May 25, 2004

Dennis G. Kennedy
Executive Director
State Lottery Commission
615 West Superior Avenue
Cleveland, Ohio 44113-1879

SYLLABUS: 2004-021

A lottery pooling venture in which participants pay a company a valuable consideration in exchange for chances to participate in Ohio's state lottery on terms other than those offered by the State Lottery Commission and for a prize in an amount different from the amount set by the State Lottery Commission is, itself, a scheme of chance, separate from Ohio's state lottery, the company's operation of which is prohibited by R.C. 2915.02(A)(2).

STATE OF OHIO
OFFICE OF THE ATTORNEY GENERAL
JIM PETRO, ATTORNEY GENERAL

30 E. Broad St.
Columbus, OH 43215-3400
Telephone: (614) 752-6417
Facsimile: (614) 466-0013
www.ag.state.oh.us

May 25, 2004

OPINION NO. 2004-021

Dennis G. Kennedy
Executive Director
State Lottery Commission
615 West Superior Avenue
Cleveland, Ohio 44113-1879

Dear Executive Director Kennedy:

You have requested an opinion concerning the legality of operating a "lottery pool for profit." We understand that a private, for-profit company wants to start a lottery pooling service in Ohio, based upon the Ohio state lottery. In general terms, the company proposes to establish pools of participants or players on behalf of which the company would purchase a certain number of state lottery tickets. Each participant will be allowed to purchase one or more shares in a pool. Should a pool have a winning lottery ticket, the amount of the prize would be divided among the participants based upon the number of shares they have purchased in the winning pool.

You express concern that the amount paid by the participants in a pool far exceeds the cost of the lottery tickets assigned to that pool.[1] You question whether Ohio law prohibits the

---

[1] The company in question, PowerPick, Inc., currently operates in other states. In *United States Postal Service v. Amada*, 200 F.3d 647 (9th Cir. 2000), the Ninth Circuit Court of Appeals examined whether PowerPick Inc.'s Arizona operation violated 39 U.S.C.A. § 3005 (concerning the use of the United States Postal Service for mailing information concerning lotteries other than state-operated lotteries). Although the *Amada* court determined, among other things, that the Arizona operation did not constitute a "lottery" under the common law definition of that term, *i.e.*, distribution of prizes by chance for a consideration, the conclusions in the *Amada* case are not determinative of whether the company's proposed Ohio operation is a "scheme of chance" prohibited by R.C. 2915.02.

The *Amada* court summarized the company's Arizona operation, in part, as follows:

> PowerPick invites the general public to purchase participations in pools of twenty-five or fifty players and in turn purchases Arizona Lotto and Arizona

operation of a business that charges its customers such a fee for this type of lottery pooling scheme.[2] For the reasons that follow, we conclude that Ohio law does prohibit this kind of activity.

> Powerball Lottery tickets for each pool. PowerPick is not affiliated with either of the state lotteries.
>
> The typical PowerPick player pays $ 22.00 to be a member of a fifty-player pool in eight consecutive drawings. PowerPick then purchases thirty-two tickets for each of the drawings on behalf of the pool. In the event that one of the number combinations chosen for the pool wins either of the lotteries, the prize money is divided fifty-ways. Each player, therefore, has 256 chances to win one fiftieth of a lottery prize.
>
> PowerPick assigns its participants to the various pools randomly. It picks the sets of numbers to play for each pool by a random computer program....
>
> For each pool of fifty players, PowerPick receives $1,100.00 in fees from its participants. PowerPick spends $ 256.00 on tickets and uses the rest to pay business expenses, advertising, bonus tickets and promotional items.

200 F.3d at 648-49 (footnote omitted). We are assuming, for purposes of discussion, that the company plans to operate in a similar manner in Ohio.

[2] As explained in 1994 Op. Att'y Gen. No. 94-061 at 2-298 n.1:

> Prior opinions of the Attorney General have noted that the Attorney General, as an executive officer, cannot determine the guilt or innocence of a particular individual since only the judiciary is vested with the authority to make such a decision. 1984 Op. Att'y Gen. No. 84-040 at 2-129; 1984 Op. Att'y Gen. No. 84-019 at 2-65 n.1; 1983 Op. Att'y Gen. No. 83-001 at 2-2. The Attorney General may only express an "opinion as to whether a given set of facts, if proven in court, could constitute a violation of a criminal statute." Op. No. 84-040 at 2-129; *accord* Op. No. 84-019 at 2-65 n.1; Op. No. 83-001 at 2-2.

