

Memorandum

Lucky draw competitions as a means to induce participation in research.

To: Jerall Toi

Senior Institutional Information Officer

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Background:

A trend amongst researchers is to engage with research participants and as a method of reward in some instances offer “entrance” into a competition (lucky draw) to win a prize, some prizes offered have been opportunity to win in some instances: an iPad; takealot vouchers; a day at a spa etc. This brings the following questions to the fore:

1. Are such competitions legally permissible in terms of the Consumer Protection Act?
2. Value totals of the prizes are inconsistent, e.g. A voucher of R5000 versus a R500 voucher or less which cannot be exchanged for cash. Is there a reasonable standard in terms of law?
3. On whom is liability imposed if no prize is awarded or if nepotism occurs? In other words, whom is the risk owner?
4. Are there checks and balances in place?
5. What is the proposed solution?

Legislative Guidelines:

The Consumer Protection Act, Act 68 of 2008 is applicable to every transaction occurring within the Republic unless it is exempted. An argument can be made that the opportunity to be entered into a draw falls outside the scope of the Act as the research participant is not a consumer, no consideration is paid for the supply of goods or services no consumer agreement was reached and no transaction occurred. It appears that a lucky draw may also fall outside the scope of the Lotteries Act, Act 57 of 1997.

Section 36 of The Consumer Protection Act read with The Consumer Protection Act Regulations published under GN R293 in GG34180 of 1 April 2011 contain in Regulation 11 some interesting departure points for consideration bearing in mind that Regulation 11 deals with promotional competitions from a consumer protection perspective.

The person who conducts a promotional competition must for a period of at least three years, retain:

- full details of the promoter, including identity or registration numbers, addresses and contact numbers;
- the rules of the promotional competition;

- a copy of the offer to participate in a promotional competition;
- the names and identity numbers of the persons responsible for conducting the promotional competition;
- a full list of all the prizes offered in the promotional competition; a representative selection of materials marketing the promotional competition or an electronic copy thereof, but such copy must be easily accessible in a generally available format;
- a list of all instances when the promotional competition was marketed, including details on the dates, the medium used and places where the marketing took place;
- the names and identity numbers of the persons responsible for conducting the selection of prize winners in the promotional competition;
- an acknowledgment of receipt of the prize signed by the prize winner, or legal guardian where applicable, and his or her identity number, and the date of receipt of the prize, or where this is not possible, proof by the promoter that the prize was sent by post or other electronic means to the winner using his or her provided details;
- declarations by the persons responsible for conducting the competition made under oath or affirmation that the prize winners were to their best knowledge not directors, members, partners, employees, agents or consultants of or any other person who directly or indirectly controls or is controlled by the promoter or marketing service providers in respect of the promotional competition, or the spouses, life partners, business partners or immediate family members;
- the basis on which the prize winners were determined;
- the summary describing the proceedings to determine the winners, including the names of the persons participating in determining the prize winners, the date and place where that determination took place and whether those proceedings were open to the general public; whether an independent person oversaw the determination of the prize winners, and his or her name and identity number; the means by which the prize winners were announced and the frequency thereof;
- a list of the names and identity numbers of the prize winners;
- a list of the dates when the prizes were handed over or paid to the prize winners;
- in the event that a prize winner could not be contacted, the steps taken by the promoter to contact the winner or otherwise inform the winner of his or her winning a prize; and
- in the event that a prize winner did not receive or accept his or her prize, the reason for his or her not so receiving or accepting the prize, and the steps taken by the promoter to hand over or pay the prize to that prize winner.

A person must not directly or indirectly inform another person that a participant has won a competition, if:

- no competition has in fact been conducted;
- the person has not in fact won the competition;
- the prize for that competition is subject to a previously undisclosed condition; or
- the person is required to offer further consideration for the prize, after the results of the competition have been announced.

Some important definitions for consideration are:

“participant” means a person who enters, competes in or is otherwise eligible to win a promotional competition;

“**prize**” includes a reward, gift, free good or service, price reduction or concession, enhancement of quantity or quality of goods or services, or other discounted or free thing;

“**promoter**” means a person who directly or indirectly promotes, sponsors, organises or conducts a promotional competition, or for whose benefit such a competition is promoted, sponsored, organised or conducted; and

“**promotional competition**” means any competition, game, scheme, arrangement, system, plan or device for distributing prizes by lot or chance if it is conducted in the ordinary course of business for the purpose of promoting a producer, distributor, supplier, or association of any such persons, or the sale of any goods or services; and any prize offered exceeds the threshold prescribed by the Minister irrespective of whether a participant is required to demonstrate any skill or ability before being awarded a prize.

If Guidelines are adopted strictly in line with the above, then the Primary Investigator will have to fully comply to requirements set out in the Promotion of Access to Information Act (“PAIA”), Act 2 of 2000 as well as the Protection of Personal Information Act, Act 4 of 2013.

Application of law to the facts:

1. Are such competitions legally permissible in terms of the Consumer Protection Act?
Argument can be made that the scope of research competitions falls outside the scope of the Act.
2. Value totals of the prizes are inconsistent, e.g. A voucher of R5000 versus a R500 voucher or less which cannot be exchanged for cash. Is there a reasonable standard in terms of law?
Currently, there does not appear to be a standard in terms of the law. According to Ethics in Health Research Guideline which states that, “Inducements encourage participation. They may be offered in some circumstances where e.g. recruitment, especially of healthy participants, is anticipated to be difficult. However, a justification for this tactic should be provided and the inducement should not unduly influence an informed choice about participation. In particular, an inducement should not undermine a potential participant’s assessment of risk of harm. All inducements should be clearly explained and justified to the REC. Input from community members on the REC or other role players may be constructive”.¹
3. On whom is liability imposed if no prize is awarded or if nepotism occurs? In other words, whom is the risk owner?
It is idealistic to envision that a perceived wrong party would hold only the Primary Investigator responsible and not join the Institution in a civil action, alternatively publish details on social media or report the matter to newspapers locally or nationally. Denny argues that there is no withdrawal of existing benefit, that there was “hope” in that a benefit may be acquired and that only in the instances of withdrawing an existing benefit or a right can legitimate expectation be argued.²
4. Are there checks and balances in place?
Currently, no checks and balances are in place to ensure that if a prize is awarded that the process and outcome was conducted in a fair manner. It is unclear whether there are resources available to conduct such checks.

¹ Ethics in Health Research published on 1 March 2015.

² Denny A, [2003] “Procedural Fairness in Competitions”, *Judicial Review* 8 p228.

5. What is the proposed solution?

Further investigation is required from the various RECs to determine risk exposure and mitigating steps into place which will not deter from ethical research gathering practices.

Vriendelike groete/Kind regards

Jerusha Naidoo

Assistant Information Officer | Division for Information Governance