

September 21, 2007

The Honorable James H. Harrison
Member, House of Representatives
P. O. Box 11867
Columbia, South Carolina 29211

Dear Representative Harrison:

In a letter to this office you questioned whether a promotional program sponsored by WeSave Inc. would constitute a lottery under State law or would be barred by any other State statute. According to your letter,

WeSave offers South Carolina state employees discounts with participating merchants through a program administered by the Office of Human Resources of the Budget and Control Board. WeSave offers discount cards that provide a non-discriminatory discount to any state employee who presents the card to a participating merchant. The program is free to both state employees and merchants. WeSave generates all of its income through advertisements placed on its website.

In order to generate traffic for the website, WeSave in North Carolina and West Virginia posts a randomly selected membership number that entitles the member to whom the number belongs to a prize. The prizes include things such as iPods, vacations, free gasoline and other items. To claim the prize the member with the winning membership number must contact WeSave within one hour of their membership number being posted. The member does not have to visit the WeSave website to claim their prize, they may do so by telephone or email upon learning that their number has been selected. Further, no consideration is required in order to be eligible to win a prize, merely participation in the free WeSave program.

WeSave would like to begin this promotional program in South Carolina.

In reviewing the proposed promotional opportunity, the only possible question that would have to be reviewed would be whether the WeSave promotion would constitute an illegal lottery. Typically, a raffle whereby an individual buys a ticket for the opportunity to win a prize based upon

a random drawing is considered a lottery. See: Op. Atty. Gen. dated June 23, 2004. However, other games or events may also be considered a lottery. In Darlington Theaters, Inc. v. Coker, et al., 190 S.C. 282, 292, 2 S.E.2d 782, 786 (1939), the State Supreme Court determined that a lottery is

...a species of gaming, which may be defined as a scheme for the distribution of prizes or things of value by lot or chance among persons who have paid, or agreed to pay, a valuable consideration for the chance to obtain a prize.

Therefore, the three elements of a lottery are (1) the offering of a prize (2) for payment of some consideration (3) with the winner determined by chance. These elements must be present in any scheme in order for it to be considered a lottery.

S.C. Code Ann. § 16-19-10 provides:

(w)hoever shall publicly or privately erect, set up, or expose to be played or drawn at or shall cause or procure to be erected, set up, or exposed to be played, drawn, or thrown at any lottery under the denomination of sales of houses, lands, plate, jewels, goods, wares, merchandise, or other things whatsoever or for money or by any undertaking whatsoever, in the nature of a lottery, by way of chances, either by dice, lots, cards, balls, numbers, figures, or tickets or who shall make, write, print or publish, or cause to be made, written, or published any scheme or proposal for any of the purposes aforesaid is guilty of a misdemeanor and, upon conviction, must be fined one thousand dollars and imprisoned for one year. One-third of the fine imposed shall be paid to the person, if any, who informed law enforcement officials or other appropriate authorities about the violation which led to the conviction. Each violation constitutes a separate offense.

Article XVII, Section 7 of the State Constitution states that

[o]nly the State may conduct lotteries, and these lotteries must be conducted in the manner that the General Assembly provides by law. The revenue derived from the lotteries must first be used to pay all operating expenses and prizes for the lotteries. The remaining lottery revenues must be credited to a separate fund in the state treasury styled the 'Education Lottery Account', and the earnings on this account must be credited to it. Education Lottery Account proceeds may be used only for education purposes as the General Assembly provides by law. The game of bingo, when conducted by charitable, religious, or fraternal organizations exempt from federal income taxation or when conducted at recognized annual state and county fairs, is not considered a lottery prohibited by this section.

As set forth above, while the WeSave promotional game has the elements of a prize and chance, in that the winner of a prize will be chosen by a randomly selected membership number, it

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does not appear that there is the element of consideration, in that you state that there is no requirement of any payment for the opportunity to win the prize. In order to claim the prize, the member with the winning membership number must contact WeSave within one hour of their membership number being posted. The member does not have to visit the WeSave website to claim their prize but may do so by telephone or email upon learning that their number has been selected. While as noted in a prior opinion of this office dated April 16, 1997, some courts have considered the expenditure of time and inconvenience as furnishing the necessary element of consideration for purposes of a lottery, in the opinion of this office the means set forth above which may be utilized to determine if one is a winner does not constitute sufficient consideration in order to meet one of the three elements of a lottery. As a result, in the opinion of this office, the WeShare promotional game would not constitute a lottery.

If there are any questions, please advise.

Sincerely,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General