This opinion will not, therefore, attempt to determine whether the operation of the lottery pooling scheme you describe constitutes a violation of the criminal statutes you mention, but will, instead, address the elements of those anti-gambling statutes and the characteristics of schemes that have been found to constitute prohibited forms of gambling under those statutes. *See generally, e.g.*, *State v. Feliciano*, 115 Ohio App. 3d 646, 685 N.E.2d 1307 (Lorain County 1996) (in part, discussing defendant's conviction under former R.C. 2915.02(A) for operating a betting scheme in which the numbers picked by the State Lottery Commission also determined the winners in the betting scheme and the relation of that conviction to the additional charge of engaging in a pattern of corrupt activity).

Constitutional Prohibition Against Lotteries

In addressing your question, we must first examine the basic prohibition against lotteries established by Ohio Const. art. XV, § 6, which states:

> Except as otherwise provided in this section, lotteries, and the sale of lottery tickets, for any purpose whatever, shall forever be prohibited in this State.
>
> *The General Assembly may authorize an agency of the state to conduct lotteries, to sell rights to participate therein*, and to award prizes by chance to participants, provided that the entire net proceeds of any such lottery are paid into a fund of the state treasury that shall consist solely of such proceeds and shall be used solely for the support of elementary, secondary, vocational, and special education programs as determined in appropriations made by the General Assembly.
>
> The General Assembly may authorize and regulate the operation of bingo to be conducted by charitable organizations for charitable purposes. (Emphasis added.)

Thus, except for a lottery conducted by the state and bingo conducted by charitable organizations for charitable purposes, Ohio Const. art. XV, § 6 prohibits the conduct of lotteries in Ohio. In accordance with the provisions of art. XV, § 6, the General Assembly enacted R.C. Chapter 3770, which governs the operation of Ohio's state lottery, the total net proceeds of which go into a separate fund to be used only for the support of education. The state lottery, operated in accordance with R.C. Chapter 3770, therefore, "exists as an exception to the overall constitutional prohibition against lotteries." 1988 Op. Att'y Gen. No. 88-002 at 2-6.

In addition, because you have not asked, this opinion will not address whether the operation of the proposed scheme may violate any other provisions of state law, *e.g.,* R.C. 1345.03 (prohibition against unconscionable consumer sales practices); R.C. 2923.32 (engaging in pattern of corrupt activity); 2 Ohio Admin. Code 109:4-3-02(A)(1) ("[i]t is a deceptive act or practice in connection with a consumer transaction for a supplier, in the sale or offering for sale of goods or services, to make any offer in written or printed advertising or promotional literature without stating clearly and conspicuously in close proximity to the words stating the offer any material exclusions, reservations, limitations, modifications, or conditions. Disclosure shall be easily legible to anyone reading the advertising or promotional literature and shall be sufficiently specific so as to leave no reasonable probability that the terms of the offer might be misunderstood"). *See generally* 1991 Op. Att'y Gen. No. 91-016 at 2-82 n. 2 ("[t]he opinion-rendering function of the Attorney General is not an appropriate forum for making findings of fact"); 1983 Op. Att'y Gen. No. 83-057 at 2-232 ("[t]his office is not equipped to serve as a fact-finding body; that function may be served by [the office of the county prosecuting attorney] or, ultimately, by the judiciary").

Statutory Prohibitions Against Schemes of Chance

You ask whether R.C. 2915.02(A) prohibits a person from operating a "lottery pool for profit." The fundamental prohibition against various forms of gambling is set forth in R.C. 2915.02, in pertinent part, as follows:

> (A) *No person shall* do any of the following:
>
> (1) Engage in bookmaking, or knowingly engage in conduct that facilitates bookmaking;
>
> (2) *Establish, promote, or operate or knowingly engage in conduct that facilitates* any game of chance conducted for profit or *any scheme of chance*;
>
> (3) *Knowingly procure*, *transmit, exchange, or* engage in conduct that *facilitates* the procurement, transmission, or exchange of *information for use in* establishing odds or *determining winners in connection with* bookmaking or with any game of chance conducted for profit or *any scheme of chance*;
>
> (4) Engage in betting or in playing any scheme or game of chance as a substantial source of income or livelihood;
>
> ....
>
> (B) .... For purposes of division (A)(2) of this section, a person facilitates a game of chance conducted for profit or a scheme of chance if the person in any way *knowingly aids in the conduct or operation of any such* game or *scheme*, *including*, without limitation, *playing any such* game or *scheme*.
>
> (C) This section does not prohibit conduct in connection with gambling expressly permitted by law.
>
> ....
>
> (F) Whoever violates this section is guilty of gambling, a misdemeanor of the first degree. If the offender previously has been convicted of any gambling offense, gambling is a felony of the fifth degree. (Emphasis added.)

R.C. 2915.02(A)(2) thus prohibits any person from establishing, promoting, operating, or knowingly facilitating, among other things, "any scheme of chance." Pursuant to R.C. 2915.02(B), included within the prohibition of R.C. 2915.02(A)(2) is the playing of any scheme of chance.[3] R.C. 2915.02(B). *See generally* R.C. 2915.01(MM) (defining "person" for purposes of R.C. Chapter 2915 as including, "an individual, corporation, business trust, estate, trust, partnership, and association," R.C. 1.59(C), and "any firm or any other legal entity, however organized").

---

[3] Pursuant to R.C. 2915.02(D), R.C. 2915.02 does not apply to games of chance conducted in accordance with the requirements and limitations set forth in R.C. 2915.02(D), to tag fishing tournaments operated under a permit issued under R.C. 1533.92, or to bingo conducted by a charitable organization that is licensed under R.C. 2915.08. The various forms of bingo, as defined by R.C. 2915.01(S), including raffles, are subject to regulation under R.C. 2915.07-.13.

Scheme of Chance Defined

As used in R.C. 2915.02, "scheme of chance" means "a slot machine, lottery, numbers game, *pool conducted for profit*, or other *scheme in which a participant gives a valuable consideration for a chance to win a prize*, but *does not include* bingo, a skill-based amusement machine, or a pool *not* conducted for profit." R.C. 2915.01(C) (emphasis added). Thus, with limited exceptions, any scheme in which a participant gives a valuable consideration for the chance to win a prize is a scheme of chance for purposes of the prohibitions established by R.C. 2915.02(A).[4]

It is clear, therefore, that R.C. 2915.02(A)(2) prohibits the establishment, promotion, operation, or knowing facilitation of any scheme of chance, including a "pool conducted for profit."[5] Your underlying concern, however, appears to be whether the type of venture you

---

[4] Recently, the General Assembly significantly restructured the statutory prohibitions against various forms of gambling. In Am. Sub. H.B. 512, 124th Gen. A. (2002) (eff. April 3, 2003; eff. date changed to July 1, 2003, by section 24 (uncodified) of Am. Sub. H.B. 87, 124th Gen. A. (eff. March 31, 2003)), the General Assembly amended R.C. 2915.02(A) to broaden the former prohibition against the establishment, promotion, operation, or knowing facilitation of games or schemes of chance conducted for profit to include all schemes of chance, whether or not conducted for profit. At the same time, Am. Sub. H.B. 512 excluded bingo from regulation as either a "game of chance" or "scheme of chance," and provided separately for the Attorney General to license charitable organizations to conduct various types of bingo.

Further changes were made by Am. Sub. H.B. 95, 125th Gen. A. (2003) (eff., in pertinent part, July 1, 2003), which added the term "pool conducted for profit" to the definition of "scheme of chance" in R.C. 2915.01(C), and expressly excluded from that definition a "pool not conducted for profit." As explained by the Legislative Service Commission in its Final Analysis of Am. Sub. H.B. 95:

> The act modifies the definition of "scheme of chance" to include a "pool conducted for profit" and to specifically exclude a "pool not conducted for profit" and a "skill-based amusement machine." The result of this modification is that a person continues to be prohibited from establishing, promoting, operating, or knowingly engaging in conduct that facilitates a pool conducted for profit but is not prohibited from engaging in such activity with respect to a pool not conducted for profit or to a skill-based amusement machine.

As a result of this amendment to R.C. 2915.01(C), certain schemes of chance, including, among others, a "pool not conducted for profit," are no longer schemes of chance prohibited by R.C. 2915.02(A).

