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Important note about the following legal opinion

The following legal opinion is in response to a question regarding whether a certain set of hypothetical facts would constitute illegal gambling as defined in the Virginia Code.

Senator Edward Houck's question sets forth certain hypothetical scenarios centering on payment of money in exchange for a product, such as a phone card or a DVD. The product offered to the consumer is not, in fact, the actual object of the transaction. Instead, the consumer disregards the item "purchased" and seeks the opportunity to play a game of chance in order to win other prizes or money.

Based on a review of existing law and relevant prior court decisions, the attorney general's opinion is that the hypothetical examples described by Senator Houck constitute illegal gambling because the elements of prize, chance and consideration are present.

A separate attorney general's opinion (#10-064; July 30, 2010) recently concluded that, in a different hypothetical situation, certain practices of "internet cafes" did not constitute illegal gambling. The conclusions reached in these opinions are consistent, in that each opinion analyzes and discusses different sets of hypothetical scenarios. This opinion does not change or supersede opinion #10-064. The opinions rendered are specific to the unique facts as presented.

Nothing in either opinion should be interpreted as a blanket statement concerning the legality or illegality of "internet cafes" that conduct sweepstakes "promotions." Each of these operations or sweepstakes promotions needs to be considered on a case-by-case basis. This most recent opinion emphasizes that while "some will constitute legitimate marketing exercises or entertainment, others will cross the line into illegal gambling."



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The Honorable R. Edward Houck
Member, Senate of Virginia
P.O. Box 7
Spotsylvania, Virginia 22553

Dear Senator Houck:

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 illegal gambling statutes have been violated in certain hypothetical scenarios that center on payment of money in exchange for a product, such as a phone card or a DVD, but the product offered to the consumer is not in fact the object of the transaction; instead, the consumer disregards the item "purchased" and seeks the opportunity to play a game of chance in order to win prizes or money.

Response

It is my opinion that the hypothetical examples you describe would constitute illegal gambling because the elements of prize, chance and consideration are present.

Background

You posit several scenarios in which a customer enters what you refer to as a "free spin" or a "free spin parlor" and the customer inserts \$5 into a machine or provides \$5 to a clerk. In exchange, the customer receives one of the following:

- A long distance telephone card purportedly worth \$5 of long distance calls. Most customers do not use the calling cards and simply discard them in the store;
- A DVD rental ticket purportedly valued at \$5, which entitles the customer to rent two DVD movies. The DVD selection is very limited and most customers simply discard the rental tickets on the floor or in trash bins;
- Computer internet rental time worth \$5, but the internet time is rarely used by customers, except to play a "sweepstakes" game over the internet.

Following one of the purchases described above, the customer is given the opportunity to play on a "slot machine" style game, which may be through a stand-alone gaming device, computer, or other similar game, where the customer has the chance to win money or a prize.

In your hypothetical, the majority of customers do not claim the product being promoted by the machines, but rather continue to play casino-like games in an effort to accumulate sufficient points to win prizes that are paid out daily.

You further assume that the "free spin parlor" posts the notice of odds of winning prizes and other information required by § 18.2-325.1. Each free spin customer is entitled to one completely free spin (one play worth a certain amount of points) per "free spin parlor" per day. The customer's ability to otherwise play the "free spin" machines, however, is limited only by the number of times he pays \$5 to "purchase" the product as described above.

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.

In addition, § 18.2-331 prohibits the possession of a "gambling device." A "gambling device" is broadly defined as

a. Any device, machine, paraphernalia, equipment, or other thing, including books, records and other papers, which are actually used in an illegal gambling operation or activity, and

b. Any machine, apparatus, implement, instrument, contrivance, board or other thing, including but not limited to those dependent upon the insertion of a coin or other object for their operation, which operates, either completely automatically or with the aid of some physical act by the player or operator, in such a manner that, depending upon elements of chance, it may eject something of value or determine the prize or other thing of value to which the player is entitled; provided, however that the return to the user of

¹ VA. CODE ANN. § 18.2-326 (2009) (setting forth the punishment for illegal gambling). Only the forms of gambling that are specifically excepted by law (private residence wagering and, generally, regulated activities that include the Lottery, pari-mutuel wagering on horse racing and charitable gaming as defined by statute) are not subject to the gambling prohibition.

nothing more than additional chances or the right to use such machine is not deemed something of value within the meaning of this subsection; and provided further, that machines that only sell, or entitled the user to, items of merchandise of equivalent value that may differ from each other in composition, size, shape or color, shall not be deemed gambling devices within the meaning of this subsection.

Such devices are no less gambling devices if they indicate beforehand the definite result of one or more operations but not all the operations. Nor are they any less a gambling device because, apart from their use or adaptability as such, they may also sell or deliver something of value on a basis other than chance.^[2]

Section 18.2-328 provides that “[t]he operator of an illegal gambling enterprise, activity or operation shall be guilty of a Class 6 felony.” The section further provides that operators who engage continuously in the illegal endeavor in excess of thirty days, or whose gross revenue exceeds \$2,000 for a single day, are subject to a fine up to \$20,000 and one to ten years imprisonment.

