

# **Advertising Laws And Regulations Handbook**

**Prepared by:**

**Indiana Broadcasters Association**

*In cooperation with*

**Bingham McHale, LLP**

**Indianapolis**

**And**

**Shaw Pittman, LLP**

**Washington, DC**



[www.indianabroadcasters.org](http://www.indianabroadcasters.org)

[indba@aol.com](mailto:indba@aol.com)

# Introduction

This *Handbook on Advertising Laws and Regulations* is an overview and guide to federal advertising laws and regulations as governed by the Federal Communications Commission (“FCC”), Federal Trade Commission (“FTC”), Department of Justice (“DOJ”) and the Indiana laws and regulations that govern advertising.

The portions of this Handbook dealing with federal laws and regulations have been prepared by **Shaw Pittman LLP**, FCC Counsel to the Indiana Broadcasters Association, and the portions dealing with Indiana laws and regulations have been prepared by **Bingham McHale LLP**, Indiana Counsel to the Indiana Broadcasters Association.

*This Handbook does not constitute legal or business advice. It is intended to serve as a source of general guidelines and legal information only and is not a substitute for legal advice on a specific situation. Legal and business advice should always be obtained for specific facts and circumstances.*

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## **False or Misleading Advertisements**

The advertiser of the product or service has the primary responsibility of ensuring that its ad is not false or misleading. The FTC has jurisdiction over the determination of whether an advertisement is false or misleading and any complaints about these types of ads. The FCC does not have any regulations directly concerning false or misleading advertisements. Nevertheless, if there is a determination by the FTC against a broadcaster, the FCC could consider the effect of that determination in considering whether the broadcaster has served the public interest. As always, radio and television broadcast stations must operate in the “public interest” and therefore, act cautiously with any advertisements they feel could be false or misleading.

### **Q: What claims or representations would indicate a false or misleading advertisement?**

**A:** A false advertisement is defined as “an advertisement, other than labeling, which is misleading in a material respect.” (see 15 U.S.C. § 55(a)(1)) In various cases, the FTC has held that the following claims or statements can lead to a determination of false or misleading advertising:

- “False oral or written representations,
- Misleading price claims,
- Sales of hazardous or systematically defective products or services without adequate disclosure,
- Failure to disclose information on pyramid schemes,
- Use of bait and switch techniques,
- Failure to perform promised services, and
- Failure to meet warranty obligations.”<sup>1</sup>

### **Q: Is a broadcaster liable for airing a false or misleading advertisement?**

**A:** Under federal law, broadcasters are exempt from criminal liability for airing a false or misleading advertisement. (see 15 U.S.C. § 54(b)) However, they could still be liable under

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<sup>1</sup> FTC Policy Statement on Deceptions, Letter to Congressman John D. Dingell, Chairman of Committee on Energy and Commerce from James C. Miller III, Chairman of Federal Trade Commission (Oct. 14, 1983).

Indiana law or subject to complaints to the FCC or FTC. According to the National Association of Broadcasters, the FCC has advised licensees who broadcast advertisements that are found to be false or misleading by the FTC that they could be subject to scrutiny concerning their compliance with their public interest obligations.

**Q: Can a broadcaster reject potentially libelous advertising?**

**A:** Yes. Indiana treats a lawsuit based on a broadcast of allegedly false or libelous material as a libel action. Thus, broadcasters may be sued for libel for the broadcasting of any advertisement found to be defamatory.<sup>2</sup> See *American Broadcasting Co., Inc. v. Smith Manuf.*, 312 N.E.2d 85, 91 (Ind. Ct. App. 1974). However, when a political advertisement contains a “use” by a legally qualified candidate for public office, a broadcaster may not edit or censor its content. Broadcasters are immune from a civil action for libel or defamation based on a candidate “use.”

Although Indiana gives us no case on point regarding broadcasters with regard to this issue, there is case law involving the print media. Newspapers may be held liable when an advertisement is libelous. *Indiana Construction Corp. v. Chicago Tribune Co.*, 648 F.Supp. 1419, 1422 (N.D. Ind. 1986). However, private newspapers may reject an advertisement, even where the advertisement is proper and the fee has been paid. *Id.* In fact, written publications such as newspapers and periodicals may refuse to carry advertising for any reason or for no reason at all. 58 Am. Jur. 2d Newspapers, Periodicals, and Press Associations § 14; see also 18 A.L.R.3d 1286. This ability is based on three distinct rights:

- (1) A business’s right to refuse to deal with anyone, unless the refusal is based on illegal discrimination or is part of an illegal restraint of trade;
- (2) The First Amendment right to refrain from saying what one does not wish to say;
- (3) The fact that a publisher’s refusal is not “state action” to which the First Amendment applies.