[5] Your question refers to the proposed scheme as a "lottery pool for profit." As defined by R.C. 2915.01(C), a "scheme of chance" includes, among other things, a "lottery" and a "pool

describe would constitute the operation of a "scheme of chance" for purposes of R.C. 2915.02(A). For the reasons that follow, we believe that a venture such as you describe does constitute the operation of a "scheme of chance" prohibited by R.C. 2915.02(A)(2).

Establishment and Operation of Ohio's State Lottery

In order to understand why the proposed venture constitutes the operation of a "scheme of chance," separate from Ohio's state-operated lottery, let us briefly review the manner in which the latter operates. The General Assembly created the State Lottery Commission, R.C. 3770.01, and conferred upon it certain powers and duties to create and operate Ohio's state lottery. Pursuant to R.C. 3770.03(A),[6] it is the Commission's duty to promulgate rules governing, among other things, the type of lottery it will conduct, the prices of tickets, and the number, nature, and

---

conducted for profit," or any "other scheme in which a participant gives a valuable consideration for a chance to win a prize." The word "lottery" means "a scheme for the distribution of prizes by lot or chance." *Troy Amusement Co. v. Attenweiler*, 64 Ohio App. 105, 116, 28 N.E.2d 207 (Miami County 1940). The term "pool conducted for profit" is not defined for purposes of R.C. Chapter 2915. R.C. 2915.01(BBB), however, defines the phrase "pool not conducted for profit," as meaning "a scheme in which a participant gives a valuable consideration for a chance to win a prize and the total amount of consideration wagered is distributed to a participant or participants." Inherent in the concept of a pool for purposes of R.C. 2915.01(C), therefore, is the use of the participants' wagers, at least in part, to form the prize for which the participants compete. It is not clear, therefore, that the proposed scheme constitutes a type of "pool," whether or not conducted for profit, for purposes of R.C. Chapter 2915. Whether or not an operation constitutes a "lottery" or a "pool conducted for profit," however, if the operation is a "scheme in which a participant gives a valuable consideration for a chance to win a prize," R.C. 2915.01(C), it is a "scheme of chance" for purposes R.C. 2915.02.

[6] R.C. 3770.03 states, in part:

> (A) The state lottery commission shall promulgate rules under which a statewide lottery may be conducted. The rules shall be promulgated pursuant to [R.C. Chapter 119], except that instant game rules shall be promulgated pursuant to [R.C. 111.15] but are not subject to division (D) of that section. Subjects covered in these rules shall include, but need not be limited to, the following:
>
> (1) The type of lottery to be conducted;
>
> (2) The prices of tickets in the lottery;
>
> (3) The number, nature, and value of prize awards, the manner and frequency of prize drawings, and the manner in which prizes shall be awarded to holders of winning tickets.

value of prizes, and to conduct the lottery in accordance with the statutory framework, *e.g.*, R.C. 3770.05 (licensure of lottery ticket sales agents); R.C. 3770.07 (claiming of prizes).[7]

Included within the statutory scheme under which the State Lottery Commission operates Ohio's lottery games is R.C. 3770.08, which states in part:

> (A) No person shall sell a lottery ticket at a price greater than that fixed by rule of the state lottery commission.
>
> (B) *No person other than a licensed lottery sales agent shall sell lottery tickets*, but nothing in this section shall be construed to prevent any person from giving lottery tickets to another as a gift. A transfer of lottery tickets by any person which is made in connection with a marketing, promotional, or advertising program shall be deemed to be a gift for the purposes of this chapter. (Emphasis added.)

---

[7] R.C. 3770.07 states, in pertinent part:

> (A) *Lottery prize awards shall be claimed by the holder of the winning lottery ticket*, or by the executor or administrator, or the trustee of a trust, of the estate of a deceased holder of a winning ticket, in a manner to be determined by the state lottery commission, within one hundred eighty days after the date on which such prize award was announced if the lottery game is an on-line game, and within one hundred eighty days after the close of the game if the lottery game is an instant game. If no valid claim to the prize award is made within the prescribed period, the prize money or the cost of goods and services awarded as prizes, or if such goods or services are resold by the commission, the proceeds from such sale, shall be returned to the state lottery fund and distributed in accordance with [R.C. 3770.06]. (Emphasis added.)

