



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II  
Attorney General

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900 East Main Street  
Richmond, Virginia 23219  
804-786-2071  
FAX 804-786-1991  
Virginia Relay Services  
800-828-1120  
7-1-1

The Honorable G. Manoli Loupassi  
Member, House of Delegates  
6002-A West Broad Street, Suite 200  
Richmond, Virginia 23230

Dear Delegate Loupassi:

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 present three scenarios involving sweepstakes and you inquire whether each scenario is legal under Virginia law. The first fact pattern involves charitable donations made in terminals installed in convenience stores or stand alone businesses that would accept donations and allow persons donating money to participate in a sweepstakes. The second scenario involves political donations made from computers, and which also would permit the person donating money to enter into sweepstakes. In the final fact pattern, a business provides on-site computer services and allows customers to enter into a sweepstakes when they purchase telephone cards or time on a computer.

## Response

It is my opinion the scenarios may or may not run afoul on the prohibition on gambling, but I lack sufficient information to reach a firm conclusion.

## Background

You relate three specific hypothetical situations.<sup>1</sup> Each scenario has the following common features. First, an individual can obtain at least one free entry each day, at each location, without any requirement of a donation or purchase. In each instance, an individual can obtain an unlimited number of free entries by mail when requested in accord with the rules. You posit that customers seek free entries, both by mail and in person. Some of the individuals who request and obtain entries without purchase actually win prizes. The winning entries can be redeemed for a predetermined cash prize in accordance with the posted odds.

Each scenario entails a series of sweepstakes. The total cash prizes to be awarded, the number of entries and the particular cash prize value for each entry are determined at the beginning of each

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<sup>1</sup>For purposes of this opinion, I base my conclusions solely on the hypothetical facts that you present. Should any of the facts change, the conclusion of the opinion also may change.

sweepstake and prominently disclosed to all participants as the odds of the game. A person receiving an entry by any method can immediately discover the value of his prize by asking the sales clerk to reveal that information. Alternatively, persons receiving entries by any method immediately can discover the value of the prize by using an “instant reveal” button on one of the computer terminals at the business.

In addition, participants in the sweepstakes can use one of the computer terminals at the business to reveal the predetermined value of his entry by using entertainment software programmed on the terminal. Some of the entertainment software displays games that mimic familiar games of chance. You note that the participant who uses the entertainment software will receive exactly the same prize that he would have received had he asked the store clerk to disclose to him the value of the prize associated with his entry or had he used the “instant reveal” option on the terminal. The participant’s odds of winning do not change by playing the games; instead, you state that the games are “an entertaining method of revealing the prize that the participant already has won (if any.)”

#### 1. Charitable donations at computer terminals

Against this common backdrop, the first scenario you inquire about involves charitable donations. In addition to the free entries noted above, an individual can make a cash donation to a charitable organization that is tax exempt under the Internal Revenue Code. The donated proceeds go to the charity designated by the customer, minus administrative costs. Administrative costs are reported in compliance with all applicable laws, and the business complies with all Virginia laws related to charitable donations.

You indicate that terminals are installed in stand-alone businesses, but also may be installed in establishments such as convenience stores. You posit that the intended clientele comprises persons likely to have an interest in charity and persons with ties to the particular charitable entities supported by the enterprise. The participant selects the charity to which he wants to donate from a list of charities offered by the computer terminal. The terms and rules of the sweepstake – including clear instructions regarding how to avail oneself of the standing offer of free participation, and the odds of the game are displayed prominently at the location and on the terminal. By “click-wrap acceptance,”<sup>2</sup> patrons acknowledge the rules when they access the terminal.

#### 2. Political contributions made from computers in business establishments

You indicate that in this scenario, businesses provide televisions tuned to news stations such as Fox News Channel or MSNBC. Customers use computers to read political blogs and websites. The establishments host election night parties where customers can watch election returns with others who are interested in politics. Persons frequenting these establishments can donate to political parties from a computer terminal. Proceeds are donated to the political party designated by the customer, minus administrative costs. Administrative costs are reported in accordance with applicable laws. The businesses comply with all Virginia laws relating to political donations. When operated as stand-alone businesses, the businesses prominently display a tally of contributions to each party, so as to incentivize supporters of a party to donate.