*Id.* (internal citations omitted).

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<sup>2</sup> To recover for defamation, a plaintiff must establish that: (1) there was a publication [or broadcast] that was defamatory of and concerning him; (2) the publication was false in some material part; (3) if the publication involved a matter of public interest or concern, the defendant published with actual malice; and (4) any alleged special damages were the proximate result of the publication. See, e.g., *Schrader v. Eli Lilly & Co.*, 639 N.E.2d 258 (Ind. 1994).

Given that broadcasters are subject to the same libel considerations as are newspaper publishers, this right of refusal should translate to broadcasters as well.

**Q: Are advertisements for weight loss methods prohibited?**

**A:** No, but the broadcaster should be careful to review the claims made in such advertisements to ensure they are not false or misleading. Since 2002, the FTC has taken a closer look at advertisements for weight loss products and services in an attempt to eliminate false or misleading advertisements and has asked for voluntary review of such ads by broadcasters before they are aired. The FTC has asked broadcasters to voluntarily review advertisements for products such as nonprescription drugs, supplements, and creams and look for the following “red flags” that could indicate a false or misleading claim:

- “Cause weight loss of two pounds or more a week for a month or more without dieting or exercise;
- Cause substantial weight loss no matter what or how much the consumer eats;
- Cause permanent weight loss (even when the consumer stops using product);
- Block the absorption of fat or calories to enable consumers to lose substantial weight;
- Safely enable consumers to lose more than three pounds per week for more than four weeks
- Cause substantial weight loss for all users;
- Cause substantial weight loss by wearing it on the body or rubbing it into the skin.”<sup>3</sup>

**Q: Are there additional requirements for advertisements that contain leasing information?**

**A:** Yes. Under the Consumer Leasing Act and Riegle Community Development and Regulatory Improvement Act, television and radio advertisements must contain required disclosures when the ad provides for leasing a consumer product. See 15 U.S.C. § 1667 *et seq.* The required disclosures are necessary when a consumer leasing ad contains a “triggering term.” The

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<sup>3</sup> *Red Flag, Bogus Weight Loss Claims, What You Can Do*, Federal Trade Commission, <http://www.ftc.gov/bcp/online/edcams/redflag/whatyoucando.html> (April 30, 2004).

triggering terms are any statement of (1) the amount of payment or (2) that any or no initial payment is required. If the ad contains either of these triggering terms, then it must clearly and conspicuously disclose:

- (1) that the transaction advertised is a lease
- (2) the total amount of any initial payments required on or before consummation of the lease or delivery of the property, whichever is later
- (3) whether a security deposit is required
- (4) the number, amounts and timing of scheduled payments
- (5) that an extra charge may be imposed at the end of the lease term, if the liability of the consumer at the end of the lease term is based on the anticipated residual value of the property.

Consumer lease advertisements broadcast on radio satisfy the disclosure requirements listed above if the ad states the information required in 1, 2, and 4, discloses the total payments required under the lease, and provides a referral to a toll-free number or written advertisement that provides all the above disclosures.

The Consumer Leasing Act specifically exempts from liability broadcast stations that air ads that do not contain the required disclosures. *See* 15 U.S.C. § 1667c(b). However, the FCC potentially could call into question a broadcaster's qualifications to operate in the public interest, if that broadcaster airs advertisements deemed to be false, misleading or deceptive.

**Q: Are there separate requirements for the toll-free number or written advertisement used to provide full disclosures in leasing advertisements?**

**A:** Yes. If a toll-free number is used to fulfill the disclosure requirements, the number must comply with the following: (1) the toll-free number must be available no later than the first date of broadcast of the advertisement containing the number; (2) the number must be available for a minimum of ten days after the last broadcast of the advertisement; (3) the advertiser must comply with a caller's requests to be sent a written copy of the disclosures; and (4) if the toll-free number is answered with a recording, a listing of the disclosures must be available early in the message. If a written advertisement is used to fulfill the disclosure requirements, the written ad

must comply with the following requirements: (1) the broadcast must include the specific name of the publication that will contain the written disclosure and the exact date of publication; (2) the publication must be in general circulation in the area in which the ad is broadcast; and (3) the written advertisement must appear in publication no less than three days prior to the broadcast advertisement and remain in publication for at least ten days thereafter.