See also [2003-2004 Ohio Monthly Record, vol. 1] Ohio Admin. Code 3770:1-8-01(A) at 360 (stating, in part, that lottery tickets "are bearer instruments and only the holder of a valid winning ticket will be entitled to the lottery prize award if such winning ticket is fully validated and the prize is claimed and presented for payment within one hundred eighty days after the date on which such prize award was announced if the lottery game is an on-line game, and one hundred eighty days after the close of the game if the lottery game is an instant game").

According to the literature you provided, under the proposed scheme, the company plans to retain possession of all lottery tickets, and, depending on the size of the prize, either collect the lottery winnings and distribute them to the winning pool's participants or, in the case of larger prizes, give the State Lottery Commission the names of the participants in the pool to which a winning ticket has been assigned.

Accordingly, R.C. 3770.08 prohibits anyone other than an agent licensed by the State Lottery Commission from selling a lottery ticket, and forbids the sale of a lottery ticket for a price greater than that established by the Commission. It is through the purchase of a lottery ticket that one obtains a "chance" to win a lottery prize. *See* 8 Ohio Admin. Code 3770:1-6-02 (stating, in part, "[a] person shall be able to play any game operated by the state lottery by purchasing a ticket issued by the state lottery").[8]

R.C. Chapter 3770 and the rules adopted by the State Lottery Commission thus govern the operation of Ohio's state lottery. *Peters v. Ohio State Lottery Comm'n*, 63 Ohio St. 3d 296, 587 N.E.2d 290 (1992). "[T]he sale and purchase of a lottery ticket are governed by contract law," *id.* at 298, and these statutes and rules become part of the contract between the state and the purchasers of lottery tickets when the tickets are purchased, *Rice v. Ohio Lottery Commission*, 96 Ohio Misc. 2d 25, 708 N.E.2d 796 (Ct. Cl. 1999). Thus, when players purchase state lottery tickets, the duties and obligations of both parties are defined by the statutes and rules governing the state lottery.

Proposed Venture as A Scheme of Chance

Let us now examine the characteristics of the proposed venture you describe. Unlike the state lottery, the terms and conditions of which are prescribed by statute, the scheme in question does not specify the legal rights and obligations of the company proposing this venture or those of the pool participants. The following discussion, therefore, addresses the general characteristics of the proposed venture as we understand it.

First, we note that the company offers to act on behalf of its pool participants in purchasing Ohio lottery tickets and in claiming prizes that correspond to specific winning tickets.[9] Under this scheme, a participant pays the company a fee in return for which the participant receives a share in each chance purchased by the company for the participant's pool; any "winnings"[10] from these chances are then divided among the winning pool's participants,

---

[8] A lottery ticket may contain more than one set of numbers if the player purchases more than one chance for a particular lottery game. Also, certain lottery games are structured so that a single ticket may be a winner based upon more than a single lottery drawing. *See, e.g.*, 8 Ohio Admin. Code 3770:1-9-150.

[9] Thus, when the company purchases tickets or claims prizes on behalf of its participants, the company has those rights vested by rule and statute in lottery players. The precise nature of the company's obligations to the participants in a winning pool, however, is not clear.

[10] Again, what constitutes "winnings" under the proposed scheme is not clear. For example, the promotional literature does not explain whether participants would be entitled to their shares of a prize for a winning ticket if the company is, for some reason, unable to claim the prize, *see generally, e.g.*, rule 3770:1-8-01(A) (establishing requirements for claiming prizes, including submission of claims within the allotted time and proper validation of tickets, and stating, in part, "[t]ickets which are stolen from the state lottery, its employees, agents or

based upon the number of shares each participant purchased in the winning pool. It appears, therefore, that the product sold by the company is the opportunity to participate in the state lottery, on a basis other than that offered by the State Lottery Commission and for a prize in an amount different from the amount set by the Commission. The opportunity for which participants pay their fee has two components: chances to win a portion of a lottery prize and the organizational and operational services provided by the company.[11]

Anyone who spends twenty-two dollars in the state lottery receives twenty-two tickets or chances, giving the participant 22 chances out of *x* number of chances, depending on the odds of that game, to win a prize. In contrast, under the scheme outlined in note one, *supra*, for twenty-two dollars, a participant in a fifty-member pool purchases, through the organizational and operational services of the company, 256 chances out of *x* number of chances to win a prize, one-fiftieth the size of the lottery prize offered by the State Lottery Commission.