The terms of the sweepstake, including clear instructions about how to avail oneself of the standing offer of free participation and the odds of the game are displayed prominently at the location and

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<sup>2</sup> The click-wrap method of acceptance “presents the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon. The product cannot be obtained or used unless and until the icon is clicked.” *Specht v. Netscape Commc’ns Corp.*, 150 F. Supp. 2d 585, 594 (S.D.N.Y. 2001), *aff’d by Specht v. Netscape Communs. Corp.*, 306 F.3d 17 (2d Cir. 2002).

on the terminal. By “click wrap acceptance,” patrons acknowledge the rules when they access the terminal.

3. Sale of a valuable product or service.

In this scenario, persons can purchase a prepaid, rechargeable telephone card and/or computer work station time. The prepaid phone cards provide local and nationwide long distance talk time at a rate of \$.03 per minute. You note that this rate compares favorably with comparable but non-rechargeable prepaid telephone calling cards that are commonly sold in the absence of promotional games of chance. The cards are not codes printed on cash register receipts, but instead are durable plastic rechargeable cards. The business tracks the use of the phone cards and can show that phone cards are used by customers in substantial amounts.

With respect to computer workstations, you note that customers are charged \$7.50 per hour. You indicate that this rate compares favorably with rates for high-speed internet access commonly paid at internet cafés and business centers in the absence of a promotional game of chance. Using the computer work stations for the entertaining method of revealing entries does not reduce entitlement to work station time, telephone talk time or any other product or service for which the customer has paid. The customers purchasing computer work station time have not only internet access, but also are provided access to an office productivity suite (including word processing, spreadsheet and other programs).

For businesses selling only computer work station time and not prepaid telephone calling cards, you note that the computer work stations are user-friendly and include educational programs such as encyclopedias, news programs, and “just-for-fun” amusement games. The computers also have programs available to provide tutorials on computer use. Staff members at these businesses are trained to assist customers in operating the computers. You indicate that these workstations are designed to respond to the needs of persons who lack a computer in the home and that such persons are part of the intended clientele. In this scenario, the businesses track the use of the computer workstations and can show that customers use the internet and office programs on these workstations.

These businesses provide the terms and rules of the sweepstakes, including clear instructions on how to avail oneself of the standing offer of free participation and the odds of the game offered to all, and these terms are displayed prominently at the location and on the workstation. By “click-wrap acceptance,” customers acknowledge the rules when they access the workstation.

### **Applicable Law and Discussion**

Before proceeding with the analysis, I must make clear at the outset that 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. Furthermore, while opinions of the Attorney General are given respectful consideration by the courts, they are not binding upon the courts.<sup>3</sup> Ultimately, whether a particular factual scenario constitutes illegal gambling turns on actual, rather than hypothetical, facts.

I also note that, with respect to the political and charitable fundraising scenarios you posit, constitutional considerations do not alter the legal analysis. Political and charitable solicitations can “involve a variety of speech interests ... that are within the protection of the First Amendment.”<sup>4</sup> There

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<sup>3</sup> Twietmeyer v. City of Hampton, 255 Va. 387, 393, 497 S.E.2d 858, 861 (1998).

<sup>4</sup> Riley v. Nat’l Fed’n of the Blind of N.C., Inc. 487 U.S. 781, 788 (1988) (quoting Village of Schaumburg v. Citizens for a Better Env’t, 444 U.S. 620, 632 (1980) (ellipses in original)).

is a difference however, between laws purporting to directly regulate charities and charitable solicitation, and the gambling and gambling device laws here which do not purport to regulate speech. As the United States Court of Appeals for the Seventh Circuit noted:

[W]agering money is an activity—just as the business of leasing property is not speech and may be regulated by zoning laws and the like, even if the lessee wants to put on a play or open a newsstand. Gambling has traditionally been closely regulated or even forbidden, without anyone suspecting that these restrictions violate the first amendment. . . . [P]ersons who seek to engage in speech cannot avoid the application of state laws that are neutral with regard to the content and viewpoint of their expression. The state may collect income taxes, which reduce the resources at the command of speakers, but laws indifferent to the content or even existence of speech pose no constitutional difficulties. The state may collect income taxes, which reduce the resources at the command of speakers, but laws indifferent to the content or even existence of speech pose no constitutional difficulties . . . . [The state] statute regulates the process of wagering rather than expression that may accompany gambling.