## Advertising of Alcoholic Products

### **Q: May broadcasters air advertisements for beer, wine or liquor?**

**A:** Yes. The Federal Alcohol Administration Act, as administered by the Bureau of Alcohol, Tobacco and Firearms (“ATF”), provides advertising guidelines for these products. This law and the ATF regulations allow for the advertisement of beer, wine, and liquor and provide for certain content requirements and restrictions. There are no FCC or FTC rules governing the advertisement of alcohol products on radio and television stations, except for the general prohibitions against deceptive, false or misleading advertising.

As for the State of Indiana, Indiana Code § 7.1-2-3-16(a) provides that the Indiana Alcohol and Tobacco Commission (“the Commission”) shall have the power to both regulate and prohibit advertising intended to advertise an alcoholic beverage or the place where alcoholic beverages are sold. The same statute also provides, however, that the Commission shall not exercise the prohibition power contained in subsection (a) as to any advertisement broadcast over duly licensed radio and television stations. IND. CODE § 7.1-2-3-16(c). The statute further provides that all advertisements relating to alcoholic beverages, whether published in the newspaper or broadcast over the radio or television, shall conform to the rules and regulations of the Commission. IND. CODE § 7.1-2-3-16(d).

That said, there are very few rules or regulations that have been promulgated by the Commission relating to the advertising of alcoholic beverages. Indiana Administrative Code section 905 I.A.C. 1-38-4, provides that “[p]rimary sources of supply, wholesalers, or salesman of alcoholic beverages, or the agents or representatives thereof, may advertise in such media as provided by law alcoholic beverages by brand name.” 905 I.A.C. 1-38-4(a). Furthermore, “[r]etailers and dealers of alcoholic beverages, or the agents or representatives thereof, may advertise in such media as provided by law alcoholic beverages by price and brand name and the place where they may be obtained.” 905 I.A.C. 1-38-4(b). However, no such advertising shall contain offers of financial rewards as inducements to purchase alcoholic beverages. 905 I.A.C. 1-38-4(c).

**Q: May broadcasters air advertisements for happy hours?**

**A:** Generally, no. Indiana Code § 7.1-5-10-20 prohibits many types of traditional “happy hours.” Specifically, the statute makes it unlawful for a holder of a retailer’s permit to do any of the following:

- (1) Sell alcoholic beverages during a portion of the day at a price that is reduced from the usual, customary, or established price that the permittee charges during the remainder of that day.
- (2) Furnish two (2) or more servings of an alcoholic beverage upon the placing of an order for one (1) serving to one (1) person for that person's personal consumption.
- (3) Charge a single price for the required purchase of two (2) or more servings of an alcoholic beverage.

Because the above activities are illegal, advertising of them by broadcasters is likewise impermissible. Broadcasters must ensure that advertising of happy hour specials conforms to the above limitations.

**Q: Are there any industry guidelines regulating the content of alcohol advertising?**

**A:** Yes. In addition to federal law and ATF regulations, the advertisement of alcohol products is self-regulated by the alcohol industry through three voluntary codes: the Beer Institute Code, the Wine Institute Code and the Distilled Spirits Council of the United States (“DISCUS”) Code. In 1996, Seagram announced it would begin advertising its hard liquor products on television, which, at that time, was contrary to the DISCUS code. The DISCUS code now allows for such advertising. It has adopted voluntary regulations similar to the Wine Institute and Beer Institute codes on the placement of advertisements in broadcasting so that they target an audience that is 21 years and older and include only responsible, age-appropriate content. Specifically, each of the codes permits placement of alcohol advertisements in programs where adults over 21 years of age constitute at least 70% of the audience, and each provides regulations against targeting underage drinkers and youth.

**Q: Are there any other restrictions or requirements for the content of advertisements for beer, wine or liquor including information relating to alcohol content?**

**A:** Yes. As set forth in the Indiana statutes discussed above, retailers and dealers of alcoholic beverages may lawfully run advertisements for alcoholic beverages, including the prices and brands of the beverages and the locations where they may be purchased. *See* 905 I.A.C. 1-38-4. However, it is unlawful for a person to advertise the proof or the amount or percentage of alcohol in beer, wine or liquor. *See* Ind. Code § 7.1-5-2-2.

The federal regulations provide for specific and different requirements for each of these products including disclosure of their alcohol content in advertising. Compliance with the requirements and prohibitions in advertisements for beer, wine and liquor is primarily the responsibility of the producer of the advertisement. Television and radio broadcasters are not responsible for ensuring compliance with ATF regulations; however, as with false or misleading advertisements, the broadcaster is always subject to complaints to the FCC and must comply with Indiana law.

