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SYLLABUS:

The elements of price, chance, and prize are not present in a method of merchandising whereby sales are made on a mail order basis by a foreign corporation to residents of Ohio and such sales are made both by direct order from a purchaser and by sales made by an independent salesman who places mail orders directly with the corporation and who is compensated for such sales, either in merchandise of a fixed or determinable value to be selected by such salesman, or in money in lieu of such merchandise; and such a merchandising plan is neither a lottery within the meaning of Article XV, Section 6, of the Constitution of Ohio, nor gambling within the meaning of Section 2915.12, Revised Code.

Columbus, Ohio, April 19, 1963

Hon. Earl W. Allison
Prosecuting Attorney
Franklin County
Columbus 15, Ohio

Dear Sir:

In your request for my opinion you have asked whether a merchandising plan proposed by a Wisconsin corporation would constitute a lottery under Ohio law.

You have forwarded to me a memorandum brief prepared by local counsel for the corporation, and I have also secured additional information. This organization conducts a mail order business; all items offered for sale are priced at one of three fixed prices. Sales are made on an installment basis; no payment is required at the time of purchase, and no interest or carrying charge is added to the purchase price. It is stated in the memorandum brief submitted that all credit applications are reviewed in the corporation's credit department and are accepted or rejected on the basis of reasonable, objective credit standards. Each prospective credit customer also forwards to the corporation a non-negotiable promissory note for the purchase price; this note is returned in the event that a credit application is rejected.

It is my understanding that this organization has no regularly-

employed sales personnel; the entire sales plan in Ohio is to be carried out by mail, with the services of independent sales people. Catalogues and other literature will be distributed in Ohio by mail; those who receive such literature may make a purchase, solicit sales, or both. Any person who makes a purchase will also receive catalogues and sales contract forms with the merchandise bought, so that he in turn may sell products for this corporation. These sales are made directly by such independent sales people and names are not submitted to the corporation as possible or prospective customers.

Individuals who make sales for this corporation are to be compensated by merchandise; I understand that the value of such merchandise will be fixed or determined by the value of the sales made; the sales person will have a choice of items. I also understand that compensation may be received in money rather than in merchandise, but I assume that such payment would be determined by the value of the items of merchandise which might be selected.

I am unable to conclude that a merchandising plan such as described here is in any way a lottery under the law of Ohio. Article XV, Section 6, of the Constitution of Ohio, prohibits lotteries and the sale of lottery tickets. No definition of a lottery appears in that section, but the Supreme Court of Ohio, in *Westerhaus Co., Inc. vs. Cincinnati*, 165 Ohio St., 327, said this in the eighth paragraph of the syllabus:

“8. In order to have a lottery, the determination as to who gets a prize or how much of a prize he gets must be dependent at least predominately upon the element of chance.”

In the *Westerhaus* case, *supra*, the Court said, as also shown by the syllabus, that “the elements of gambling are payment of a price for a chance to gain a prize.”

In Opinion No. 649, Opinions of the Attorney General for 1959, page 345, my predecessor in office ruled as follows:

“A plan whereby a dealer agrees to pay a purchaser of an automobile \$100.00 upon the purchase of an automobile under the same plan by any individual whose name was first submitted by said original purchaser, and also to pay to said original purchaser \$50.00 upon the purchase of any automobile under the same plan by a person whose

name is first submitted by such individual above referred to, is a lottery; and the promotion of such a scheme is a violation of Section 2915.12, Revised Code."

The plan there being considered was a rather involved one in which the motor vehicle dealer and a car buyer entered into a contract which entitled the purchaser to submit names of prospective car buyers to the dealer. The dealer's regular sales personnel then attempted to make a sale, and, if successful within the defined time period and in the manner described in the contract, the original purchaser was entitled to the payment of \$100.00. In the event that the second purchaser also submitted names and additional sales were made, the original purchaser was entitled to receive an additional \$50.00 payment.

The Attorney General found the elements of consideration, prize, and chance, making this a lottery and a violation of Section 2915.12, Revised Code. That section reads in part:

"No person, for his own profit, shall establish, open, set on foot, carry on, promote, make, draw, or act as 'backer' or 'vendor' for or on account of a lottery or scheme of chance by whatever name known, located in or to be drawn, paid, or carried on within or without this state, or by any of such means, sell or expose for sale anything of value.

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I do not find the elements of price, chance and prize present in the merchandising method you have described. A person who receives catalogues and sales contracts may attempt to sell merchandise; a purchase from the company is not a requirement in order to become a salesman. Names of prospective customers are not referred for sales efforts by others. Compensation is paid for successful sales efforts, and such compensation is determined by the volume of sales made; this is true whether the sales person selects an item of merchandise from a prepared list or elects to receive payment in money in lieu of merchandise.

It is, therefore, my opinion and you are advised that the elements of price, chance, and prize are not present in a method of merchandising whereby sales are made on a mail order basis by a foreign corporation to residents of Ohio and such sales are made both by direct order from a purchaser and by sales made by an

independent salesman who places mail orders directly with the corporation and who is compensated for such sales, either in merchandise of a fixed or determinable value to be selected by such salesman, or in money in lieu of such merchandise; and such a merchandising plan is neither a lottery within the meaning of Article XV, Section 6, of the Constitution of Ohio, nor gambling within the meaning of Section 2915.12, Revised Code.

Respectfully,
WILLIAM B. SAXBE
Attorney General