00-053

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING FRAUD.

Every person who participates in "gifting program" by giving valuable consideration for opportunity to receive further compensation for inducing others to become participants is guilty of Class 1 misdemeanor for operating pyramid promotional scheme.

The Honorable William H. Fuller III
Commonwealth's Attorney for the City of Danville
August 29, 2000

You ask for guidance regarding the meaning of the term "operates" as it is used in § 18.2-239 of the *Code of Virginia*, pertaining to pyramid promotional schemes.

You enclose documents describing a "gifting program." An individual participates in the program by "giving" $2,000 to a "senior" on the "board" of a private group, which entitles the individual to become a "freshman" on the "board." As new persons join, the "freshman" advances and, after eight "freshmen" have joined the "board," the "senior" rotates off the "board" with a total gift of $16,000. Assuming that the described "gifting program" is a pyramid promotional scheme, you inquire whether a person giving $2,000, with the expectation of advancing on the "board" and receiving $16,000, is guilty of a Class 1 misdemeanor for operating a pyramid promotional scheme, in violation of § 18.2-239.

Section 18.2-239 states that "[e]very person who … operates … any pyramid promotional scheme shall be guilty of a Class 1 misdemeanor."[1] A "pyramid promotional scheme" is defined as "any program utilizing a pyramid or chain process by which a participant gives a valuable consideration for the opportunity to receive compensation or things of value in return for inducing other persons to become participants in the program."[2]

The Supreme Court of Virginia decided *Bell v. Commonwealth*[3] and *Love v. Durastill of Richmond, Inc*.[4] under § 18.2-239 without considering the meaning of the term "operates" as used in the statute.[5] Neither of the pyramid promotional scheme statutes--§ 18.2-239 or § 18.2-240--defines the term "operates." In the absence of a statutory definition, a statutory term should be given its common, ordinary and accepted meaning, given the context in which it is used.[6] Generally, "operate" means "[to] produce an effect … to cause to occur … to cause to function."[7] In applying this definition to § 18.2-239, I am mindful that, although penal statutes must be construed strictly, such "'rule of construction "does not abrogate the well recognized canon that a statute … should be read and applied so as to accord with the purpose intended and attain the objects desired if that may be accomplished without doing harm to its language."'"[8]

Participants in the described "gifting program" give valuable consideration for the opportunity to receive compensation in return for inducing others to become participants in the scheme. The action of a participant in making the payment or "gift" sustains the program and induces others to make that contribution. It is my opinion that the act of giving $2,000 constitutes the operation and promotion of a pyramid promotional scheme. An individual moves through the "gifting program"

to obtain future compensation, i.e., he pays $2,000 in anticipation of receiving a total gift of $16,000. Therefore, everyone who pays into the "gifting program" is operating and promoting the program, because absent the payment of this "gift," the program would fail.

Accordingly, it is my opinion that every person who participates in the "gifting program" by paying $2,000, with the expectation of advancing and ultimately receiving $16,000, is guilty of a Class 1 misdemeanor for operating a pyramid promotional scheme, in violation of § 18.2-239.

[1]Punishment for conviction of a Class 1 misdemeanor is "confinement in jail for not more than twelve months and a fine of not more than $2,500, either or both." Section 18.2-11.

[2]Section 18.2-239.

[3]236 Va. 298, 374 S.E.2d 13 (1988).

[4]242 Va. 186, 408 S.E.2d 892 (1991).

[5]In *Bell*, the Virginia Supreme Court had to determine whether a "self-development" plan was operating as a pyramid promotional scheme under § 18.2-239. In determining such plan was a pyramid promotional scheme, the Court focused on the meaning of the words "compensation" and "consideration" as such words are used in § 18.2-239. The Court held that the term "compensation," defined in § 18.2-239(b) as not meaning "payment based on sales of goods or services to persons who are not participants in the [pyramid] scheme and who are not purchasing in order to participate in the scheme," included certain commissions received under the scheme. 236 Va. at 302, 304, 374 S.E.2d at 15, 16. The Court also held that the term "consideration" includes more than a payment of money and noted that it is the price bargained for and paid for a promise, which may be in the form of a benefit to the promisor or a detriment to the promisee. *Id*. at 302, 374 S.E.2d at 16 (citing Brewer v. Bank of Danville, 202 Va. 807, 815, 120 S.E.2d 273, 279 (1961)). In *Durastill*, the Court held that, even when intermediate parties do not receive compensation, the enterprise still can be classified as a pyramid promotional scheme because the enterprise uses the pyramid or chain process. 242 Va. at 190, 408 S.E.2d at 895.

[6]*See* Commonwealth v. Orange-Madison Coop., 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980); 1999 Op. Va. Att'y Gen. 31, 31, and opinions cited at 32 n.2.

[7]Webster's Third New International Dictionary of the English Language Unabridged 1580-81 (1993).

[8]Love v. Durastill, 242 Va. 189, 408 S.E.2d at 894 (quoting Crone v. Richmond Newspapers, 238 Va. 248, 254, 384 S.E.2d 77, 80 (1989) (quoting Gough v. Shaner, Adm'r, 197 Va. 572, 575, 90 S.E.2d 171, 174 (1955))).