**Q: Are there any industry regulations governing the advertising of the alcoholic content of these products?**

**A:** Yes. The DISCUS codes require that such advertising be truthful, factual and not used to “promote the potency” of the product. In addition, the Wine Institute Code prohibits any reference to the alcohol content in advertisements for wine or wine coolers, unless such disclosure is required by law.

## **Advertising of Tobacco Products**

Generally, broadcasters are prohibited from broadcasting advertisements for cigarettes, little cigars, smokeless tobacco or chewing tobacco. Broadcasters are allowed to air advertisements for smoking accessories, cigars, pipes, pipe tobacco or cigarette-making machines.

### **Q: May broadcasters air advertisements for cigarettes, small cigars and smokeless tobacco?**

**A:** No. The Federal Cigarette Labeling and Advertising Act of 1969 (the “Act”) makes it unlawful to advertise “cigarettes” and “little cigars” on “any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.” In 1986, Congress enacted the Comprehensive Smokeless Tobacco Health Education Act, extending the broadcast ban to include advertisements for smokeless tobacco products. The broadcast ban on cigarette advertisements survived a constitutional challenge in *Capital Broadcasting v. Mitchell*. The plaintiffs in that case, several broadcasters and the National Association of Broadcasters, contended that the advertising ban under the Act violated their First Amendment right to freedom of speech and their due process rights. The federal district court in Washington, D.C. upheld the broadcast advertising ban, and the Supreme Court affirmed without opinion.

### **Q: How are “cigarettes,” “little cigars,” and “smokeless tobacco” defined?**

**A:** For purposes of the federal law, “cigarettes” are defined as “(A) any roll of tobacco wrapped in paper or in any substance not containing tobacco, and (B) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph (A).” “Little cigars” are defined as “any roll of tobacco wrapped in leaf tobacco or any substance containing tobacco (other than any roll of tobacco which is a cigarette) and as to which one thousand units weighs no more than three pounds.” “Smokeless tobacco” is defined as “any finely cut, ground, powdered, or leaf tobacco that is intended to be placed in the oral cavity” (i.e. chewing tobacco, snuff, etc.).

**Q: May broadcasters air advertisements for pipe tobacco and cigars?**

**A:** Yes. Federal law does not prohibit the broadcast advertising of cigars (not defined as little cigars) or pipe tobacco. According to DOJ advisory letters, if an advertisement “specifically relates only to cigars [or loose tobacco] . . . it does not fall within the statutory ban.” However, the FTC, which enforces the print advertisement restrictions of tobacco products, recently entered into a settlement agreement with a number of cigar manufacturers which subjects the companies to fines for airing cigar advertisements absent a health risk disclosure. The warnings, which the major cigar companies are required to rotate, include:

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Cancers Of The Mouth And Throat, Even If You Do Not Inhale.

SURGEON GENERAL WARNING: Cigar Smoking Can Cause Lung Cancer And Heart Disease.

SURGEON GENERAL WARNING: Tobacco Use Increases The Risk Of Infertility, Stillbirth And Low Birth Weight.

SURGEON GENERAL WARNING: Cigars Are Not A Safe Alternative To Cigarettes.

SURGEON GENERAL WARNING: Tobacco Smoke Increases The Risk Of Lung Cancer And Heart Disease, Even In Nonsmokers.

Cigar companies are required to display one of these warnings clearly and prominently in all **audio and video ads**, on packages, in print ads, on the Internet, and on point-of-purchase displays. Therefore, as a cautionary measure, FTC staff has recommended that broadcasters include similar health risk warnings when airing permissible cigar ads.

**Q: May broadcasters advertise shops that sell tobacco products?**

**A:** Generally, yes. There is no specific Federal prohibition against advertising smoke shops. However, each commercial message must be scrutinized for content that may be prohibited. According to DOJ informal opinions, examples of prohibited advertisements include the following: (1) advertisements that include the words “cigarette” or “little cigar”; (2) advertisements that include the brand names of cigarettes or little cigars; and (3) advertisements that juxtapose words in such a way as to suggest that cigarettes, little cigars or smokeless tobacco are available and can be purchased at the shop. In contrast, advertisements for smoke shops that do not include this prohibited language pose less risk of scrutiny and DOJ enforcement action.

**Q: What are examples of smoke shop advertisements that are problematic?**

**A:** Any mention of the words “cigarette,” “little cigar,” or “smokeless tobacco” in a broadcast spot will likely constitute a prohibited advertisement and lead to DOJ scrutiny and enforcement action. For example, the DOJ has found on air advertisements for “The Stop” and “E-Z Convenience Store” to violate the Act because “cigarettes” were advertised as among the items sold at the stores. Moreover, if the word “cigarette” is included in the name of a smoke shop, as in “Joe’s Cigarette and Smoke Shop,” the station advertisement could lead to DOJ scrutiny and possible enforcement action. This is true even if the text of the spot has nothing to do with smoking related products. For example, a company named “Joe’s Cigarette and Convenience Store” could not advertise its weekly milk special on broadcast radio or television because the word “cigarette” is in its name.