To put this in doctrinal terms:

A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others . . . . Government regulation of expressive activity is content neutral so long as it is “justified without reference to the content of the regulated speech.”

[The State’s] regulation of gambling is unrelated to the content of any expression. It is justified without reference to that expression . . . .<sup>[5]</sup>

In short, if a person is engaged in illegal gambling, he is not exempt from civil or criminal prohibitions on gambling simply because he ostensibly raises funds for charities or political organizations.

With a few limited exceptions, gambling is illegal in Virginia.<sup>6</sup> Gambling devices also are illegal.<sup>7</sup> It is well settled that “an activity constitutes illegal gambling when the elements of prize, chance and consideration are present together.”<sup>8</sup> Prize and chance are present in all three scenarios. Nevertheless, this Office has long recognized that certain sweepstakes are legal. Past opinions reason that the element of consideration is missing in situations where a purchase is unnecessary to win.<sup>9</sup> The question common to all three scenarios you present is whether the computer terminals that allow customers to play games and win sweepstakes prizes constitute legal sweepstakes or illegal gambling.

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<sup>5</sup> *There to Care, Inc. v. Comm’r of Ind. Dep’t of Revenue*, 19 F.3d 1165, 1167-68 (7th Cir. 1994) (citations omitted) (emphasis in original).

<sup>6</sup> VA. CODE ANN. §§ 18.2-325 & 18.2-326 (Supp. 2011).

<sup>7</sup> Sections 18.2-331 (2009) (prohibiting illegal gambling devices) & 18.2-335(3) (2009) (defining gambling devices).

<sup>8</sup> 2002 Op. Va. Att’y Gen. 144, 146.

<sup>9</sup> *Id.* See also 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); 1977-78 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 gas station give-away promotion).

Courts have grappled over the years with drawing the line between legal sweepstakes and illegal gambling that purports to function as a sweepstakes.<sup>10</sup> I find persuasive the decision of the Court of Appeals of Texas, which concluded that “the decision turns on whether the sweepstakes was intended to promote the sale of [a product or service] or whether the [products or services] were there as an attempt to legitimize an illegal gambling device.”<sup>11</sup> The court persuasively observed that “the mere pretense of free prizes, designed to evade the law, would not negate the element of consideration.”<sup>12</sup> Ultimately, that court upheld the jury’s conclusion that the defendant’s sale of telephone cards in that case did not alter the fact that the defendant had engaged in illegal gambling. The court found that the evidence had established that

the main purpose and function of the machines, and the business, was to induce people to play the game, agreeing to gain or lose something of value at least partially by chance, and not to promote telephone cards; that it was [the defendant’s] intent to structure the business to entice players to exchange money for chances to play, which they did; and that the telephone cards were not the primary subject of the transaction, but mere subterfuge.<sup>[13]</sup>

I lack sufficient information to determine whether the three proposed scenarios constitute illegal gambling or a lawful sweepstakes because I cannot determine from the facts presented whether the element of consideration is present. It may be that, in fact, the businesses are fundraising for political parties or charities and the sweepstakes serve as a marketing tool for those purposes. Businesses selling telephone cards or computer time also may engage lawfully in sweepstakes. It may be, however, that the true character of these scenarios consists of gambling and that the ostensible fundraising or products constitute a thin veneer designed to obscure the gambling nature of the activity.

You note, for example, with respect to the charitable and political donations scenarios, that the donations are forwarded to the charity or political entity designated by the customer, minus “administrative costs.” If the businesses that own these cafés or machines forward an inconsequential portion of the donations to charitable or political causes, it is more likely that a factfinder will be persuaded that such operations violate the prohibition on gambling.

