



PRIZE PROMOTIONS AROUND THE WORLD

China



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ABOUT

Welcome to the fourth edition of DLA Piper's popular Guide to Prize Promotions Around the World. Prize promotions remain a popular marketing tool used globally by businesses to attract customers. The internet and various social media platforms make this an attractive, cost efficient means of reaching a large, multi-jurisdictional customer base; but it is not without its legal challenges.

This handbook is designed to equip our clients with a useful tool to assist them with the management of the early development stages of a promotion, and to bring potentially problematic issues to their attention as soon as possible.

NEW FEATURES AND TRENDS

In response to client demand, this fourth edition of the Guide has been expanded to cover 39 jurisdictions which count among the most significant for our clients, with the addition of Denmark, Hungary, Nigeria and Turkey.

As our interactive map shows, the extent of regulation and sanctions in this area is on the rise, with the most noticeable change being brought about by the introduction of GDPR across the EU. GDPR extends obligations around handling promotion entrants' personal data (eg for winner publicity, use of promotions to generate marketing leads and use of UGC entries containing personal data), and introduces the possibility of huge fines for breaches of those obligations.

ABOUT OUR GLOBAL ADVERTISING AND MARKETING TEAM

The DLA Piper global advertising and marketing team is well-versed in handling complex, frequently multi-jurisdictional compliance projects. This includes advising on compliance aspects of international prize promotions, which we are often asked to clear across large numbers of jurisdictions, while working to short deadlines.

More broadly, our global advertising and marketing team is able to support the full range of advertising-related work, from copy clearance to dealing with advertising regulators and litigation, to negotiating advertising and sponsorship deals, to e-privacy issues and ad-tech. Our advertising and marketing lawyers offer deep understanding of the advertising and media industries, and combine this with a sophisticated approach to cross-border working.

DISCLAIMER

This Guide is not a substitute for legal advice. Nor is it intended to be an exhaustive guide to all rules and regulations relating to promotions in the jurisdictions covered, or to cover all aspects of the legal regimes surveyed, such as specific sectoral requirements. Rather, it aims to simplify what are often complex provisions into a more manageable summary and to highlight areas of potential concern to promoters. It is current as at the last modified date stated in each section.

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CHINA



Last modified 14 January 2019

GOVERNING LAW

What are the main applicable governing laws or codes for prize promotions?

| Name | Law or Code? |
|---|--|
| Anti-Unfair Competition Law of the People's Republic of China 2017 (反不正当竞争法) | Law |
| Certain Regulations on Prohibiting Unfair Competition in Prize-offering Sales 1993 (关于禁止有奖销售活动中不正当竞争行为的若干规定) | Code by the State Administration for Industry and Commerce |
| Certain Regulations on Anti-unfair Competition in Pharmaceutical Industry 1993 (医药行业关于反不正当竞争的若干规定) | Code by the State Pharmaceutical Administration |
| Reply of the State Administration of Industry and Commerce on Issues concerning the Identification of Prize-offering Sales by Lottery Draw and the Interpretation Power of Anti-Unfair Competition Law 1998 (国家工商行政管理局关于抽奖式有奖销售认定及国家工商行政管理局对《反不正当竞争法》具体应用解释权问题的答复) | Code by the State Administration for Industry and Commerce |
| Reply of the State Administration of Industry and Commerce on Issues concerning the Identification of Prize-offering Sales by Lottery Draw and the Interpretation Power of Anti-Unfair Competition Law 1998 (国家工商行政管理局关于抽奖式有奖销售认定及国家工商行政管理局对反不正当竞争法》具体应用解释权问题的答复) | Code by the State Administration for Industry and Commerce |
| Law of the People's Republic of China on the Protection of Consumer Rights and Interests 2013 (消费者权益保护法) | Law |

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| | |
|---|---|
| Advertising Law of the People's Republic of China 2015 (广告法) | Law |
| Measures for the Administration on Sales Promotion Acts of Retailers 2006 (零售商促销行为管理办法) | Code jointly issued by the State Administration of Taxation, State Administration for Industry and Commerce, Ministry of Commerce, Ministry of Public Security and National Development and Reform Commission |
| Decision on Internet Information Protection 2012 (and data protection provisions scattered in various laws and regulations) (全国人民代表大会常务委员会关于加强网络信息保护的決定) | Laws and Codes |
| Cyber Security Law of the People's Republic of China 2017 (网络安全法) | Law |
| Personal Information Security Specification 2017 (个人信息安全规范) | National Standard |

EXTRA-TERRITORIALITY

Do national regulators enforce rules against entities operating abroad?

In relation to prize promotions which are operated purely online and outside China, Chinese regulators, such as the Ministry of Finance, The State Administration for Industry and Commerce, State Administration of Taxation, Ministry of Commerce, Ministry of Public Security and National Development and Reform Commission etc. normally do not consider Chinese laws/rules to be applicable to such promotions, and in practice, generally do not enforce those rules on such promotions.