Although the company retains approximately seventy-six percent of the fee paid by each participant, it does use approximately twenty-three percent of the consideration paid by its participants to purchase the lottery tickets the company assigns to the participants' pools. Thus, at least a portion of the consideration paid to the company by a pool participant is used to purchase the participant's share in the lottery tickets that afford the chance to win a prize. Pursuant to the definition of "scheme of chance" in R.C. 2915.01(C), so long as a valuable consideration is paid for a chance to win a prize, the activity is a scheme of chance for purposes of R.C. 2915.02(A). *See generally, e.g.*, *Stevens v. Cincinnati Times-Star Co.*, 72 Ohio St. 112, 152, 73 N.E. 1058 (1905) (finding a scheme in which participants paid fifty cents, twenty-four cents of which was for a subscription to a newspaper and the remainder of which constituted a pool of money to be distributed among those who most closely guessed the number of votes cast in a particular election, to be unlawful, and explaining "[t]he vice of the project lies in the

---

representatives, or are otherwise acquired without ever having been lawfully sold, or deemed to be sold, in accordance with the rules of the commission and the regulations of the director, and tickets which are torn, altered, mutilated, or that do not comply with the applicable game rules may be declared void by the director"), or if the prize money is lost or stolen before it is distributed to the participants, *see generally* rule 3770:1-8-01(A) (making lottery tickets bearer instruments that may be redeemed by anyone holding them).

[11] Pursuant to R.C. 3770.08, no one may sell a chance to participate in Ohio's state lottery unless he has been licensed by the Director of the State Lottery Commission. There is no provision in R.C. Chapter 3770 or the rules adopted by the State Lottery Commission that authorizes its licensed agents or anyone else to sell partial interests in lottery tickets. *Cf. generally* N.J. Stat. Ann. § 5:9-14 (stating, in part, "[n]o person shall sell a ticket or *share* at a price greater than that fixed by rule or regulation of the commission. No person other than a licensed lottery sales agent shall sell lottery tickets or *shares*, except that nothing in this section shall be construed to prevent any person from giving lottery tickets or *shares* to another as a gift" (emphasis added)).

payment of money for the opportunity to win more money by a scheme of chance"). It would appear, therefore, that the company is, in exchange for at least a portion of the fee paid by pool participants, selling its participants chances to win a prize.[12] Accordingly, the proposed scheme appears to constitute a "*scheme in which a participant gives a valuable consideration for a chance to win a prize*" and thus a "scheme of chance" for purposes of R.C. 2915.02(A).

Establishment, Promotion, Operation, or Knowing Facilitation

R.C. 2915.02(A)(2) prohibits a person from engaging in specific activities, *i.e.*, establishing, promoting, operating, or knowingly facilitating a scheme of chance. In *Freedom Road Foundation v. Ohio Dept. of Liquor Control*, 80 Ohio St. 3d 202, 685 N.E.2d 522 (1997), the court discussed the distinction between "operating" and "conducting" a scheme of chance for purposes of former R.C. 2915.02(D)(1),[13] which prohibited schemes of chance other than those

---

[12] In *United States Postal Service v. Amada*, the Ninth Circuit Court of Appeals determined that participants in PowerPick's Arizona lottery pools were not furnishing consideration to the company in order to win a prize, "but to pay for the many services provided by [the company]," 200 F.3d at 652, *e.g.*, purchasing lottery tickets, assigning participants to pools, filling out forms to purchase lottery tickets. The *Amada* court concluded that the portion of the consideration paid by pool participants for the chances to win a prize were paid to the Arizona state lottery, and that the remaining seventy-six percent of the participants' fees went to the company for its services. Whether another finder of fact would reach the same conclusion as to whether pool participants are paying the company or the state lottery for their chances to win a prize is a matter that we cannot predict. *Cf.* R.C. 2915.02(C) (making R.C. 2915.02 inapplicable to "gambling expressly permitted by law"); *Croce v. Ports*, 228 N.J. Super. 581, 584, 550 A.2d 533 (Law Division Burlington County 1988) (characterizing the sale of a share in a validly purchased state lottery ticket as a gambling transaction on its own, "involving the [state] lottery only indirectly").