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<sup>10</sup> See *Moore v. Mississippi Gambling Comm’n*, 2011 Miss. App. LEXIS 169 (Miss. Ct. App. March 29, 2011) (internet café computer terminals were illegal gambling devices notwithstanding sweepstakes game available to all); *Barber v. Jefferson Cnty. Racing Ass’n, Inc.*, 960 So. 2d 599 (Ala. 2006) (element of consideration was present because the internet time was largely unused and customers instead were flocking to the prize “readers”); *Sun Light Prepaid Phonocard Co., Inc. v. South Carolina*, 600 S.E.2d 61, 64 (S.C. 2004) (concluding under the facts of the case that phone card dispensers were gambling devices under South Carolina law because they functioned “like slot machines and not traditional vending machines.”); *Tennessee v. Vance*, 2004 Tenn. Crim. App. LEXIS 317 (Tenn. Crim. App. April 8, 2004) (concluding on the facts of the case that the “free spin” machines that dispensed low value baseball cards were illegal gambling devices); *MDS Invs, LLC v. City of Boise*, 65 P.3d 197 (Idaho 2003) (“free spin” machines constituted illegal gambling devices); *Jack Eiser Sales Co., Inc. v. Wilson*, 752 N.E.2d 225 (Ind. Ct. App. 2001) (“free spin” machines were prohibited gambling devices). See also *Ward v. West Oil Co.*, 692 S.E.2d 516 (S.C. 2010) (concluding that “pull-tab” machines were illegal gambling devices); *Animal Prot. Soc. of Durham, Inc. v. North Carolina*, 382 S.E.2d 801 (N.C. Ct. App. 1989) (affirming summary judgment against the promoters of a bingo game because the evidence showed that the product being promoted was illegal bingo, not the sale of plastic hair combs and peppermint candies).

<sup>11</sup> *Jester v. Texas*, 64 S.W.3d 553, 558 (Tex. App. 2001) (upholding jury conviction on gambling charges).

<sup>12</sup> *Id.* (citation omitted).

<sup>13</sup> *Id.* at 558-59.

Another distinct feature of the three scenarios you posit is the fact that the entire business model appears to be built upon perpetual sweepstakes. Ordinary sweepstakes are limited in time and attached to a particular marketing campaign for a product that is otherwise sold independently of the sweepstakes. If that model is stood on its head, and the business model effectively consists of persuading individuals to purchase chances to win prizes, with a product or service an afterthought to the chance to win prizes, the element of consideration is present regardless of whether some individuals are offered free entries.

Finally, you note that individuals can obtain free entries either by requesting them in person, or by mail. With a traditional sweepstakes, this feature generally removes the "consideration" element of gambling. That does not in all cases, however, eliminate the element of consideration. For example, the Supreme Court of North Dakota concluded that a "Lucky Strike" game associated with a telephone card dispensing machine constituted an illegal gambling device.<sup>14</sup> In reaching this conclusion, the Court rejected the argument that "there is no consideration because there is no purchase necessary to play the game."<sup>15</sup> The Court reasoned that

the limited availability of free play does not exempt the Lucky Strike game from being defined as gambling. Sweepstakes that are commonplace as marketing promotion tools are significantly different than the Lucky Strike game. The high pay-out rate of the Lucky Strike game is a distinguishing feature because it goes to the true purpose of the game. Midwestern offers one free Lucky Strike game piece per mailed request and on this basis claims, because no purchase is necessary, it is as acceptable as a retail promotional sweepstakes. However, it does not follow that simply because low-stakes, temporary promotional sweepstakes with pay-out rates of one-half of one percent that offer free play are not pursued as lotteries, we must conclude high-stakes, permanent games with pay-out rates of sixty-five percent are immune from the definition of a lottery because they also offer limited free play.<sup>16</sup>

The ultimate question is whether the sweepstakes is the product, *i.e.* individuals are paying to participate in a game of chance, or whether these scenarios employ sweepstakes legitimately to promote giving or merchandise and services. That question will have to be addressed on a case-by-case basis by each jurisdiction's Commonwealth Attorney and the trier of fact.

#### Conclusion

Accordingly, it is my opinion that the scenarios may or may not run afoul on the prohibition on gambling, but I lack sufficient information to reach a firm conclusion.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II  
Attorney General

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<sup>14</sup> Midwestern Enters. v. Stenehjem, 625 N.W.2d 234, 241 (N.D. 2001).

<sup>15</sup> *Id.* at 239.

<sup>16</sup> *Id.* at 239-40.