If the promotion targets Chinese consumers, but is promoted from a non-Chinese website or through direct marketing from outside China, the regulators will do what they can to take action, but in current practice enforcement is very much limited to actions against illegal lotteries, mainly by blocking the offending foreign websites. So far, there have not been any actual cases of other enforcements against offshore operators which have no physical nexus with, or presence in China.

SKILLS COMPETITIONS

Can a prize promotion be run that is based on skill?

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Yes, but promoter/organizers should ensure the winner is determined on the basis of skill and not chance, particularly if the entrant needs to pay to enter. If the level of skill is not met, it could be categorized as a promotion judged on the basis of chance, and as such if payment is required, this could be considered a lottery, and may give rise to criminal liability.

There is no detailed guidance under the laws and regulations as to the level of skill, knowledge or judgement the entrants should exercise in a skill competition. The common practice in China is that the requirement for entrants to exercise skill or judgement or to display knowledge should either prevent a significant proportion of potential entrants from taking part or prevent a significant proportion of entrants from receiving a prize.

PRIZE DRAWS

Can a prize promotion be run where there is an element of chance in the selection of the winner?

Unlawful (potentially deemed an illegal lottery, fraud and/or violation of the relevant anti-unfair competition laws and regulations), unless participants do not pay to enter or to claim/receive prize. China does not allow companies to conduct lotteries, although it does operate a couple of 'state' operated lotteries).

The laws and regulations are not clear or specific about 'payment'. However, according to the relevant cases and professional opinions, it can be inferred that in the following situations payment is required:

- Where the only route of entry is a premium rate phone line;
- Paying more than usual rates for delivery of the prize;
- Paying to discover whether a prize has been won or to collect a prize; and
- Paying for goods and services at an inflated rate in order to take part in the promotion.

Under the current practice (which could change in the future), the provision of data does not amount to payment.

SELECTION OF WINNERS

Are there any requirements for the selection of winners and award of prizes?

Promoters should provide participants with information regarding the:

- Prize type;
- Probability of winning;
- Value of prize or variety of prize; and
- Time and method to award the prize.

If the prizes are not awarded instantly, additional information including the time, location and method to reveal winners as well as the time and method to inform the winners must be provided to participants. If the prizes are awarded instantly, for prizes above ¥500 (approx. US\$73), details of how the prize is to

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be awarded must be provided to participants.

Promoters must not engage in any of the following prize-offering sales:

- Conduct prize-offering sales by deceptive means, such as falsely declaring to have prizes or making false representation regarding the prize type, probability of winning, the value of the highest prize, total prize value, prize volume, prize quality, or method of prize awarding etc.
- Provide unclear information about the prize promotion, such as the prize type, conditions to claim the prize, the prize value etc.
- Use unfair means to ensure a designated insider wins the prize.
- Intentionally keep the goods or lottery tickets with winning marks from being released to the market, or not release them simultaneously with the other goods and lottery tickets.
- Intentionally release the goods or lottery tickets with different prize values or prize marks at different times.
- Conduct prize-offering sales employed as a means to sell goods of low quality at a high price.
- Conduct prize-offering sales in the form of lucky draw (on the basis of chance) where the highest prize exceeds ¥50,000 (approx. US\$7,270).
- Conduct other fraudulent acts of prize-offering sales.

JUDGES

Are there any particular requirements in relation to judges or judging for skills competitions?

No.

Note: This is a broad comment in relation to general commercial prize promotions and does not apply to all skill competitions such as large-scale competitions including sports competitions and singing contests on TV which may have specific rules for judges and/or judging.

PRIZES

Are there any restrictions on the prizes awarded?

For any kind of lucky draw or prize promotion based on chance, the highest prize cannot exceed the value of ¥50,000 (approx. US\$7,270), including but not limited to:

- The right to use a commodity whose price exceeds ¥50,000 (approx. US\$7,270), regardless of the period of time of such use right;
- Job opportunity which offers more than ¥50,000 (approx. US\$7,270) salary or other interests, regardless of whether the winner has to fulfil any obligations; and

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- Social welfare lotteries and sports lotteries which offer any prize exceeding ¥50,000 (approx. US\$7,270).

REGISTRATION REQUIREMENTS AND FEES

Are there any registration requirements, or any fees/taxes payable?

Registration Requirements

For retail stores conducting promotions in relation to a store opening, festival celebration or store anniversary celebration etc, unless the retail store's premises is less than 3,000m², the promotion must be filed with the Administration for Industry and Commerce within 15 days after the promotion is finished.

Fees / Taxes Payable

There are no fees payable.

The grant of prizes is generally deemed as sales of goods for PRC enterprise income tax (EIT) and value-added tax (VAT) purposes, and therefore may subject the enterprise promoter to PRC EIT and VAT.

The individual winner is generally liable to PRC individual income tax (IIT) (normally at the tax rate of 20%) if the winner receives the prizes for free. Such IIT should be withheld by the enterprise promoter.

If the tangible prize needs to be brought into China from overseas, it may trigger additional PRC import taxes (such as import VAT, consumption tax, and customs duties).

The above PRC tax implications may vary depending on each case.

Note: This is a broad comment in relation to general commercial prize promotions and does not apply to all skill competitions such as large-scale competitions including sports competitions and singing contests on TV which may require additional registration and/or fees.