Similarly, the DOJ has prohibited over-the-air advertisements that include the brand name of cigarettes. Thus, an advertisement for “Joe’s Convenience Store” could not state that “Marlboro” or “Kool” products are sold at the store. In fact, a number of the DOJ’s opinions have demonstrated that even the juxtaposition of certain words implying that cigarettes, little cigars and smokeless tobacco are sold at a store can subject a broadcaster to enforcement action. For example, the DOJ has found that an advertisement which was sponsored by a store named “Dirt Cheap” and which included the words “smokers” and “tobacco,” would violate the Act if aired. The DOJ has also issued informal opinions prohibiting an advertisement that juxtaposed the shop name “One Stop Tobacco” with “cartons” and “packs,” as well as an ad for a store

called the “Smokers Outlet” with included the words “sell name brands.” Although there may be constitutional arguments that the DOJ’s position is overly broad, stations should think carefully about deciding to risk running ads for smoke shops.

**Q: What are examples of permissible smoke shop advertisements?**

**A:** A smoke shop advertisement that makes no direct or indirect mention of cigarettes, little cigars, chewing tobacco or brand names should not be viewed as violating the Act. Based on the DOJ informal opinion letters, smoke shop advertisements that promote the sale of paraphernalia associated with smoking, such as cigar humidors, rolling paper, and pipes, are not likely to be found problematic under the federal tobacco laws. For example, DOJ informal opinion letters have permitted smoke shop advertisements for “The Tobacco Outlet,” “The Smokers Outlet,” “Smoker Friendly,” and “J&J Discount Tobacco,” because they did not “fall within the statutory ban.” However, as mentioned above, advertisements that juxtapose words in such a way as to suggest that cigarettes, little cigars or smokeless tobacco are available and can be purchased at the shop may violate the Act.

Because it is often very difficult to define with precision what will trigger DOJ scrutiny and possible enforcement of the broadcast ban on the advertising of certain tobacco products, and because the risk of liability under the Act is substantial, stations should seek the advice of counsel before they agree to accept and air any tobacco-related advertisements.

**Q: May broadcasters name an event which includes a cigarette product in the title?**

**A:** Yes. It is generally permissible for a radio or television broadcaster to mention the name of an event whose title includes the name of a cigarette product, such as the “Virginia Slims Tennis Tournament.” However, such appropriate mentions should be kept to a minimum.

## Advertisement of Lotteries

### **Q: May Indiana broadcasters air advertisements for legally authorized lotteries?**

**A:** Yes. A federal criminal statute prohibits stations located in states which do not have their own state lottery from carrying announcements promoting the lotteries of any states. *See* 18 U.S.C. 1304,1307 47 C.F.R. § 73.1211(a). However, Indiana does operate its own state lottery. Consequently, in Indiana, there are no restrictions on the ability of broadcasters to run advertising for legally authorized in-state and out-of-state lotteries. In that connection, Congress has enacted several exceptions applicable to Indiana which permits such advertising. Pursuant to 18 U.S.C. § 1307(a), broadcasters may air the following types of lottery advertisements:

- An advertisement for a lottery conducted by a state acting under authority of state law which is broadcast by a radio or television station licensed to that state; in addition, a broadcaster may air an advertisement for a lottery conducted by a state other than the one in which it is located, if the state in which the station is located also has a state-authorized lottery;
- An advertisement for a lottery that is authorized by the state, or not prohibited by the state, and is conducted by a not-for-profit organization or a governmental organization; and
- An advertisement for a lottery that is conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization

In addition, pursuant to 25 U.S.C. § 2701, stations may also broadcast advertisements for gaming conducted by an Indian Tribe in compliance with the Indian Gaming Regulatory Act.

As noted above, in Indiana, lotteries conducted by the state lottery commission are legal. *See L.E. Services, Inc. v. State Lottery Comm'n of Indiana*, 646 N.E.2d 334 (Ind. Ct. App. 1995),

*transfer denied.* Article 30 of the Indiana Code regulates the Indiana State Lottery. The state lottery commission may promote and advertise the lottery. IND. CODE § 4-30-3-8(a).<sup>4</sup>

It is important to note that under Indiana Code § 4-30-14-6, a person who, without being authorized by the state lottery commission in writing, uses the term “Indiana lottery”, “state lottery”, or “Indiana state lottery” or a similar term in reference to an enterprise other than a lottery conducted under this article commits a Class A misdemeanor.