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.³ Section 18.2-325.1, enacted during the 2010 General Assembly,⁴ 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.”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

² Section 18.2-325(3) (Supp. 2010).

³ Section 18.2-325(1)(b).

⁴ 2010 Va. Acts ch. 877.

⁵ 2002 Op. Va. Att’y Gen. 144, 145.

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

declaratory of existing law, is consistent with this longstanding interpretation of “consideration.” This means that sweepstakes offers do not constitute gambling when no purchase is required to participate in the sweepstakes. The element of consideration is missing in that scenario.

A recent opinion of this office concluded that the practices of certain hypothetical “internet cafes” did not constitute illegal gambling on the specific hypothetical facts described. That opinion contemplated a situation in which an internet café offered computer services, including electronic mail, software such as word processing and spreadsheets, and other office services like fax and copying machines, and offered patrons a chance to earn free minutes when they purchased minutes for computer usage. Computer users could play a game to earn free minutes, or the cashier could inform the patron whether they had won. Furthermore, there were opportunities to participate in these sweepstakes by mail, with no requirement of purchase. Copy centers and certain coffee shops meet this description: they offer computer use for a fee, and those legitimate businesses are not precluded from using sweepstakes to promote their businesses. The opinion cautioned, however, 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.”⁷

You describe a scenario different from the one at issue in the prior opinion. In your hypothetical examples, the elements of prize, chance and consideration are present. The hypothetical transactions purport to constitute a bargained for exchange, aided by a sweepstakes style game. In your hypothetical examples, however, the product is, demonstrably, of no interest to the consumer. Instead, the consumer is interested in the opportunity to play a game of chance in an effort ultimately to win money or prizes. As the Court of Appeals of Texas pointed out in an analogous fact pattern, “the decision turns on whether the sweepstakes was intended to promote the sale of telephone cards or whether the telephone cards were there as an attempt to legitimize an illegal gambling device.”⁸ The court persuasively observed that “the mere pretense of free prizes, designed to evade the law, would not negate the element of consideration.”⁹ Ultimately, that court upheld the jury’s conclusion that the defendants had engaged in illegal gambling because the evidence 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.¹⁰

Decisions from other courts have reached the same conclusion.¹¹

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).

⁷ 2010 Op. Va. Att’y Gen. 10-064 at 3.

⁸ *Jester v. Texas*, 64 S.W.3d 553, 558 (Tex. Ct. App. 2001) (upholding jury conviction on gambling charges).

⁹ *Id.*

¹⁰ *Id.* at 558-59.

¹¹ *See Sun Light Prepaid Phonocard Co., Inc. v. South Carolina*, 600 S.E.2d 61 (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 (April 8, 2004 Tenn. Crim. App.) (concluding on the facts of the case that the “free spin” machines that

Section 18.2-325.1 does not compel a contrary result. That section governs a “lawful game, contest, lottery, scheme or promotional offering” and specifies certain requirements for such contests.¹² That section does not legitimize gambling that masquerades as a purchase. Rather, it specifies certain requirements for lawful sweepstakes and promotions. Offering a customer a free spin of the roulette wheel or of a slot machine at a casino, with subsequent turns requiring payment, would not render casinos legal in Virginia.

The United States Supreme Court aptly observed, in the context of lottery schemes, that

[e]nforcing such legislation has long been a difficult task. Law enforcement officers, federal and state, have been plagued with as many types of lotteries as the seemingly inexhaustible ingenuity of their promoters could devise in their efforts to circumvent the law. When their schemes reached the courts, the decision, of necessity, usually turned on whether the scheme, on its own peculiar facts, constituted a lottery. So varied have been the techniques used by promoters to conceal the joint factors of prize, chance, and consideration, and so clever have they been in applying these techniques to feigned as well as legitimate business activities, that it has often been difficult to apply the decision of one case to the facts of another.¹³

The same holds true of various machines and sweepstakes. Some will constitute legitimate marketing exercises or entertainment, others will cross the line into illegal gambling. I must again caution, as I did with the most recent opinion on the subject, that, in the final analysis, “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.”¹⁴

Conclusion

Accordingly, it is my opinion that the hypothetical examples you describe would constitute illegal gambling because the elements of prize, chance and consideration are present.

With kindest regards, I am

Very truly yours,



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dispensed low value baseball cards were illegal gambling devices); *MDS Investments, 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 Protection Soc. v. State*, 382 S.E.2d 801 (N.C. 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).

¹² Section 18.2-325.1 (Supp. 2010).

¹³ *FCC v. Am. Broad. Co.*, 347 U.S. 284, 292-93 (1954).

¹⁴ 2010 Op. Va. Att’y Gen. 10-064 at 3.