OTHER LOCAL REQUIREMENTS

Are there any other key local requirements?

- Medical products cannot be promoted with prizes.
- Promoters must not use un-qualified or low quality products as prizes, or compromise the after-sale services (if applicable).
- The advertising and other marketing communications regarding the promotion must be real, legal, clear, easy to understand, as opposed to ambiguous or vague. Operators (as promoters) are not allowed to reserve their rights to interpret the advertising and other marketing communications. "Personal data involved in prize promotions should be collected and processed

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in accordance with the Cyber Security Law and the Personal Information Security Specification. For example, the collection and use of personal data must be legitimate, rightful, and necessary. The promoter must publish the rules for collecting and using the personal data, and specify the purpose, means and scope of the personal data. Appropriate consents must be obtained from the data subjects before the personal data is collected, used, or shared.

TIMING

Is time required to ensure compliance (other than reviewing the terms and conditions)?

No, although time should be allowed to deal with data protection issues (e.g. ensuring an appropriate privacy policy is in place and including appropriate tick box functionality for consents).

TRANSLATIONS

Are the terms required to be translated by law?

The laws and regulations are not specific or clear on whether the terms and conditions have to be translated into simplified Chinese. However translation of the terms and conditions into simplified Chinese is the preferred approach to avoid misunderstanding between promoters and participants. Also translation is recommended if:

- The terms and conditions work as a privacy policy for personal data processing, they are required to be easily understood; and
- There is any dispute, local courts/arbitral tribunals would require evidence in simplified Chinese and the terms and conditions may be used as evidence.

PENALTIES FOR NON-COMPLIANCE

What are the penalties for non-compliance?

Violation of Anti-Unfair Competition Law, Law on the Protection of Consumer Rights and Interests, Cyber Security Law and related regulations

Sanctions are proportionate to the breach and routinely commence with requests to amend or terminate the non-compliant promotions. Fines ranging from ¥50,000 (approx. US\$7,270) to ¥500,000 (approx. US\$72,700) can be imposed against the promoter in breach depending on the circumstances. Also consumers who suffered from an infringement arising from an unfair competition can sue the promoter for compensation. Promoters who engage in fraudulent practice in the provision of goods or services must, on the demand of the consumers, compensate the consumers for their losses and damages (three times the value of the goods/services paid by the consumers but not less than ¥500 (approx. US\$73)).

In addition, the penalties for non-compliance with certain requirements can be subject to a public announcement by the relevant authorities which can lead to brand and reputational damage.

Illegal lottery

If the promotion is deemed an illegal lottery, sanctions include criminal detention (1-6 months) or a

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prison term of up to 5 years, and/or a fine of up to 5 times the value of the illegal gains. In extremely serious cases, the sanctions will be a prison term of not less than 5 years plus a fine of up to 5 times of the illegal gains or confiscation of property.

Data privacy breaches

Sanctions in relation to data privacy breaches follow a graded approach - warning and requirement to comply, then possibly fines of one to ten times the value of the unlawful income and confiscation of unlawful income; or fines of up to ¥ 1,000,000 (approx. US\$145,450) if there is no unlawful income. In severe cases, the sanction could, for example, be suspension of the relevant business, revocation of the business license or the license to conduct the relevant business, and the closure of a website. Persons held responsible will be subject to fines from ¥ 10,000 (approx. US\$1,450) to ¥ 100,000 (approx. US\$14,545), and could be prohibited from engaging in relevant businesses and their conduct could be recorded in their social credit files. For illegal provision or sale of personal data to third parties, the responsible person could be subject to administrative detention with fines of one to ten times the value of the unlawful income and confiscation of unlawful income; or fines of up to ¥ 1,000,000 (approx. US\$145,450) if there is no unlawful income, in cases where no criminal offense is committed. Where the illegal provision or sale of personal data constitutes a criminal offense, the responsible person will be subject to up to 7 years imprisonment, and potentially a concurrent fine will be imposed on the organization if applicable.

RESTRICTIVENESS OF REGULATIONS

How restrictive are the legal obligations applicable to prize promotions?

The existing rules set out some basic requirements, which are based on common sense and are not unduly onerous. There are no registration or other formality requirements, except for promotions conducted by retail stores 3,000m² or larger. Most prize promotion mechanics are allowed so long as:

- It is not a lottery; and
- The highest prize is not more than ¥50,000 (approx. US\$7,270) for prize promotions based on chance.

The rules are not overly burdensome for promoters. The standard to distinguish between prize-offering and lottery is not very clear and in practice prize promotions are rarely considered as lotteries.

REGULARITY OF SANCTIONS

How frequently does the regulator impose serious sanctions for non-compliance?

Prison sentences are rarely imposed.

On the other hand, it is not uncommon to see fines imposed on promoters, mainly for violation of the Anti-Unfair Competition Law, Law on the Protection of Consumer Rights and Interests and related regulations. In particular, there are a number of cases where promoters were fined for offering prizes exceeding ¥50,000 (approx. US\$7,270) in lucky draws.

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