**Q: What constitutes a lottery under state and federal law?**

**A:** Under Indiana Code § 4-30-2-4, “lottery” is defined as the Indiana State Lottery.

Under federal law, a game will be deemed a lottery if it has a prize, an element of chance, and requires consideration. A prize is anything of value offered to a contestant. The element of chance can exist either when a winner is selected by chance or when the value of the prize is not predetermined. According to FCC guidelines, the element of consideration is present in any contest or promotion that requires a contestant to “furnish any money or other thing of value, have in [his or her] possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast,” or meet any other requirement which involves a substantial expenditure of time and effort by the contestant. If any of these three elements are not present, there is no lottery.

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<sup>4</sup> IND. CODE § 4-30-3-8 (b) A promotion may refer to the total lottery prize, even though the prize may be paid over a period of years.

(c) The commission may act as a retailer and conduct promotions involving the dispensing of free lottery tickets.

(d) The director may authorize a sales incentive program for employees of the commission for the purpose of increasing the sales volume and distribution of lottery tickets.

## **Advertisement of Gambling and Contests**

While the revenue received from running advertisements for various forms of gambling and contests may be more than welcome to media outlets, especially in these tough economic times, all IBA members should be aware of the conditions under which such advertisements may be legally aired, as well as the risks of running improper advertisements, which may include being subjected to civil and/or criminal penalties. This section is intended to provide IBA members with a brief overview of the laws regarding gambling and contests and the advertising of these activities to assist IBA members in determining whether the benefits of running a particular ad outweigh the risks.

### **Q: May broadcasters air advertisements for casino gambling?**

**A:** Yes, federal law allows the advertisement of legal casino gambling. In *Greater New Orleans Broadcasting Assoc. v. U.S.*, the Supreme Court of the United States held that stations licensed to a state where state-run casino gambling is legal can broadcast advertisements for those casinos, even if their signals reach into a state where gambling is illegal. 527 U.S. 173 (1999). The FCC has stated that it will not prohibit truthful advertisements for legal casino gambling even when broadcast by stations located in states where casino gambling is not legal. However, the rule under Indiana law is that if the gambling is legal in the state where it is being conducted, it is legal to advertise the event here in Indiana. There are no Indiana statutes or regulations that prohibit such advertising and Indiana Counsel for the IBA confirmed this conclusion with both the Indiana Department of Revenue and the Indiana Gaming Commission.

No Indiana rules or regulations prohibit the advertisement of legal gambling operations, in-state or out-of-state, such as the riverboat casinos, Las Vegas casinos, Atlantic City casinos, and various Indian casinos.

### **Q: May broadcasters air advertisements for contests under federal law?**

**A:** Yes. In a contest, a prize is awarded based upon chance, diligence, knowledge or skill. A contest is similar to a lottery, except that it is usually missing the element of consideration and possibly the element of chance. Under federal law, a station may broadcast advertisements for

contests that are not lotteries as long as they are not deceptive, misleading and false. However, Indiana law provides additional limitations discussed below.

**Q: May broadcasters air advertisements for contests involving games of chance under Indiana law?**

**A:** Yes, but only if they meet certain strict requirements. Indiana Code § 4-32-1-1 *et seq.* regulates the operation of “games of chance” by both for-profit and not-for-profit organizations. “Games of chance” include door prize events, raffle events, bingo events, *et cetera*. A “raffle event” is defined as the selling of tickets or chances to win a prize awarded through a random drawing. IND. CODE § 4-32-6-21. A “door prize” means a prize awarded to a person based solely on the person’s attendance at an event or the purchase of a ticket to attend an event. IND. CODE § 4-32-6-14.

Taken as a whole, these statutory provisions outlaw most forms of what is commonly thought of as gambling, but make limited exceptions for certain activities, such as charity raffles, charity bingo events, horse racing and, of course, riverboat casinos. Pursuant to these and other statutes, it is unlawful to either participate in or promote (which would include running advertisements for) Indiana games of chance that are not specifically so authorized.

Generally speaking, charitable (non-profit) organizations may sponsor games of chance if they meet certain requirements, such as obtaining a permit. The State Lottery is treated as if it were one of these games.

The only forms of gambling open to for-profit entities is riverboat gambling, which is heavily regulated by the Indiana Gaming Commission and race wagering that occurs at state approved horse tracks.