[13] Former R.C. 2915.02(D)(1), 1993-1994 Ohio Laws, Part III, 5510 (Am. H.B. 336, eff. Oct. 29, 1993), excepted from the gambling prohibitions of that section:

> (1) Schemes of chance *conducted by* a charitable organization that is, and has received from the internal revenue service a determination letter that is currently in effect stating that the organization is, exempt from federal income taxation under subsection 501(a) and described in subsection 501(c)(3) of the Internal Revenue Code, provided that all of the money or assets received from the scheme of chance after deduction only of prizes paid out during the conduct of the scheme of chance are used by, or given, donated, or otherwise transferred to, any organization that is described in subsection 509(a)(1), 509(a)(2), or 509(a)(3) of the Internal Revenue Code and is either a governmental unit or an organization that is tax exempt under subsection 501(a) and described in subsection 501(c)(3) of the Internal Revenue Code, and provided that the scheme of chance is not conducted during, or within ten hours of, a bingo game conducted for amusement

"conducted" by charitable organizations. The scheme examined in that case occurred in a bar whose employees volunteered on behalf of a charitable organization to sell the "tip tickets" and to pay prizes from the revenues generated by ticket sales. After the deduction of prizes paid out, one hundred percent of the net revenues from ticket sales went to the charitable group that had organized the scheme. The court found that, although the volunteers may have been engaged in the "operation" of the scheme, the charitable organization "conducted" the scheme. As explained by the court: "'Operate,' while not expressly defined in R.C. Chapter 2915, connotes performance of an activity, while the verbs used to define 'conduct' would allow [an entity] to delegate operation of the activity, while retaining a supervisory or organizational role," and thus "conducting" the activity. *Id*. at 205.

Under the proposed scheme, the company performs various activities, including, among others, receiving the participants' fees, assigning participants to pools, purchasing lottery tickets on behalf of the pools, assigning purchased tickets to the pools, notifying the participants of the numbers on the lottery tickets assigned to their pools, and distributing any prizes among the participants in a winning pool, all of which are part of the scheme. According to the meaning of "operate" set forth in the *Freedom Road Foundation* case, a company's performance of the foregoing activities would appear to be sufficient to constitute the operation of the proposed scheme.[14] Again, we emphasize that we are not making any findings of fact about a specific lottery pooling venture. Rather, our conclusion concerns only those ventures that possess the characteristics described in the foregoing. Moreover, we cannot predict whether a court may

---

> purposes only pursuant to section 2915.12 of the Revised Code. (Emphasis added.)

At the same time, former 2915.02(A)(2) prohibited a person from engaging in specific activities, *i.e.*, establishing, promoting, operating, or knowingly facilitating, with respect to certain types of gambling. Because R.C. 2915.02(A)(2) continues to prohibit anyone from, among other things, "operating" certain types of gambling, we believe that the court's discussion of "operating," for purposes of former R.C. 2915.02, in *Freedom Road Foundation v. Ohio Dept. of Liquor Control*, 80 Ohio St. 3d 202, 685 N.E.2d 522 (1997), remains valid.

[14] We note that the court in *United States Postal Service v. Amada*, concluded that the company in its Arizona venture did not "operate" a common law lottery. The *Amada* court determined that the company was not operating a lottery because the company did not offer the prizes awarded, *but see* n. 10, *supra*, the participants did not pay the company for the chance to win a prize, *see* n. 12, *supra*, and the company did not supply the element of chance by which the prizes were awarded. In reaching the last of its conclusions, the court rejected the notion that the company's pooling of participants increased each participant's chance of winning a prize, and did not address the additional elements of chance added by the company through its random assignment of players and tickets to its various pools. In any event, the characteristics of an "operation" in the context of federal anti-lottery statutes are not determinative of whether a company is operating a scheme of chance for purposes of R.C. 2915.02(A)(2).

determine, upon examination of the totality of such a venture, that the operation of such venture constitutes a violation of R.C. 2915.02(A).

Conclusion

Based upon the foregoing, it is my opinion, and you are advised that, a lottery pooling venture in which participants pay a company a valuable consideration in exchange for chances to participate in Ohio's state lottery on terms other than those offered by the State Lottery Commission and for a prize in an amount different from the amount set by the State Lottery Commission is, itself, a scheme of chance, separate from Ohio's state lottery, the company's operation of which is prohibited by R.C. 2915.02(A)(2).

Respectfully,

JIM PETRO
Attorney General