



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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Attorney General

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The Honorable Bill Janis
Member, House of Delegates
P.O. Box 3703
Glen Allen, Virginia 23058-3703

Dear Delegate Janis:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask whether prizes offered by a retail provider of internet and computer services are permissible or whether they constitute illegal gambling under the laws of Virginia when entries to win prizes are available to persons who purchase computer time as well as to those who do not.

Response

It is my opinion that the element of consideration is missing, and therefore no illegal gambling occurs, when the opportunity to win a prize is offered both with a purchase and without the requirement of a purchase.

Background

You relate that a business engages in the sale of internet and computer time. Consumers who purchase time on the computers use on-site computers that are equipped with high-speed internet access and various software programs, including word processing and spreadsheets. This business also provides office support services at this location, including fax and copying services.

When customers purchase internet time, they are issued entries for possible prizes. The purchaser of time has several options to determine whether the entry is a winning entry. First, the cashier can announce whether any of the entries are winners. Second, the computer stations are equipped with software that will reveal whether any of the entries are winners. Finally, the computer user can select a game that uses a display to reveal whether any of the entries are winners. Selecting the game option does not improve the odds of winning and does not deplete the customer's purchased internet time. Regardless of the method used to learn whether any of the entries are winners, the odds and prizes remain the same.

You further represent that consumers also may obtain free entries by logging into their account on the terminal or by mail. The odds of winning are the same regardless of whether the entries are provided in conjunction with a purchase of internet time, or whether the entries are received for free.

Applicable Law and Discussion

Illegal gambling is a crime.¹ Code § 18.2-325 broadly defines “illegal gambling” as:

The making, placing or receipt of any bet or wager in the Commonwealth of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest or event, occurs or is to occur inside or outside the limits of the Commonwealth.

Section 18.2-325 further states that

the making, placing, or receipt of any bet or wager of money or other thing of value shall include the purchase of a product, which purchase credits the purchaser with free points or other measurable units that may be risked by the purchaser for an opportunity to win additional points or other measurable units that are redeemable by the purchaser for money at the location where the product was purchased.

Finally, if a “lawful game, contest, lottery, scheme or promotional offering” complies with the requirements contained in § 18.2-325.1, it is not prohibited.² Section 18.2-325.1, enacted during the 2010 General Assembly,³ provides in relevant part that

Pursuant to subdivision 1 b of § 18.2-325, any lawful game, contest, lottery, scheme, or promotional offering (the contest) may be conducted provided the following requirements are met:

1. There is available a method of free entry to all participants wishing to enter the contest without a purchase.
2. There is equal opportunity to play and equal odds of winning for all participants regardless of whether a participant entered with a valid purchase or through a free alternative method of entry.

Section 18.2-325.1 (3) through (6) requires that certain disclosures be made. Finally, the legislation states that its provisions are declaratory of existing law.

It is well settled that “an activity constitutes illegal gambling when the elements of prize, chance and consideration are present together.”⁴ The promotional scheme you describe clearly includes the elements of prize and chance. Therefore, whether the activity is illegal depends on whether the element of “consideration” is also present. Consideration is not present

because of any person’s attendance upon the premises of another; his execution, mailing or delivery of an entry blank; his answering of questions, verbally or in writing; his

¹ VA. CODE ANN. § 18.12-326 (2009) (setting forth the punishment for illegal gambling); *see also* VA. CODE ANN. § 18.12-328 (2009) (setting forth the punishment for persons who operate an illegal gambling enterprise).

² VA. CODE ANN. § 18.12-325 (2010).

³ 2010 Va. Acts ch. 877.

⁴ 2002 Op. Va. Att’y Gen. 144, 145.

witnessing of a demonstration or other proceeding; or any one or more thereof, where no charge is made to, paid by, or any purchase required of him in connection therewith.^{5]}

Prior opinions of the Attorney General consistently have concluded “that the element of consideration is missing when no purchase is required to enter into a drawing or other game of chance, but that it is present when eligibility to receive a prize is limited to those who make a purchase.”⁶ Section 18.2-325.1, which expressly provides that its provisions are declaratory of existing law, is consistent with this longstanding interpretation of “consideration.”

I must further caution that, ultimately, the application of various elements of a criminal offense to a specific set of facts rests with the Commonwealth’s attorney, the grand jury and the trier of fact.

Conclusion

Accordingly, it is my opinion that the element of consideration is missing, and therefore no illegal gambling occurs, when the opportunity to win a prize is offered both with a purchase and without the requirement of a purchase.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "Ken C II". The signature is stylized and cursive.

Kenneth T. Cuccinelli, II
Attorney General

1:485; 1:941/10-064

⁵ VA. CODE ANN. § 18.2-332 (2009).

⁶ 2002 Op. Va. Att’y Gen. at 146. *See also* 2008 Op. Va. Att’y Gen. 3, 4-5 (discussing the element of “consideration” in the context of poker games); 1997 Op. Va. Att’y Gen. 97, 98 (concluding that prizes awarded as part of a safety program conducted in the workplace were not illegal gambling because no consideration was present); 1981-82 Op. Va. Att’y Gen. 175, 175-76 (concluding that consideration is absent when cable television company’s offer of entry blank to consumers required no purchase or subscription to cable service); 1977-1978 Op. Va. Att’y Gen. 238, 238-39 (concluding that the element of consideration is present where eligibility to receive prize is limited to those who purchase clothing memberships); 1969-70 Op. Va. Att’y Gen. 167, 167 (concluding that consideration is absent when no purchase is required for participating in give-away promotion).