**Q: What constitutes illegal gambling under Indiana law?**

**A:** Any charitable gaming not approved by the Indiana Gaming Commission, any non-charity bingo, raffles or other games of chance, and any casino games (*e.g.*, blackjack, craps, roulette) not conducted on an approved riverboat are illegal in Indiana.

Any form of illegal gambling cannot be promoted or advertised by any person, station or business. Stations should be aware of Indiana Code § 35-45-5-1 *et seq.*, which makes it a felony to promote “professional gambling.” The definition of “gambling” applicable to this prohibition provides that the term does not include legal riverboat gambling or “bona fide contests of skill, speed, strength or endurance in which awards are made only to entrants or the owners of entries.” IND. CODE § 35-45-5-1. While the statute does not *explicitly* make the media outlet that simply ran the advertisement for the illegal activity guilty of *promoting* professional gambling, there is unfortunately the risk that an overzealous prosecutor could make a criminal case against the station with a better than average chance of conviction. In addition, an argument could be made that because the station implicitly suggests when it runs an advertisement for a gambling event that such event is legal, the station could also be guilty of false advertising if the event turns out to be illegal.

**Q: May broadcasters air advertisements for contests involving games of skill under Indiana law?**

**A:** Yes. Gambling does not include participation in bona fide contests of skill, speed, strength, or endurance in which awards are made only to entrants or the owners of entries or participation in bona fide business transactions that are valid under the law of contracts. IND. CODE § 35-45-5-1. Thus, games of skill are legal, and advertising such games is also legal.

Here is a recent example of a station promoting a game of skill: Indiana Counsel to the IBA was asked to give a legal opinion regarding a promotion by a professional hockey team where all persons who bought a ticket for a given game would be eligible to be selected at random to have the chance to win a prize by shooting a hockey puck into the goal during a break in the game. The only way to win was by participating in a game of skill (shooting the puck), not a game of “chance.” Therefore, there was no restriction on the promotion or advertisement of the event. This conclusion was confirmed by the Indiana Department of Revenue and the Indiana Gaming Commission, both of which agreed with this analysis.

## **Q: May Indiana broadcasters air advertisements for charity gaming events?**

**A:** Yes, Indiana broadcasters may run paid advertisements for legal charity gaming events. 45 I.A.C. 18-3-2(g).<sup>5</sup> However, the Indiana broadcaster must first satisfy itself of three things. First, the advertised event must be conducted by a not-for-profit organization.<sup>6</sup> Second, the organization must be a “licensed qualified organization” under Indiana law. *See* IND. CODE § 4-32-6-20(a).<sup>7</sup> Finally, the “lottery, gift enterprise or similar scheme” must be an “allowable event” and therefore legal under Indiana law. *See* IND. CODE § 4-32-6-2.<sup>8</sup>

As a preliminary matter, a broadcaster should verify that the organization conducting the event is licensed by the Indiana Department of Revenue (“IDR”). In this connection, the broadcaster might ask the organization to give the broadcaster a copy of the organization’s license from the IDR. In addition, the broadcaster will need to find out more about the event in order to ensure that it is an “allowable event” within the meaning of Indiana Code § 4-32-6-2, or receive assurances from the organization, the organization’s attorney, or the IDR itself that the event is an allowable event.

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<sup>5</sup> “A qualified organization may advertise an allowable event. An advertisement in printed media must contain the name and license number, in bold print, of the organization conducting the event. An advertisement in broadcast media must announce, at the end of the advertisement, the name and license number of the organization conducting the event. A television announcement of the name and license number of the organization conducting the event may be in the form of an audio, a visual, or both.”

<sup>6</sup> An organization is not-for-profit if it is tax-exempt under section 501 of the Internal Revenue Code.

<sup>7</sup> IND. CODE § 4-32-6-20(a) “Qualified organization” means:

(1) a bona fide religious, educational, senior citizens, veterans, or civic organization operating in Indiana that:

(A) operates without profit to the organization's members;

(B) is exempt from taxation under Section 501 of the Internal Revenue Code; and

(C) has been continuously in existence in Indiana for at least five (5) years or is affiliated with a parent organization that has been in existence in Indiana for at least five (5) years; or

(2) a bona fide political organization operating in Indiana that produces exempt function income (as defined in Section 527 of the Internal Revenue Code).

There are not-for-profit organizations that will not or cannot be “licensed qualified organizations.”

<sup>8</sup> IND. CODE § 4-32-6-2 “Allowable event” means:

(1) a bingo event;

(2) a charity game night;

(3) a raffle;

(4) a door prize drawing;

(5) a festival; or

(6) a sale of pull tabs, punchboards, or tip boards;

conducted by a qualified organization in accordance with this article and rules adopted by the department under this article.

