules.

Follow the Twitter Rules

While these guidelines should help keep your contest entrants in good standing, please make sure you also review both the [Twitter Rules](#) and our [search best practices](#) before starting your contest. If you're a business on Twitter, you might also want to check out business.twitter.com for more information and tips.

Applicable laws and regulations

Before starting any contests or sweepstakes please ensure that they comply with all applicable laws and regulations. Compliance with such laws and regulations is your responsibility; please consult with an attorney if you have questions about legal compliance.

Source: <https://help.twitter.com/en/rules-and-policies/twitter-contest-rules>

All contests run on YouTube or that use YouTube are subject to the below rules. In addition, your contest cannot be run or conducted in a way that conflicts with our [Privacy Policy](#), [Terms of Service](#), or [Community Guidelines](#).

- YouTube does not allow contests to be run through ad units, but you can engage users in contests through your content on the platform, provided that the contest conforms with the below rules.
- **I. General Restrictions and Requirements:**
- You are solely responsible for your contest.
- Your contest on YouTube must comply with all applicable federal, state, and local laws, rules, and regulations, including U.S. sanctions.
- Your contest cannot infringe upon or encourage the infringement of any third party rights or the participation in any unlawful activity.
- You cannot ask the user to give all rights for, or transfer the ownership of, their entry to you.
- Your contest must be free to enter (don't forget to check your local lottery laws!).
- You and any third party may not manipulate metrics on the YouTube service, including numbers of views, likes, dislikes, or subscribers, such that those metrics fail to reflect genuine user engagement with the YouTube service.
- You cannot associate or affiliate YouTube with your contest without YouTube's prior written consent. This prohibits, among other things, expressly stating or doing anything that suggests that YouTube is involved with or has endorsed your contest in any way.

Source: <https://support.google.com/youtube/answer/1620498?hl=en>

II. Your Official Contest Rules:

1. You must have a set of "Official Rules" which:
 - a. include links to the YouTube [Community Guidelines](#) and indicate entries which don't comply will be disqualified.
 - b. state all disclosures required by all applicable federal, state and local laws, rules and regulations, including U.S. sanctions.
 - c. are wholly compliant and consistent with the YouTube [Terms of Service](#).
2. Your contest must be conducted, and all prizes awarded as outlined in your Official Rules.
3. You are responsible for your rules and all aspects of your contest administration.
4. Your rules must clearly state that YouTube is not a sponsor of your contest and require users to release YouTube from any and all liability related to your contest.
5. You must include a legally compliant privacy notice in your Official Rules which explains how you will use any personal data you collect for the contest and adhere to that use.

Disclaimer: We are not your attorneys and the information presented here is not legal advice. We provide it for informational purposes and suggest you seek advice in your jurisdiction for running a contest legally.

Source: <https://support.google.com/youtube/answer/1620498?hl=en>

User-Generated Content Promotions

- Usually applies to contests or games of skill
- Potential liability for IP infringement, right of publicity violations, deceptive advertising, libel based on user content
- Submission guidelines
- Pre-moderation/post-moderation
- IP ownership/usage rights in user content

Compliance Checklist

Question	Yes	No
Is there a prize given to winners? (If everyone receives prize, then it's not a prize promotion.)		
Is winner selected by chance?		
Is there an age limit for entry?		
Are there geographic limitations for entry?		
Is the program targeting beneficiaries, providers or referral sources?		
Is the participant information subject to HIPAA?		
Does entry require payment/purchase/substantial time or effort?		
Is there a UGC component to entry (e.g., photo or video submission)?		
Is the total value of prizes over \$5,000?		
Is it a social media promotion?		
Does prize involve travel?		



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Po Yi

Partner, Advertising, Marketing and Media

pyi@manatt.com

212.790.4517



Randi Seigel

Partner, Manatt Health

rseigel@manatt.com

212.790.4567

manatt

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