There are a number of ways an event, even if conducted by an IDR-licensed qualified organization, may be illegal. For example, there are frequency-of-event limitations. An event could also exceed the applicable prize limitation, or by operators or workers receiving payment for conducting or assisting at the event, or by too much being paid to rent equipment. *See* 45 I.A.C. 18-3-2 (subsections (a) through (q) of which outline the number of ways an event may become illegal).

Once a broadcaster decides to run a paid advertisement for a charitable event, the ad must include “the name and license number of the organization conducting the event.” 45 I.A.C. 18-3-2(g). Television has the option of providing this information via audio or video, or both. *Id.* Under Indiana Code § 4-32-9-36, an advertisement for an allowable event in radio broadcast media must announce, within the advertisement, the name of the qualified organization conducting the allowable event and that the qualified organization’s license number is on file.

**Q: Are there specific or additional federal requirements for advertisements of licensee-run contests?**

**A:** Yes. The FCC rules require that a station “shall fully and accurately disclose the material terms of the contest and shall conduct the contest substantially as announced or advertised.” (see 47 C.F.R. § 73.1216) The material terms of a contest may include any statement that may influence a person to participate in the contest and include such factors as the method of entry, eligibility guidelines, deadline to enter, prizes, including the value of such prizes, the method for choosing the winner(s) and any tie-breaking method. Licensee-run contests have been a source of fines by the FCC and all procedures associated with such advertisements should be carefully reviewed.

**Q: May Indiana broadcasters air advertisements for internet gambling sites?**

**A:** No. We have all seen “casino on the net” websites and the advertising of such operations by certain Internet providers. Typically, you can play these games for free or, by providing a credit

card number, play for money. The business conducting the operation is often located off-shore and therefore beyond the reach of United States law (or at least the enforcement of those laws).

The Indiana Legislature has never directly addressed the issue of Internet gambling. Senate Bill No. 327, introduced in January 2002, would have expressly made it illegal to knowingly operate an Internet server that provides illegal gambling or bookmaking, but the bill did not pass.

Despite the absence of a specific statute addressing the issue, the Indiana Attorney General has taken the official position that Internet gambling is unlawful in Indiana. Official Opinion No. 98-8, which was issued on July 7, 1998, expressly states that even though legal forms of gambling could conceivably be conducted over the Internet, it would need, at a minimum, to be expressly approved by the applicable Indiana regulatory agency, which has never occurred. **The Attorney General thus concluded that an Indiana resident who places unlawful wagers over the Internet, such as by playing a simple hand of blackjack, is participating in illegal gambling.**

Consistent with that Opinion, the Attorney General issued a Notice on January 9, 1998, to all “Internet gambling operators” stating that “it is illegal for Indiana residents to gamble over the Internet and it is also illegal for you to promote and engage in gambling with Indiana residents.” The Notice also demands that if anyone is “informing” Indiana residents that it is lawful for them to gamble over the Internet, they must stop doing so immediately because such information is false. Arguably, any radio or television station that runs an ad concerning Internet gambling is “informing” the listener of the advertisement that such activity is legal. If so, that station would be violating the law. Of course, this also means that Internet providers that promote such websites are currently violating the Indiana criminal statutes and might some day be indicted if the State Attorney General or a local prosecutor is so inclined.

In addition, the United States DOJ has advised broadcasters that it considers online gambling to be illegal and in violation of several federal statutes. At least five states have passed legislation banning online gambling.

As set forth above, the risks of being subjected to civil and/or criminal penalties resulting from running ads for Internet gambling greatly outweigh the possible economic benefits from running the ads. Therefore, it is our strong recommendation that all stations decline to run such advertisements.

**Q: How are laws governing lottery, casino and contest advertising enforced?**

**A:** These laws and regulations are enforced on a federal level by the FCC and on the state level by the Indiana Department of Revenue and the Indiana Attorney General. A violation of the rules could lead to a fine, short-term license renewal or, ultimately, denial of a license renewal or license revocation for repeat violations.

## **Conclusion**

As you know, **Bingham McHale LLP** is the Indiana Counsel for the IBA, and **Shaw Pittman LLP** is the FCC Counsel for the IBA. We encourage you to call our legal hotlines, (**Indiana: 317-686-5227 / FCC: 202-663-8217**), if you have a specific promotion or advertisement that needs to be addressed. For that matter, we are also here for you on other questions requiring the interpretation of federal and Indiana law. We are committed to giving quick and accurate responses to each and every call we receive and look forward to continuing to work with you in this regard.